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Babcock v. Standish, 19 P. R. 195, distinguished in Leonard v. Burrows, 24 Occ. N. 219, 7 O. L. R. 316, 3 O. W. R. 186; followed in McKelvey v. Chilman, 23 Occ. N. 114, 5 O. L. R. 263.

Bacon's Will, Re, 31 Ch. D. 460, considered in Bank of Montreal v. Burns, 22 Occ. N. 342.

Baddeley v. Earl Granville, 19 Q. B. D. 423, applied in Love v. New Fairview Corporation, 24 Occ. N. 259, 10 B. C. R. 330.

Baden Machinery Manufacturing Co., Re, 4 O. W. R. 379, reversed in Hood v. Eden, 25 Occ. N. 115, 35 S. C. R. 476.

Bailey v. Cates, 11 B. C. R. 62, 24 Occ. N. 412, affirmed in S. C., 25 Occ. N. 28, 35 S. C. R. 263, 457.

Bailey v. King, 21 Occ. N. 19, 27 A. R. 703, affirmed in S. C., 21 Occ. N. 399, 31 S. C. R. 338.

Bailey v. Reinhardt, Q. R. 17 S. C. 387, affirmed in S. C., Q. R. 20 S. C., 225.

Bain v. Brand, 1 App. Cas. 762, followed in Stack v. T. Eaton Co., 22 Occ. N. 322, 4 O. L. R. 335.

Baird v. Morphy, Q. R. 23 S. C. 497, affirmed in Baird v. Ferrier, Q. R. 13 K. B. 317.

Baker v. Davey, 1 B. & C. 704, followed in Genge v. Wachter, 20 Occ. N. 158, 4 Terr. L. R. 122.

Balli Coal Co. v. Osborne, [1899] A. C. 351, applied and followed in Union Bank of Canada v. Rideau Lumber Co., 23 Occ. N. 11, 4 O. L. R. 721.

Banister v. Wakeman, 15 L. R. A. 201, referred to in McIver v. MacGillivray, 24 Occ. N. 142, 237.

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Bank of England, Governor and Company of, v. Vagliano, [1891] A. C. 107, followed in London Life Ins. Co. v. Molsons Bank, 24 Occ. N. 330, 8 O. L. R. 238, 3 O. W. R. 858.

Bank of Hamilton v. Anderson, 7 O. L. R. 613, affirmed in S. C., 24 Occ. N. 347, 8 O. L. R. 153, 3 O. W. R. 301, 380, 709.

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Bank of Montreal v. Black, 9 Man. L. R. 439, distinguished in Shiels v. Adamson, 24 Occ. N. 158, 14 Man. L. R. 703, followed in Schwartz v. Winkler, 22 Occ. N. 401, 14 Man. L. R. 197.

Bank of Montreal v. Kirkpatrick, 2 O. L. R. 113, overruled in Toronto R. W. Co. v. City of Toronto, [1904] A. C. 809.

Bank of Montreal v. Lingham, 2 O. W. R. 332, affirmed in S. C., 24 Occ. N. 123, 7 O. L. R. 164, 3 O. W. R. 182.

Bank of Toronto v. St. Lawrence Fire Ins. Co., Q. R. 11 K. B. 251, reversed in S. C., Q. R. 12 K. B. 556, [1903] A. C. 59.

Banque du Peuple v. Trottier, 28 S. C. R. 422, followed in Lapointe v. Montreal Police Benevolent and Pension Society, 35 S. C. R. 5.

Banque Jacques-Cartier v. Gauthier, Q. R. 19 S. C. 93, reversed in S. C., Q. R. 10 K. B. 245.

Barber v. Maughan, 42 U. C. R. 134, followed in Christin v. Christin, 21 Occ. N. 284, 1 O. L. R. 634.

Barker v. Furlong, [1891] 2 Ch. 172, followed in Miller v. McCuaig, 20 Occ. N. 27, 13 Man. L. R. 220.

Barnard v. Riendeau, 31 S. C. R. 234, followed in Doucet v. Clerex, Q. R. 23 S. C. 107.

Barnardo v. McHugh, [1891] A. C. 388, followed in In re Slater, 23 Occ. N. 337, 14 Man. L. R. 523.

Barraclough v. Brown, [1897] A. C. 623, referred to in Henry v. The King, 25 Occ. N. 141, 9 Ex. C. R. 417, referred to in Rex v. Lovejoy, 25 Occ. N. 141, 7 Ex. C. R. 377.

Barrie Public School Board v. Town of Barrie, 19 P. R. 33, followed in Town of Emerson v. Wright, 24 Occ. N. 190, 14 Man. L. R. 636.

Barry v. The Queen, 2 Ex. C. R. 333, referred to in McQuade v. The King, 22 Occ. N. 87, 7 Ex. C. R. 318.

Bartlett v. Pickersgill, 4 East 577, discussed in Hull v. Allen, 22 Occ. N. 138.

Bastien v. Filiatrault, 6 Rev. Jur. 13, Q. R. 15 S. C. 445, affirmed in S. C., 31 S. C. R. 129.

Baxter v. France, [1895] 1 Q. B. 455, referred to in Holden v. Grand Trunk R. W. Co., 21 Occ. N. 533, 2 O. L. R. 421.

Baxter v. France No. 2, [1895] 1 Q. B. 591, distinguished in Holden v. Grand Trunk R. W. Co., 21 Occ. N. 533, 2 O. L. R. 421.

Baxter v. Jones, 22 Occ. N. 372, 4 O. L. R. 541, affirmed in S. C., 23 Occ. N. 258, 6 O. L. R. 360.

Baxter v. Phillips, 23 S. C. R. 317, referred to in Meloche v. Deguire, 24 Occ. N. 75, 34 S. C. R. 24.

Beam v. Beatty, 22 Occ. N. 58, 3 O. L. R. 345, reversed in S. C. 22 Occ. N. 381, 4 O. L. R. 554.

Beaton v. Intelligencer Printing and Publishing Co., 22 A. R. 97, distinguished in Fulford v. Wallace, 21 Occ. N. 238, 1 O. L. R. 278, and followed in Vansycle v. Parish, 21 Occ. N. 128, 1 O. L. R. 13.

Beauchamp v. City of Montreal, M. L. R. 7 S. C. 382, followed in L'Huissier v. Brosseau, Q. R. 20 S. C. 170.

Beauchemin v. Armstrong, 24 Occ. N. 111, 34 S. C. R. 285, distinguished in Dufresne v. Fee, 35 S. C. R. 8.

Beauchemin v. Cadieux, Q. R. 10 K. B. 255, affirmed in S. C., 31 S. C. R. 370.

Beauharnois Election Case, 21 S. C. R. 447, distinguished in In re Cumberland Dominion Election, Logan v. Ripley, 25 Occ. N. 134, 36 S. C. R. 542.

Bedford, Duke of, v. Ellis, [1901] A. C. 1, referred to in Metallic Roofing Co. of Canada v. Local Union No. 30, Amalgamated Sheet Metal Workers' International Association, 9 O. L. R. 171, 5 O. W. R. 95.

Belcher v. McDonald, 23 Occ. N. 141, 9 Brit. Col. L. R. 377, reversed in S. C., 33 S. C. R. 321, and 33 S. C. R. 321, reversed in McDonald v. Belcher, [1904] A. C. 429.

Belden v. Freeman, 21 N. S. Reps. 106, followed in White v. Hissix, 35 N. S. Reps. 432.

Bell v. Landon, 9 P. R. 100, distinguished in Standard Trading Co. v. Seybold, 23 Occ. N. 45, 5 O. L. R. 8.

Bell Telephone Co. Assessment, In re, 25 A. R. 351, applied in In re Queenston Heights Bridge Co. Assessment, 21 Occ. N. 112, 1 O. L. R. 114, and in In re Stratford Waterworks Co. and City of Stratford, 21 Occ. N. 479, and in In re Toronto Electric Light Co. Assessment, 22 Occ. N. 206, 3 O. L. R. 620.

Bell Telephone Co. v. City of Quebec, 20 S. C. R. 230, followed in County of Toussignant v. County of Nicolet, 22 Occ. N. 355, 32 S. C. R. 353.

Bellagh v. Royal Mutual Fire Ins. Co., 5 A. R. 87, followed in Green v. Manitoba Assce. Co., 21 Occ. N. 360, 13 Man. L. R. 395.

Bentley v. Botsford, 8 B. C. R. 128, followed in Fry v. Botsford, 22 Occ. N. 421, 9 B. C. R. 234.

Berkeley's Trusts, Re, 8 P. R. 193, followed in In re Williams, 22 Occ. N. 323, 4 O. L. R. 501.

Berlin, Town of, and Township of Waterloo, In re, 24 Occ. N. 89, 7 O. L. R. 64, 3 O. W. R. 145, affirmed in S. C. 24 Occ. N. 333, 8 O. L. R. 335, 3 O. W. R. 903.

Berthier, Commune de, v. Dennis, 27 S. C. R. 147, referred to in Delisle v. Arsenal, 25 Occ. N. 95, 36 S. C. R. 23.

Biggs v. Freehold L. & S. Co., 19 Occ. N. 210, 26 A. R. 232, reversed in S. C., 21 Occ. N. 229, 31 S. C. R. 136.

Billing v. Summens, 24 Occ. N. 83, 7 O. L. R. 340, 3 O. W. R. 17, affirmed in S. C., 8 O. L. R. 540, 4 O. W. R. 218.

Birch v. Cropper, 14 App. Cas. 525, followed in Morrow v. Peterborough Water Co., 22 Occ. N. 326, 4 O. L. R. 324.

Birely and Toronto, Hamilton, and Buffalo R. W. Co., In re, referred to in In re Brennan and Ottawa Electric R. W. Co., 25 Occ. N. 309, 31 S. C. R. 311.

Birkbeck Loan Co. v. Johnston, 22 Occ. N. 160, 3 O. L. R. 497, varied in S. C., 6 O. L. R. 258.

Birkett v. Grand Trunk R. W. Co., 3 O. W. R. 892, reversed in S. C., 25 Occ. N. 1, 35 S. C. R. 296.

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Blain v. Canadian Pacific R. W. Co., 23 Occ. N. 65, 5 O. L. R. 334, affirmed in S. C., 24 Occ. N. 49; Canadian Pacific R. W. Co. v. Blain, 34 S. C. R. 75.

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Boley v. McLean, 41 U. C. R. 271, referred to in Township of East Hawkesbury v. Township of Lochiel, 34 S. C. R. 513, 24 Occ. N. 261.

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Boss v. Litton, 5 C. & P. 407, explained and distinguished in Belding v. City of Hamilton, 22 Occ. N. 110, 3 O. L. R. 318.

Boston Deep Sea Fishing Co. v. Ansell, 39 Ch. D. 339, followed in Davidson v. Manitoba and North-West Land Corporation, 22 Occ. N. 305, 23 Occ. N. 26, 14 Man. L. R. 232.

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Bouchard v. Bastien, Q. R. 16 S. C. 565, affirmed in S. C., Q. R. 19 S. C. 507.

Bouchard v. Ouellette, 2 Q. P. R. 253, referred to in Hogue v. McConnell, 3 Q. P. R. 387.

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Bowman v. Blyth, 7 E. & B. 26, applied and followed in McGillivray v. Muir, 23 Occ. N. 282, 6 O. L. R. 154.

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Bradlaugh v. Clark, 8 App. Cas. 354, followed in McDonald v. Robertson, 22 Occ. N. 430.

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Bridgetown, &c., Co. v. Barbados, &c., Co., 38 Ch. D. 378, distinguished in Ruggles v. M. and V. B. R. W. Co., 22 Occ. N. 432.

Briggs v. Newswander, 8 B. C. R. 402, reversed in S. C., 22 Occ. N. 277, 32 S. C. R. 405; referred to in Giegerich v. Fleutot, 25 Occ. N. 7, 35 S. C. R. 327.

Briggs v. Wardell, 10 Mass. 356, referred to in McIver v. MacGillivray, 24 Occ. N. 142, 237.

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Brigham v. The Queen, 20 Occ. N. 423, 6 Ex. C. R. 414, affirmed in S. C., 30 S. C. R. 620.

Brimstone v. Smith, 1 Man. L. R. 302, followed in Roberts v. Hartley, 22 Occ. N. 185, 23 Occ. N. 53, 14 Man. L. R. 284.

Bristol, Cardiff, and Swansea Aerated Bread Co. v. Maggs, 44 Ch. D. 616, followed in Queen's College v. Jayne, 10 O. L. R. 319, 5 O. W. R. 666.

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Brook v. Bradley, L. R. 3 Ch. 672, distinguished in Law v. Acton, 22 Occ. N. 419, 14 Man. L. R. 246.

Brook v. Hook, L. R. 6 Ex. 89, considered in Grady v. Tierney, 20 Occ. N. 193, 4 Terr. L. R. 133.

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Bryce v. Township of Brooke, 22 Occ. N. 255, 4 O. L. R. 97, reversed in S. C., 23 Occ. N. 40, 5 O. L. R. 59.

Brydon v. Lutes, 9 Man. L. R. 463, followed in Black v. Wiebe, 15 Man. L. R. 260, 1 W. L. R. 75.

Buccleuch, The Duke of, [1892] P. 201, referred to in Hunter v. Boyd, 24 Occ. N. 61, 6 O. L. R. 639, 2 O. W. R. 1055.

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Burdick v. Garrick, L. R. 5 Ch. 233, distinguished in Ross v. Robertson, 24 Occ. N. 228, 7 O. L. R. 413, 3 O. W. R. 158.

Burgess v. Tully, 24 C. P. 549, discussed in Turner v. Tourangeau, 24 Occ. N. 350, 8 O. L. R. 221, 4 O. W. R. 12.

Burrard Dominion Election, In re, 21 Occ. N. 252, 8 B. C. R. 65, affirmed in S. C. 22 Occ. N. 10, 31 S. C. R. 459.

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Caledonian R. W. Co. v. Walker's Trustees, 7 App. Cas. 259, referred to in McQuade v. The King, 22 Occ. N. 87, 7 Ex. C. R. 318.

Calgary and Edmonton R. W. Co. v. The King, 33 S. C. R. 673, reversed in S. C., [1904] A. C. 765.

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Calloway v. Stobart Sons & Co., 14 Man. L. R. 650, affirmed in S. C., 35 S. C. R. 301.

Cambrian Railway Company's Scheme, In re, L. R. 3 Ch. 280 n. 1, referred to in In re Atlantic and Lake Superior R. W. Co., 25 Occ. N. 83, 9 Ex. C. R. 283.

Came v. Consolidated Car Heating Co., Q. R. 18 S. C. 44, reversed in S. C., Q. R. 11 K. B. 103.

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Cameron v. Hutchinson, 16 Gr. 526, applied in Smith v. Hunt, 21 Occ. N. 438, 2 O. L. R. 134.

Cameron v. Walker, 19 O. R. 212, referred to in McVity v. Trenouth, 9 O. L. R. 105, 5 O. W. R. 123.

Campbell v. Bank of New South Wales, Torrens Australasian Digest, p. 149, not followed in Barnes v. Baird, 25 Occ. N. 20, 15 Man. L. R. 162.

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Campbell v. Fleming, 1 A. & E. 40, distinguished in Murray v. Smith, 22 Occ. N. 241, 14 Man. L. R. 125.

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Canadian Pacific R. W. Co. and City of Toronto, In re, 22 Occ. N. 235, 4 O. L. R. 134, reversed in part in S. C., 23 Occ. N. 218, 5 O. L. R. 717.

Canadian Pacific R. W. Co. and City of Toronto, In re, 23 Occ. N. 218, 5 O. L. R. 717, affirmed in part and varied in part in Canadian Pacific R. W. Co. v. City of Toronto, [1905] A. C. 33.

Canadian Pacific R. W. Co. v. Little Seminary of St. Thérèse, 16 S. C. R. 606, applied in In re Haskell and Grand Trunk R. W. Co., 24 Occ. N. 232, 7 O. L. R. 429, 3 O. W. R. 377.

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Canadian Pacific R. W. Co. v. Roy, 20 Occ. N. 441, Q. R. 9 Q. B. 351, reversed in S. C., [1902] A. C. 220, followed in Montreal Street R. W. Co. v. Gareau, 21 Occ. N. 128, Q. R. 10 K. B. 417.

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Cape Breton Co., In re, 26 Ch. D. 221, 29 Ch. D. 795, approved in Burland v. Earle, [1902] A. C. 83.

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Derry v. Peek, 14 App. Cas. 337, applied in Indian Head Wine and Liquor Co. v. Skinner, 23 Occ. N. 73, Plisson v. Skinner, 5 Terr. L. R. 391.

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Dominion Coal Co. v. The Lake Ontario, 7 Ex. C. R. 403, affirmed in S. C., 23 Occ. N. 33, 32 S. C. R. 507.

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Earle v. Burland, 23 Occ. N. 276, 6 O. L. R. 327, reversed in Burland v. Earle, [1905] A. C. 590.

Earle v. Kingscote, [1900] 2 Ch. 585, applied and followed in Traviss v. Hales, 24 Occ. N. 12, 6 O. L. R. 574, 2 O. W. R. 1037.

Eaux Minérales, La Compagnie Générale de, In re, [1891] 1 Ch. 451, followed in Sinclair v. Campbell, 21 Occ. N. 382, 2 O. L. R. 1.

Eckhardt v. Lancashire Ins. Co., 18 Occ. N. 361, 29 O. R. 695, 20 Occ. N. 297, 27 A. R. 373, affirmed in S. C., 21 Occ. N. 136, 31 S. C. R. 72.

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Elmy v. Sawyer, In re, 1 A. & E. 843, followed in Rex v. Venot, 23 Occ. N. 71.

Eldon v. Haig, 1 Chit. 11, followed in Rex ex rel. Roberts v. Ponsford, 22 Occ. N. 146, 3 O. L. R. 410.

Elgin Loan and Savings Co. v. London Guarantee and Accident Co., 8 O. L. R. 117, reversed in part in S. C., 9 O. L. R. 569, 5 O. W. R. 349.

Elgin Loan and Savings Co. v. National Trust Co., 7 O. L. R. 1, affirmed in S. C., 10 O. L. R. 41, 5 O. W. R. 466.

Elizabethtown, Township of, v. Township of Augusta, 21 Occ. N. 375, 2 O. L. R. 4, affirmed in S. C., 22 Occ. N. 191, 32 S. C. R. 295.

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Elson v. North American Life Assurance Co., 9 B. C. R. 474, affirmed in North American Life Assurance Co. v. Elson, 33 S. C. R. 383.

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Emery v. Webster, 9 Ex. 242, followed in Chevalier v. Ross, 22 Occ. N. 96, 3 O. L. R. 219.

Emmerson v. Maddison, 36 N. B. Reps. 260, reversed in Maddison v. Emmerson, 24 Occ. N. 204, 34 S. C. R. 533.

Esdaile v. Payne, 40 Ch. D. 520, distinguished in Challoner v. Township of Lobo, 21 Occ. N. 201, 1 O. L. R. 292.

Esquimalt and Nanaimo R. W. Co. v. New Vancouver Coal Co., 6 B. C. R. 306, reversed in S. C., 9 B. C. R. 162.

Evans v. Jaffray, 1 O. L. R. 614, followed in Langley v. Law Society of Upper Canada, 22 Occ. N. 99, 3 O. L. R. 245. Applied in Chandler and Massey, Limited, v. Grand Trunk R. W. Co., 23 Occ. N. 172, 194, 5 O. L. R. 589.

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Fahey v. Jephcott, 21 Occ. N. 143, 1 O. L. R. 18, reversed in S. C., 21 Occ. N. 556.

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Falck v. Williams, [1900] A. C. 176, followed in Coit v. Dowling, 4 Terr. L. R. 464.

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Farmers' Loan and Savings Co. v. Patchett, 23 Occ. N. 285, 6 O. L. R. 255, affirmed in S. C., 25 Occ. N. 7, 8 O. L. R. 569, 4 O. W. R. 349.

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Fawcett v. Canadian Pacific R. W. Co., 22 Occ. N. 244, 8 B. C. R. 393, affirmed in S. C., 32 S. C. R. 721.

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Hunt v. Harlow, 1 Old. 709, followed in McLaughlin Carriage Co. v. Fader, 34 N. S. Reps. 534.

Hunt v. United States, 166 U. S. 424, referred to in In re Gaynor and Greene, 25 Occ. N. 116; Gaynor and Greene v. United States of America, 36 S. C. R. 247.

Hunter and City of Toronto, In re, 3 O. W. R. 170, affirmed in S. C., 24 Occ. N. 336, 8 O. L. R. 52, 3 O. W. R. 660.

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Huson and South Norwich, In re, 19 A. R. 343, followed in In re Salter and Township of Beckwith, 22 Occ. N. 182, 4 O. L. R. 51.

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Illingworth v. Spaulding, 43 Fed. Rep. 827, approved in MacLaughlin v. Lake Erie and Detroit River R. W. Co., 21 Occ. N. 466, 2 O. L. R. 190.

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Imperial Bank v. Bank of Hamilton, 21 Occ. N. 400, 31 S. C. R. 344, affirmed in S. C., [1903] A. C. 49.

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Jackson v. Normanby Brick Co., [1899] 1 Ch. 438, approved in Saunders v. Richards Co., 21 Occ. N. 510, 2 N. B. Eq. Reps. 303.

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Marler v. Molsons Bank, 23 L. C. Jur. 293, not followed in Silverstone v. Bank of Hochelaga, 21 Occ. N. 309.

Marriott v. Hampton, 2 Sm. L. C. 10th ed., p. 431, followed in McDermott v. Hickling, 22 Occ. N. 59.

Marsh v. Huron College, 27 Gr. 605, referred to in Forbes v. Grimsby Public School Board, 24 Occ. N. 130, 7 O. L. R. 137, 2 O. W. R. 1158.

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Monson v. Tussaud, [1894] 1 Q. B. 671, referred to in Quirk v. Dudley, 22 Occ. N. 388, 4 O. L. R. 532.

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Morley, In re, [1895] 2 Ch. 738, applied in In re Cameron, 21 Occ. N. 393, 2 O. L. R. 756.

Morrison v. Grand Trunk R. W. Co., 22 Occ. N. 162, 4 O. L. R. 43, reversed in S. C., 23 Occ. N. 9, 5 O. L. R. 38.

Morrow v. Canadian Pacific R. W. Co., 21 A. R. 149, followed in Vallee v. Grand Trunk R. W. Co., 21 Occ. N. 109, 1 O. L. R. 224. A. R. 149, followed in Sims v. Grand Trunk R. W. Co., 10 O. L. R. 330, 5 O. W. R. 664.

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Morton v. Grand Trunk R. W. Co., 3 O. W. R. 704, reversed in S. C., 24 Occ. N. 351, 8 O. L. R. 372, 4 O. W. R. 126.

Moseley v. Victoria Rubber Co., 55 L. T. N. S. 482, followed in Clergue v. McKay, 22 Occ. N. 64, 3 O. L. R. 63.

Mott v. Milne, 31 N. S. Reps. 372, distinguished in McIver v. MacGillivray, 24 Occ. N. 142, 237.

Mowat v. Provident Savings Life Assurance Society, 21 Occ. N. 17, 27 A. R. 675, reversed in S. C., 22 Occ. N. 221, 32 S. C. R. 147.

Moxon v. Payne, L. R. 8 Ch. 881, followed in Atkinson v. Borland, 14 Man. L. R. 205.

Municipal Clauses Act and J. O. Dunsmuir, In re, 8 B. C. R. 361, followed in In re Vancouver Incorporation Act, 1900, and B. T. Rogers, 9 B. C. R. 495.

Murphy, In re, 26 O. R. 163, 23 A. R. 386, followed in In re Watts, 22 Occ. N. 166, 3 O. L. R. 368.

Murphy v. Bury, 24 S. C. R. 668, doubted in Bank of Toronto v. St. Lawrence Fire Ins. Co., [1903] A. C. 59.

Murphy v. Grand Trunk R. W. Co., Divisional Court, 27th May, 1889, applied and followed in Doyle v. Diamond Flint Glass Co., 24 Occ. N. 368, 8 O. L. R. 499, 3 O. W. R. 510, 921.

Murphy v. Halpin, Ir. R. 8 C. L. 127, followed in Hopewell v. Kennedy, 25 Occ. N. 70, 9 O. L. R. 43, 4 O. W. R. 433.

Murray v. Jenkins, 28 S. C. R. 565, followed in Jones Stacker Co. v. Green, 22 Occ. N. 264, 14 Man. L. R. 61.

Murray Canal, Re, 6 O. R. 685, approved in Kidd v. Harris, 22 Occ N. 25, 3 O. L. R. 60.

Mutchmor v. Mutchmor, 3 O. W. R. 309, affirmed in S. C., 24 Occ. N. 314, 8 O. L. R. 271, 3 O. W. R. 931.

Mustapha, In re, Mustapha v. Wedlake, 8 Times L. R. 160, followed in Charlton v. Brooke, 23 Occ. N. 286, 6 O. L. R. 87.

Mutual Reserve Life Ins. Co. v. Foster, 20 Times L. R. 715, referred to in Metropolitan Life Ins. Co. v. Montreal Coal and Towing Co., 25 Occ. N. 4, 35 S. C. R. 266.

Mutual Reserve Life Ins. Co. v. Foster, 20 Times L. R. 715, distinguished in Angers v. Mutual Reserve Fund Life Association, 35 S. C. R. 330.

Myers v. Sault Ste. Marie Pulp Co., 22 Occ. N. 203, 3 O. L. R. 600, affirmed in S. C., 23 Occ. N. 81, 33 S. C. R. 23.

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McArthur v. Dominion Cartridge Co., [1905] A. C. 72, followed in Hainer v. Grand Trunk R. W. Co., 25 Occ. N. 93. Grand Trunk R. W. Co. v. Hainer, 36 S. C. R. 180. H. 34, distinguished in In re Lisgar Dominion Election, 21 Occ. N. 487, 13 Man. L. R. 478.

McCleave, Ex p., 35 N. B. Reps. 100, distinguished in Gaul v. Township of Ellice, 22 Occ. N. 157, 3 O. L. R. 438.

McClure v. Township of Brooke, 22 Occ. N. 255, 4 O. L. R. 97, reversed in S. C., 23 Occ. N. 40, 5 O. L. R. 59.

McCosh v. Barton, 21 Occ. N. 186, 1 O. L. R. 229, reversed in S. C., 21 Occ. N. 371, 2 O. L. R.

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McDermott v. Hickling, 22 Occ. N. 59, reversed in S. C., 23 Occ. N. 40, 1 O. W. R. 768.

McDermott v. McDermott, 3 Ch. Ch. 38, approved in Challoner v. Township of Lobo, 21 Occ. N. 201, 1 O. L. R. 292.

McDonald v. McDonald, 35 N. S. Reps. 205, affirmed in S. C., 23 Occ. N. 135, 33 S. C. R. 145.

McDougall v. Campbell, 41 U. C. R. 332, followed in Armour v. Dinner, 4 Terr. L. R. 30.

McDougall v. McMillan, 25 C. P. 75, 92, followed in Sawers v. City of Toronto, 22 Occ. N. 25, 389, 2 O. L. R. 717, 4 O. L. R. 624.

McDougall v. Windsor Water Commissioners, 21 Occ. N. 14, 27 A. R. 566, affirmed in S. C., 21 Occ. N. 366, 31 S. C. R. 326.

McDowell v. Ulster Bank, 60 Alb. L. J. 346, distinguished in Haynen v. Mundle, 22 Occ. N. 152.

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McFadden v. Brandon, 6 O. L. R. 247, affirmed in S. C., 24 Occ. N. 393, 8 O. L. R. 610, 4 O. W. R. 349.

McGibbon v. Abbott, 10 App. Cas. 653, followed in Brosseau v. Doré, 25 Occ. N. 2, 35 S. C. R. 205.

McHugh v. Grand Trunk R. W. Co., 20 Occ. N. 437, 32 O. R. 234, reversed in S. C., 21 Occ. N. 581, 2 O. L. R. 600.

McIntosh v. Firstbrook Box Co., 8 O. L. R. 419, affirmed in S. C., 10 O. L. R. 526, 6 O. W. R. 237.

McIntyre, In re, 21 Occ. N. 350, varied in S. C., 22 Occ. N. 90, 3 O. L. R. 212.

McIntyre, Re, McIntyre v. London and Western Trusts Co., 7 O. L. R. 548, affirmed in S. C., 9 O. L. R. 408, 5 O. W. R. 137.

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McKain and Canadian Birkbeck Investment and Savings Co., 3 O. W. R. 156, affirmed in S. C., 24 Occ. N. 128, 7 O. L. R. 241, 3 O. W. R. 335.

McKay v. Grand Trunk R. W. Co., 23 Occ. N. 136, 5 O. L. R. 313, reversed in S. C., 24 Occ. N. 49; Grand Trunk R. W. Co. v. McKay, 34 S. C. R. 81.

McKay v. Township of Hinchinbrooke, 24 S. C. R. 55, referred to in County of Toussignant v. County of Nicolet, 22 Occ. N. 355, 32 S. C. R. 353.

McKelvey v. Le Roi Mining Co., 9 B. C. R. 62, reversed in S. C., 23 Occ. N. 61, 32 S. C. R. 664.

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McLauchlin v. Grand Trunk R. W. Co., 12 O. R. 418, distinguished in Deys v. Kingston and Pembroke R. W. Co., 24 Occ. N. 393, 8 O. L. R. 588, 4 O. W. R. 182.

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McLeod v. Power, [1898] 2 Ch. 295, followed in McDonald v. Gillis, 33 N. S. Reps. 244.

McMillan v. Grand Trunk R. W. Co., 16 S. C. R. 543, followed in Ferris v. Canadian Northern R. W. Co., 15 Man. L. R. 134, 1 W. L. R. 177.

McMillan v. McMillan, 21 Gr. 594, followed in In re Thomas, 21 Occ. N. 594, 2 O. L. R. 660.

McNeil v. McPhee, 31 N. S. Reps. 140, followed in Conrad v. Corkum, 35 N. S. Reps. 288.

McNevin v. Canadian Railway Accident Ins. Co., 21 Occ. N. 76, 32 O. R. 284, affirmed in S. C., 21 Occ. N. 553, 2 O. L. R. 521, affirmed in S. C., 22 Occ. N. 233, 32 S. C. R. 194.

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McNutt Estate, In re, 24 N. S. Reps. 264, distinguished in In re Wheelock Estate, 33 N. S. Reps. 357.

McSorley v. Mayor, &c., of St. John, 6 S. C. R. 531, distinguished in Gaul v. Township of Ellice, 22 Occ. N. 157, 3 O. L. R. 438.

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Neil v. Almond, 29 O. R. 63, approved in In re Woodall, 24 Occ. N. 350, 8 O. L. R. 288, 4 O. W. R. 131.
Nelson Coke and Gas Co. v. Pellatt, 21 Occ. N. 500, 2 O. L. R. 390, reversed in S. C., 22 Occ. N. 382, 4 O. L. R. 481.
New London Credit Syndicate v. Neale, [1898] 2 Q. B. 487, followed in Smith v. Squires, 21 Occ. N. 216, 13 Man. L. R. 360.
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New Vancouver Coal Mining and Land Co., 2 B. C. 8, reversed in S. C., 9 B. C. R. 571.
New Westminster Provincial Election, In re, 22 Occ. N. 43, 8 B. C. R. 273, affirmed in S. C., 9 B. C. R. 192.
Newell v. Bradford, 37 L. J. C. P. 1, considered in Bank of Montreal v. Burns, 22 Occ. N. 342.
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Oliver v. Hunting, 44 Ch. D. 205, referred to in Calder v. Hallett, 5 Terr. L. R. 1.
Omnium Securities Co. v. Canada Fire and Marine Ins. Co., 1 O. R. 494, observed upon in Agricultural S. and L. Co. v. Liverpool and London and Globe Ins. Co., 21 Occ. N. 582, 3 O. L. R. 127.
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Ontario Express and Transportation Co., In re, 25 O. R. 587, commented on in Birnie v. Toronto Milk Co., 23 Occ. N. 11, 5 O. L. R. 1.
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Palmer v. Jones, 21 Occ. N. 290, 1 O. L. R. 382, affirmed in S. C., 21 Occ. N. 556, 2 O. L. R. 632.

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Panama, &c., Co. v. India Rubber, &c., Co., L. R. 10 Ch 515, followed in Murray v. Smith, 22 Occ. N. 241, 14 Man. L. R. 125.

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Parsons v. Lloyd, 2 W. Bl. 845, distinguished in Rex v. Finlay, 21 Occ. N. 419, 13 Man. L. R. 383.

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Penny v. Wimbledon Urban District Council, [1898] 2 Q. B. 212, [1899] 2 Q. B. 72, followed in Kirk v. City of Toronto, 25 Occ. N. 29, 8 O. L. R. 730, 4 O. W. R. 496.

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Phœnix Ins. Co. v. City of Kingston, 7 O. R. 343, followed in In re Edinburgh Life Ins. Co., 21 Occ. N. 38.

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Pither v. Manley, 9 B. C. R. 257, affirmed in S. C. 23 Occ. N. 64, 32 S. C. R. 651.

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Poulin v. Prevost, summarized in Bertrand v. Hinerth, 25 L. C. J. 168, followed in Gilman v. Cockshutt, Q. R. 18 S. C. 552.

Pounder v. North Eastern R. W. Co., [1892] 1 Q. B. 385, dissented from in Canadian Pacific R. W. Co. v. Blain, 24 Occ. N. 49, 34 S. C. R. 75.

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Preston Banking Co. v. Allsup, [1895] 1 Ch. 141, referred to in Grant v. Grant, 24 Occ. N. 139.

Price v. Guinane, 16 O. R. 264, followed in In re Canadian Pacific R. W. Co. and Lechtzier, 23 Occ. N. 339, 14 Man. L. R. 566.

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Prickett v. Badger, 1 C. B. N. S. 545, approved in Spilling v. Clement, 24 Occ. N. 96, 14 Man. L. R. 588.

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Provident Chemical Works v. Chemical Manufacturing Co., 4 O. L. R. 546, applied in Rex v. Cruttenden, 10 O. L. R. 80, 6 O. W. R. 249, approved in Spilling v. O'Kelly, 24 Occ. N. 119, 8 Ex. C. R. 426. Followed in Gillett v. Lumsden, 24 Occ. N. 345, 8 O. L. R. 168, 3 O. W. R. 851.

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Pullen v. Snelus, 40 L. T. N. S. 363, followed in Dodge v. Smith, 21 Occ. N. 162, 1 O. L. R. 46.

Pullman v. Hill, [1891] 1 Q. B. 524, commented on, not followed in Puterbaugh v. Gold Medal Furniture Manufacturing Co., 24 Occ. N. 205, 7 O. L. R. 582, 3 O. W. R. 535.

Purtle v. Henry, 33 N. B. Reps. 607, not followed in Morris v. McAulay, 21 Occ. N. 547.

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Quay v. Quay, 11 P. R. 258, explained in Campbell v. Baker, 9 O. L. R. 291, 5 O. W. R. 372.

Quay v. The Queen, 17 S. C. R. 30, considered in Ontario Lands and Oil Co. v. Canada Southern R. W. Co., 21 Occ. N. 188, 1 O. L. R. 215.

Quebec and Lake St. John R. W. Co. v. Lemay, Q. R. 25 S. C. 82, affirmed in S. C., Q. R. 14 K. B. 35.

Quebec, City of, v. The King, 24 S. C. R. 430, referred to in Letourneux v. The King, 33 S. C. R. 335.

Quebec, City of, v. The Queen, 24 S. C. R. 420, followed in Letourneux v. The Queen, 21 Occ. N. 277, 7 Ex. C. R. 1.

Quebec, Corporation of, v. Oliver, 15 Q. L. R. 319, distinguished in Bourget v. City of Sherbrooke, Q. R. 27 S. C. 78.

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Randall v. Lithgow, 53 L. J. Q. B. 518, referred to in Cicognia v. McHeather, 22 Occ. N. 309.

Randall v. Ottawa Electric Co., 24 Occ. N. 5, 6 O. L. R. 619, 2 O. W. R. 1022, reversed in S. C., 24 Occ. N. 262; Randall v. Ahearn and Soper, 34 S. C. R. 698.

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Regina v. Bank of Nova Scotia, 11 S. C. R. 1, applied in In re Elmsdale Co., 24 Occ. N. 341.

Regina v. Bennett, 1 O. R. 445, referred to in Rex v. Breen, 24 Occ. N. 325.

Regina v. Bigelow, 31 N. S. Reps. 436, affirmed in S. C., 31 S. C. R. 128.

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Regina v. Cockshott, [1898] 1 Q. B. 582, followed in Rex v. Walsh, 24 Occ. N. 82, 7 O. L. R. 149, 3 O. W. R. 31.
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Rex v. Brunstead, 2 B. & Ad. 699, followed in Rex v. License Commissioners for License District No. 1, In re Anderson, 23 Occ. N. 270, 14 Man. L. R. 535.

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Rex v. Chappelle, 7 Ex. C. R. 414, reversed in S. C., 23 Occ. N. 34, 32 S. C. R. 586. Affirmed in Chappelle v. The King, [1904] A. C. 586.

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Rex v. Gibson, 4 Can. Crim. Cas. 451, followed in Rex v. Wener, Q. R. 12 K. B. 329.

Rex v. MacArthur, 8 Ed. C. R. 245, reversed in S. C., 24 Occ. N. 201, 34 S. C. R. 570.

Rex v. Morgan, 21 Occ. N. 533, 2 O. L. R. 413, affirmed in S. C., 21 Occ. N. 583.

Rex v. Neuberger, 9 B. C. R. 272, distinguished in Rex v. Tucker, 10 O. L. R. 500, 6 O. W. R. 533.

Rex v. Pulsford, 8 B. & C. 350, distinguished in Forbes v. Grimsby Public School Board, 24 Occ. N. 130, 7 O. L. R. 137, 2 O. W. R. 1158.

Rex v. Riendeau, Q. R. 9 Q. B. 147, affirmed in part and reversed in part in S. C., Q. R. 10 K. B. 584.

Rex v. Scully, 21 Occ. N. 432, 2 O. L. R. 315, affirmed in S. C., 22 Occ. N. 360, 4 O. L. R. 394.

Rex v. Slaughenwhite, 37 N. S. Reps. 382, reversed in Slaughenwhite v. The King, 35 S. C. R. 607.

Rex v. Stewart, 21 Occ. N. 280, 7 Ex. C. R. 55, affirmed in S. C., 32 S. C. R. 483.

Rex v. Tavistock, 3 D. & R. 431, followed in Cumberland Overseers of the Poor v. McDonald, 35 N. S. Reps. 394.

Rex v. The "Kitty D.," 2 O. W. R. 1065, reversed in S. C., 24 Occ. N. 261, 34 S. C. R. 673.

Rex v. Turnbull Real Estate Co., 23 Occ. N. 99, 8 Ex. C. R. 163, affirmed in Turnbull Real Estate Co. v. The Queen, 33 S. C. R. 677.

Rex v. Tweed, 7 Ex. C. R. 414, reversed in S. C., 23 Occ. N. 34, 32 S. C. R. 586.

Rex v. Wilson, Ex p. Irving, 35 N. B. Reps. 461, explained and commented upon in Ex p. Graves, 35 N. B. Reps. 587.

Rex v. Young, 14 Man. L. R. 58, followed in Rex v. Osberg, 15 Man. L. R. 147, 1 W. L. R. 121.

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Richards v. Bank of British North America, 21 Occ. N. 576, 8 B. C. R. 143, affirmed in S. C., 8 B. C. R. 209.

Richards v. Bank of Nova Scotia, 26 S. C. R. 381, referred to in Commercial Bank of Windsor v. Morrison, 22 Occ. N. 196, 32 S. C. R. 98.

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Richelieu and Ontario Navigation Co. v. The "Cape Breton," 25 Occ. N. 57, 9 Ex. C. R. 67, affirmed in part and reversed in part in The "Cape Breton" v. Richelieu and Ontario Navigation Co., 36 S. C. R. 564.

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Ritchie v. Vermillion Mining Co., 21 Occ. N. 291, 1 O. L. R. 654, affirmed in S. C., 22 Occ. N. 382, 4 O. L. R. 588.

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Robson v. Jardine, 22 Gr. 420, followed in In re Thomas, 21 Occ. N. 594, 2 O. L. R. 660.

Rochefoucauld v. Boustead, [1897] 1 Ch. 196, discussed in Hull v. Allen, 22 Occ. N. 138.

Rockwood, etc., Agricultural Socy., In re, 12 Man. L. R. 655, distinguished in Stobart v. Forbes 20 Occ. N. 446, 13 Man. L. R. 184.

Rodgers v. Parker, 18 C. B. 112, followed in McDonald v. Fraser, 24 Occ. N. 101, 14 Man. L. R. 582.

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Rolland v. La Caisse d'Economie de Notre Dame de Quebec, 24 S. C. R. 405, discussed in Consumers' Cordage Co. v. Connolly, 21 Occ. N. 331, 31 S. C. R. 244.

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Rosenbaum v. Nelson, [1900] 2 Ch. 267, commented on and distinguished in Gilmour v. Simon, 15 Man. L. R. 205, 1 W. L. R. 417.

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Ruggles v. Middleton and Victoria Beach R. W. Co., 22 Occ. N. 432, affirmed in S. C., 35 N. S. Reps. 553.

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Russell v. The Queen, 7 App. Cas. 829, followed in Rex v. Carlisle, 23 Occ. N. 321, 6 O. L. R. 718.

Ruttan v. Burk, 1 O. W. R. 560, affirmed in S. C., 24 Occ. N. 85, 7 O. L. R. 56, 3 O. W. R. 167.

Ryan v. Willoughby, 20 Occ. N. 198, 27 A. R. 135, affirmed in S. C., 21 Occ. N. 2, 31 S. C. R. 33.

Ryland, In re, [1903] 1 Ch. 467, followed in Re Barrett, 10 O. L. R. 337, 5 O. W. R. 790.

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Sands v. Standard Ins. Co., 27 Gr. 167, followed in Green v. Manitoba Assce. Co., 21 Occ. N. 360, 13 Man. L. R. 395.

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Saults v. Eaket, 11 Man. L. R. 597, distinguished in Jones Stacker Co. v. Green, 22 Occ. N. 264, 14 Man. L. R. 61.

Saunby v. London Water Commissioners, 2 O. W. R. 763, reversed in S. C., 24 Occ. N. 201; London Water Commissioners v. Saunby, 34 S. C. R. 650.

Sawyer v. Pringle, 18 A. R. 218, distinguished in Abell Engine and Machine Works Co. v. McGuire, 21 Occ. N. 358, 13 Man. L. R. 454, and followed in Abell v. Campbell, 21 Occ. N. 303.

Sawyer-Massey Co. v. Parkin, In re, 28 O. R. 662, not followed in Kreutziger v. Brox, 21 Occ. N. 139, 32 O. R. 418.

Schofield v. Earl of Londesborough, [1896] A. C. 514, followed in Imperial Bank of Canada v. Bank of Hamilton, [1903] A. C. 49.

Schultz v. Great Eastern R. W. Co., 19 Q. B. D. 30, followed in Centaur Cycle Co. v. Hill, 24 Occ. N. 121, 7 O. L. R. 110, 2 O. W. R. 1025.

Scott and County of Peterborough, In re, 26 U. C. R. 36, followed in Sutton v. Village of Port Carling, 22 Occ. N. 139, 3 O. L. R. 445.

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Sharter v. Groves, 6 Ha. 162, distinguished in In re Fingland—Fingland v. McKnight, 21 Occ. N. 566.:

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Shelly v. Shelly, 18 Gr. 495, referred to in Genge v. Wachter, 20 Occ. N. 158, 4 Terr. L. R. 122.

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Sidebotham v. Holland, [1895] 1 Q. B. 378, referred to in In re Burrows and Nicholson, 24 Occ. N. 326, 14 Man. L. R. 739.

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Siple v. Blow, 2 O. W. R. 258, reversed in S. C., 24 Occ. N. 392, 8 O. L. R. 547, 3 O. W. R. 855.

Skillings v. Royal Ins. Co., 22 Occ. N. 258, 4 O. L. R. 123, affirmed in S. C., 23 Occ. N. 294, 6 O. L. R. 401.

Skinner v. Farquharson, 33 N. S. Reps. 261, reversed in S. C., 22 Occ. N. 197, 32 S. C. R. 58.

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Sly v. Ottawa Agricultural Co., 25 C. P. 28, followed in Green v. Manitoba Assce. Co., 21 Occ. N. 360, 13 Man. L. R. 395.

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Smith v. Barter, 2 Ex. C. R. 474, overruled on one point, in Power v. Griffin, 23 Occ. N. 79, 33 S. C. R. 39.

Smith v. Canadian Pacific R. W. Co., 34 N. S. Reps. 22, reversed in S. C., 21 Occ. N. 427, 31 S. C. R. 367.

Smith v. Fort William Public School Board, 24 O. R. 363, referred to in Forbes v. Grimsby Public School Board, 24 Occ. N. 15, 6 O. L. R. 539, 2 O. W. R. 947.

Smith v. Hughes, L. R. 6 Q. B. 597, followed in Jones Stacker Co. v. Green, 22 Occ. N. 264, 14 Man. L. R. 61.

Smith v. Hunt, 21 Occ. N. 438, 2 O. L. R. 134, varied in S. C., 22 Occ. N. 429, 4 O. L. R. 653.

Smith v. Sissiboo Pulp Co., 30 N. S. Reps. 348, distinguished in Dominion Radiator Co. v. Cann, 37 N. S. Reps. 237.

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Smurthwaite v. Hannay, [1894] A. C. 494, distinguished in Langley v. Law Society of Upper Canada, 22 Occ. N. 99, 3 O. L. R. 245.

Snell and Town of Belleville, Re, 30 U. C. R. 81, distinguished in Regina v. Duggan, 21 Occ. N. 35.

Snell v. Toronto R. W. Co., 20 Occ. N. 224, 27 A. R. 151, affirmed in S. C., 21 Occ. N. 327, 31 S. C. R. 241.

Snetsinger v. Leitch, 32 O. R. 440, referred to in Gardner v. Perry, 23 Occ. N. 295.

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South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord, [1897] 2 Ch. 487, followed in Dunlop Pneumatic Tire Co., 23 Occ. N. 106, 5 O. L. R. 249.

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South Wales Miners' Federation v. Glamorgan Coal Co., [1905] A. C. 239, applied in Brauch v. Roth, 10 O. L. R. 284, 6 O. W. R. 345.

Southampton, In re Village of, and County of Bruce, 8 O. L. R. 106, 24 Occ. N. 353, 3 O. W. R. 729, reversed in S. C., 25 Occ. N. 12, 8 O. L. R. 664, 4 O. W. R. 341.

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Springdale School District v. Canadian Pacific R. W. Co., 14 Man. L. R. 382, 23 Occ. N. 159, varied in S. C., 25 Occ. N. 102, 35 S. C. R. 550.

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Star v. Rookesby, 1 Salk. 335, followed in Garrioch v. McKay, 21 Occ. N. 421, 13 Man. L. R. 404.

Starkey v. Bank of England, [1903] A. C. 114, referred to in Maneer v. Sanford, 24 Occ. N. 70.

Starr v. Royal Electric Co., 33 N. S. Reps. 156, affirmed in S. C., 20 Occ. N. 323, 30 S. C. R. 384.

Steam Stone Cutter Co. v. Shortsleeves, 4 Ban. & Ard. 364, approved in MacLaughlin v. Lake Erie and Detroit River R. W. Co., 21 Occ. N. 466, 2 O. L. R. 190.

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Stephen v. Simpson, 15 Gr. 594, specially referred to in McVity v. Trenouth, 9 O. L. R. 105, 5 O. W. R. 123.

Stephens v. McArthur, 19 S. C. R. 446, followed in Schwartz v. Winkler, 21 Occ. N. 574, 13 Man. L. R. 493, and in Codville v. Fraser, 22 Occ. N. 123, 14 Man. L. R. 12, and in Morphy v. Colwell, 22 Occ. N. 111, 3 O. L. R. 314, referred to in Benallack v. Bank of British North America, 36 S. C. R. 120.

Stevenson v. City of Kingston, 31 C. P. 333, followed in Ottawa Gas Co. v. City of Ottawa, 22 Occ. N. 408, 4 O. L. R. 656.

Stevenson v. Traynor, 12 O. R. 804, followed in Hislop v. Joss, 22 Occ. N. 144, 3 O. L. R. 281.

Steward v. England, [1895] 2 Ch. 820, followed in Cogswell v. Grant, 21 Occ. N. 351, 34 N. S. Reps. 340.

Stewart v. Jones, 20 Occ. N. 380, 19 P. R. 227, reversed in S. C., 21 Occ. N. 141, 1 O. L. R. 34.

Stewart v. Warner, 4 B. C. R. 298, approved in Hopper v. Dunsmuir, 10 B. C. R. 17.

Stirton v. Gummer, 31 O. R. 277, followed in Downey v. Armstrong, 1 O. L. R. 237.

Stoughton v. Leigh, 1 Taunt. 402, followed in Allan v. Rever, 22 Occ. N. 294, 4 O. L. R. 309.

Strathy Wire Fence Co., In re, 2 O. W. R. 834, affirmed in S. C., 24 Occ. N. 304, 8 O. L. R. 186, 3 O. W. R. 889.

Stumm v. Dixon, 22 Q. B. D. 99, 529, applied in Lougheed v. Parrish, 4 Terr. L. R. 54.

Sturgeon Falls Electric Light and Power Co., and Town of Sturgeon Falls, In re, 21 Occ. N. 595, 2 O. L. R. 585, approved in Excelsior Life Ins. Co. v. Employers' Liability Assurance Corporation, In re Faulkner, 23 Occ. N. 215, 5 O. L. R. 609.

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Sumner v. Cole, 32 N. S. Reps. 179, reversed in S. C., 20 Occ. N. 324, 30 S. C. R. 379.

Sumpler v. Hedges, [1898] 1 Q. B. 673, followed in Black v. Wiebe, 15 Man. L. R. 260, 1 W. L. R. 75.

Sun Life Assce. Co. v. Elliott, 7 B. C. R. 189, reversed in S. C., 21 Occ. N. 154, 31 S. C. R. 91.

Sung v. Lung, 8 B. C. R. 423, considered in Noble Five Mining Co. v. Last Chance Mining Co., 23 Occ. N. 252, 9 B. C. R. 514.

Sutherland-Innes Co. v. Township of Romney, 19 Occ. N. 381, 26 A. R. 495, reversed in S. C., 21 Occ. N. 1, 30 S. C. R. 495.

Sutherland-Innes Co. v. Township of Romney, 21 Occ. N. 1, 30 S. C. R. 495, considered and followed in In re Townships of Mersea and Gosfield North and Township of Rochester, 21 Occ. N. 558, 2 O. L. R. 435.

Sutherland v. Mannix, 8 Man. L. R. 541, considered in Western Milling Co. v. Darke, 2 Terr. L. R. 40.

Sutton v. Sutton, 22 Ch. D. 511, followed in Cogswell v. Grant, 21 Occ. N. 351, 34 N. S. Reps. 340.

Swaine v. Wilson, 24 Q. B. D. 252, considered in Parker v. Toronto Musical Protective Assn., 21 Occ. N. 31, 32 O. R. 305.

Sweet v. Maugham, 11 Sim. 51, not followed in Liddell v. Copp-Clark Co., 21 Occ. N. 126, 19 P. R. 332.

Switzer v. Laidman, 18 O. R. 420, distinguished in Vansycle v. Parish, 21 Occ. N. 128, 1 O. L. R. 13.

Sydenham School Section, In re, 23 Occ. N. 305, 6 O. L. R. 417, affirmed in S. C., 24 Occ. N. 88, 7 O. L. R. 49, 3 O. W. R. 227.

Sykes v. North Eastern R. W. Co., 44 L. J. C. P. 191, followed in Davidson v. Stuart, 22 Occ. N. 266, 14 Man. L. R. 74.

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Taff Vale R. W. Co. v. Amalgamated Society of Railway Servants, [1901] A. C. 426, referred to in Metallic Roofing Co. of Canada v. Local Union No. 30, Amalgamated Sheet Metal Workers' International Association, 9 O. L. R. 171, 5 O. W. R. 95, followed in Le Roi Mining Co. v. Rossland Miners' Union, 8 B. C. R. 370.

Talbot v. Guilmartin, 30 S. C. R. 482, followed in Lapointe v. Montreal Police Benevolent and Pension Society, 35 S. C. R. 5.

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Tanner v. Bissell, 21 U. C. R. 553, referred to in Township of Last Hawkesbury v. Township of Lochiel, 34 S. C. R. 513, 24 Occ. N. 261.

Tate v. Natural Gas and Oil Co., 18 P. R. 82, followed in Langley v. Law Society of Upper Canada, 22 Occ. N. 99, 3 O. L. R. 245.

Taylor v. Caldwell, 3 B. & S. 826, distinguished in Ontario Electric Light and Power Co. v. Baxter and Galloway Co., 23 Occ. N. 152, 5 O. L. R. 419.

Taylor v. Cummings, 27 S. C. R. 592, distinguished in Roberts v. Hartley, 22 Occ. N. 185, 23 Occ. N. 53, 14 Man. L. R. 284.

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Taylor v. Taylor, 23 Occ. N. 335, 6 O. L. R. 356, 2 O. W. R. 921, affirmed in S. C., 24 Occ. N. 19, 6 O. L. R. 545, 2 O. W. R. 953.

Teetzel v. Dominion Construction Co., 18 P. R. 16, followed in Trusts and Guarantee Co. v. Hart, 21 Occ. N. 494.

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Tennant v. Trenchard, L. R. 4 Ch. 537, 546, 38 L. J. Ch. 661, followed in Hutton v. Justin, 22 Occ. N. 23, 2 O. L. R. 713.

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Thompson v. Coulter, 2 O. W. R. 356, reversed in S. C., 24 Occ. N. 48, 34 S. C. R. 261, 3 O. W. R. 82.

Thompson v. London County Council, [1899] 1 Q. B. 840, followed in Quigley v. Waterloo Mfg. Co. 21 Occ. N. 240, 336, 1 O. L. R. 96, distinguished in Langley v. Law Society of Upper Canada, 22 Occ. N. 99, 3 O. L. R. 245, referred to in Hart v. Bissett, 23 Occ. N. 335.

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Thorne v. Parsons, 22 Occ. N. 379, 4 O. L. R. 682, affirmed in S. C., 23 Occ. N. 180, 33 S. C. R. 309.

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Toronto, City of, v. Bell Telephone Co. of Canada, 22 Occ. N. 142, 3 O. L. R. 465, reversed in S. C., 23 Occ. N. 277, 6 O. L. R. 335, affirmed in S. C., [1905] A. C. 52.

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Toronto General Trusts Corporation v. Central Ontario R. W. Co., 6 O. L. R. 1, affirmed in S. C., 24 Occ. N. 365, 8 O. L. R. 342, 3 O. W. R. 910, affirmed in Central Ontario R. W. Co. v. Trusts and Guarantee Company, [1905] A. C. 576.

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ACCOUNT.

Ac[illegible]or—*Agent's Returns—Compromise—Subsequent Discovery of Error—Rectification—Prejudice.*]—P. was agent to manage the wharf property of W., and receive the rents and profits thereof, being paid by commission. When his agency terminated W.

was unable to obtain account from him, and brought an action therefor, which was compromised by P. paying $375, giving $125 cash and a note for the balance, and receiving an assignment of all debts due to W. in respect to the wharf property during his agency, a list of which was prepared at the time. Shortly before the note became due P. discovered that on one of the accounts assigned to him $100 had been paid, and demanded credit on his note for that sum. This W. refused, and in an action on the note P. asserted that the error avoided the compromise, and that the note was without consideration, or in the alternative that the note should be rectified:—Held, that, as it appeared that P.'s attorney had knowledge of the error before the compromise was effected, and as, by the compromise, W. was prevented from going fully into the accounts and perhaps establishing a greater liability on the part of P., W. was entitled to recover the full amount of the note. *Peters* v. *Worrall*, 22 Occ. N. 198, 32 S. C. R. 52

Action for—*Company—Board of Directors—Onus—Particulars.*]—In an action en reddition de comptes brought by a company against their president, the onus is upon the defendant to establish his allegation that the plaintiffs' board of directors is incomplete. 2. The plaintiffs asked that in default of accounting the defendant should be adjudged to pay a certain sum which they alleged he had received by virtue of certain contracts:—Held, that they were not obliged to state at what date and from what persons such sum had been received. *Temiscouata R. W. Co.* v. *Macdonald*, 3 Q. P. R. 462.

Action for—*Neglect to File—Order.*]—A plaintiff, who sues upon an account without filing it, and whose declaration is in general terms, will be ordered upon motion of the defendant to file his account, and to serve a copy upon the defendant. *Lachine Rapids Co.* v. *Hemond*, 5 Q. P. R. 138.

Action for — *Service of Account—Dilatory Exception.*]—The failure to serve upon the defendant a detailed account at the same time as process in the action, is not ground for an exception to the form, but rather for a dilatory exception, such failure having only the effect of delaying the proceedings until the account has been served. *Dubrule* v. *Leclaire*, Q. R. 24 S. C. 314.

Agreement as to Manufacture and Sale of Patented Article — License to sell or agency for sale—Partnership—Fiduciary relationship—Statute of Limitations—Cancellation of agreement—Notice—Subsequent sales—Waiver—Reference—Sales subsequent to judgment — Infringement. *Barr Cash and Package Carriers Co.* v. *Hamilton Brass Manufacturing Co.*, 3 O. W. R. 762, 6 O. W. R. 643.

Co-heirs—*Form of action.*]—An heir has no right to sue one of his co-heirs en reddition de compte, but the only action which he can bring is an action en compte et partage. *Renaud* v. *Delfausse*, 5 Q. P. R. 230.

Contestation—*Maladministration — Exception to Form — Demurrer.*] — The party seeking an account may, in his contestation of the account rendered, urge all acts of maladministration committed by the accounting party; and objections to that mode of proceeding should be made by an exception to the form, and not by demurrer. *Blackwood* v. *Mussen*, 4 Q. P. R. 432.

Damages — Settlement — Opening up — Reference—Special directions. *Hull* v. *Jackson*, 3 O. W. R. 717.

Evidence—Reference—Appeal— Arrangement for payment of creditors—Fraudulent conveyance—Omission from report — Motion to amend—Error of referee. *Lynch* v. *Murphy*, 3 O. W. R. 401.

Extra-judicial Accounts — *Form—Administration—Reformation of Account—Action en Reddition.*]—The rendering of an account divided into distinct heads of receipts, disbursements, and balances, is only required by law in the case of accounts which are rendered in the cause in pursuance of a judgment. No particular form is necessary for extra-judicial accounts, and it is sufficient if they give such details in regard to their subject as will make it possible to check them. 2. When an account of an administration is rendered, the person to whom it is rendered has no right, upon the ground that it is incomplete or inexact, to begin an action en reddition de compte; he should proceed by way of action for reformation of the account. *Beaudry* v. *Prévost*, Q. R. 22 S. C. 32.

Jurisdiction — *Master and Servant — Division of Office Receipts—Discovery.*]—In a suit for an account the plaintiff stated that he was appointed deputy sheriff by the defendant, under an agreement that he was to have half of the net receipts of the sheriff's office. The defendant stated the agreement to be that the plaintiff was to have half of the fees from writs and executions only. On the probabilities of the evidence the Court found in favour of the defendant's version of the agreement. Of the receipts in which under this finding the plaintiff might be entitled on discovery to share, the fees in one case, amounting to $35, alone remained undivided:—Held, that the bill should not be dismissed. *Hawthorne* v. *Sterling*, 24 Occ. N. 241, 2 N. B. Eq. Reps. 503.

Partition—*Requête Civile — Amendment—Supreme Court Act, s. 63—Order nunc pro tunc — Final or Interlocutory Judgment—Form of Petition in Revocation — Res Judicata.*]—On a reference to amend certain accounts already taken, a judgment rendered on the 30th September, 1901, adjudicated on matters in issue between the parties, and, on the accountant's report, homologated on the 25th October, 1901, judgment was ordered to be entered against the appellant for $26,316, on the 30th January, 1902. The appellant filed a requête civile to revoke the latter judgment within six months after it had been rendered, but without referring to the first judgment in the conclusions of the petition. It was objected that the first judgment had the effect of res judicata as to the matters in dispute and was a final judgment inter partes:—Held, that, whether the first judgment was final or merely interlocutory, the petition in revocation must be taken as impeaching both former judgments relating to the accounts upon which it was based; that it came in time, as it had been filed within six months of the rendering of the last judgment; and that it virtually raised anew all the issues relating to the taking of the accounts

affected by the two former judgments. A motion to amend the petition so as to include specifically any necessary conclusions against the judgment of the 30th September, 1901, had been refused in the Court below, and was renewed on the appeal to the Supreme Court of Canada:—Held, that, as the facts set forth in the petition necessarily involved a contestation of the accountant's reports dealt with in the first judgment, the case was a proper one for the exercise of the discretion allowed by s. 63 of the Supreme Court Act, and that the amendment to the conclusions of the petition should be permitted nunc pro tunc. *Hill* v. *Hill*, 24 Occ. N. 73, 34 S. C. R. 13.

Pleading—*Account Rendered before Action.*]—When the rendering of an account, with vouchers and deposit of the balance, is, by the plea, alleged to have been made before the institution of the action, the plaintiff cannot inscribe in law, but must discuss (débattre) such account. *Nixon* v. *Nixon*, Q. R. 24 S. C. 316.

Pleading—*Incidental Demand — Omissions from Principal Demand.*] — Omissions made by the plaintiff in framing an action en reddition de compte may, notwithstanding Arts. 516 and 522, C. P., be the subject of an incidental demand. *Roe* v. *Hood*, 4 Q. P. R. 333.

Right of Action for—*Privity—Pledge of Debentures—Subsequent Claim on Proceeds.*]—A contractor for work to be done for a company who have agreed to pay him by handing over the proceeds of their debentures, which have been transferred for the purpose of securing a loan, the contractor consenting that the lender shall be paid before him out of the proceeds of the debentures, has a right of action for an account against the latter. *Fosbrooke* v. *Murray*, 6 Q. P. R. 122.

Redemption — Trustee in possession — Master's report—Appeal. *Hull* v. *Allen*, 1 O. W. R. 151, 782, 6 O. W. R. 961.

Re-opening— *Delay—Contract—Error.*] —The appellants contracted with respondents to furnish them with electric lighting at three quarters of a cent per ampere hour, the bill to be rendered monthly. At the time the current was 52 volts, but it was soon after doubled, without any notice to the respondents, and without any change in the lighting. Accounts were rendered at the original rate during about two years and a half, when the appellants pretended that, in consequence of the increase of the voltage, the quantity of the light furnished was doubled, and the action was to recover the value of the additional light from the date of the change:—Held, affirming the judgment in Q. R. 16 S. C. 377, that, the appellants having, during a lengthened period, placed their own interpretation upon the contract, and the respondents having thereby been deprived of any opportunity to abandon the agreement, it was too late for the appellants to complain that they had followed a wrong principle in calculating the light furnished. *Royal Electric Co.* v. *Davis*, Q. R. 9 Q. B. 445.

Sale of Hotel Business—Counterclaim for balance of purchase money—Deductions —Resale of assets—License—Trust — Goodwill — Chattel mortgage — Seizure — Sale — Onus. *Boucher* v. *Capital Brewing Co.*, 5 O. W. R. 270, 686, 6 O. W. R. 70.

Stated account—Agreement not to sue — Conditional statement — Further adjustment of accounts—Recovery on one item— Absence of alternative claim on items—Refusal to amend—Admission of parol evidence —Partnership—Profits. *Jackson* v. *Drake* (B.C.), 1 W. L. R. 97, 2 W. L. R. 379.

Work Done and Services Rendered— Set-off — Counterclaim — Cross-accounts — Costs. *Sjostrom* v. *Gale* (N.W.T.), 2 W. L. R. 332.

See ADMINISTRATION—ANNUITY—APPEAL —ARBITRATION AND AWARD—BILLS OF EXCHANGE AND PROMISSORY NOTES—CONTRACT —COSTS—COURTS—LIMITATION OF ACTION —MORTGAGE—SET-OFF—TRUSTS AND TRUSTEES.

ACCOUNT STATED.

See EVIDENCE.

ACCRETION.

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ACKNOWLEDGMENT.

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See APPEAL—BILLS OF EXCHANGE AND PROMISSORY NOTES—HUSBAND AND WIFE—MASTER AND SERVANT—PARTNERSHIP—VENDOR AND PURCHASER—WATER AND WATERCOURSES—WAY.

ACTS.

See DEED.

ACT OF PARLIAMENT.

See STATUTES.

ACTION.

Consolidation of Actions — Stay of proceedings—Parties—Jury notice. *Murphy* v. *Brodie*, 1 O. W. R. 429, 681, 2 O. W. R. 106, 3 O. W. R. 508.

Discontinuance—*Counterclaim — Cause of Action—Jurisdiction.*]—Where the plaintiff discontinues his action after the defendant has delivered a counterclaim, the defendant may proceed with his counterclaim as if it were an action; the plaintiff will

then be in the same position as a defendant served with a writ of summons; and if the counterclaim is one which the defendant could assert only by virtue of the plaintiff having come into the jurisdiction and sued the defendant, he should not be allowed to proceed with it as a term of permitting the plaintiff to discontinue. *Dominion Burglary Guarantee Co.* v. *Wood*, 22 Occ. N. 151, 3 O. L. R. 365.

Discontinuance — *Practice as to — Return of Writ—Motion to Dismiss.*]—The provisions of Art. 276, C. P., as to desistment, are not limitative, and the form prescribed by the Article is not obligatory. 2. A plaintiff who desists from his demand before return of the writ, is not obliged to return his action upon the day fixed in order to be in a position to state that he has desisted. 3. A motion for dismissal made after desistment is of no effect. *Lauterman* v. *Vineberg*, 5 Q. P. R. 127.

Dismissal for Default of Doing an Act—*Necessity for Further Order.*]—Upon an appeal from an order of the Master in Chambers upon a motion to dismiss the action for default of an undertaking:—Held, per Meredith, C.J., that where an order is made for the doing of an act, or, in the alternative, that the action should be dismissed, and default is made in the doing of the act, the order operates to put an end to the action, and no further order is necessary, and, the action being dead, the Court has no power to relieve from the consequences of such default. On appeal, a Divisional Court, being of opinion that under the circumstances the action should be dismissed, declined to consider the question of the necessity of a further application or the power to relieve from the default. *Crown Corundum and Mica Co.* v. *Logan*, 1 O. W. R. 107, 174, 22 Occ. N. 159, 3 O. L. R. 434.

Dismissal for not Going to Trial—*Joinder of Issue Served but not Filed.*]—An application for a judgment, as in case of nonsuit, was refused where it appeared that the plaintiff had not filed a joinder of issue, though one had been served. *Gallagher* v. *Wilson*, 21 Occ. N. 54, 35 N. B. Reps. 238.

Dismissal for Want of Prosecution —*Party in Default—Costs.*]—1. A party interested who is bound to continue a suit is not entitled to a mise en demeure, the law itself putting him in default to do so. 2. When a continuance of suit is not effected by the party interested, the party remaining in the case may bring an action to compel him to continue the suit, without any previous demand, and is entitled to the costs of such suit. Judgment in Q. R. 21 S. C. 48 reversed as to costs. *Arcand* v. *Yon*, Q. R. 22 S. C. 502.

Local Venue — *Real Action — Situs of Chattels in Question.*] — The plaintiffs had begun an action accompanied by a saisie conservatoire, claiming $700 as the price of wood seized, and demanding, as a subsidiary matter, that they should also be paid the price of the wood upon the sale of it to be made by the Court:—Held, that such action was not a real action, within the meaning of Art. 100, C. C. P., and could not be begun in the place in which the thing seized was situated. *Auger* v. *Moreau*, Q. R. 20 S. C. 285.

See Assessment and Taxes — Costs — Courts—Limitation of Action—Summary Procedure.

ADEMPTION.

See Wills.

ADMINISTRATION.

See Executors and Administrators.

ADMINISTRATION BOND.

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ADMINISTRATOR.

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ADMIRALTY.

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ADMIT, NOTICE OF.

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ADULTERATION OF FOODS.

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ADVERSE ACTION.

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ADVOCATE.

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See ARREST—ATTACHMENT OF DEBTS—BILLS OF SALE—EVIDENCE.

AGENCY.

See BANKS AND BANKING—BILLS OF EXCHANGE—COMPANY—INSURANCE—LIMITATION OF ACTION—MONEY—MORTGAGE—PARLIAMENT—PRINCIPAL AND AGENT—RAILWAY—SET-OFF—SOLICITOR—SPECIFIC PERFORMANCE—TRUSTS AND TRUSTEES—WARRANTY.

AGISTMENT.

See ANIMALS.

AGREEMENT.

See CONTRACT—LANDLORD AND TENANT—SPECIFIC PERFORMANCE—VENDOR AND PURCHASER.

AGREEMENT TO BEQUEATH PROPERTY.

See SPECIFIC PERFORMANCE.

AID TO RAILWAY.

See RAILWAY.

AIDING AND ABETTING.

See CRIMINAL LAW.

AIR.

See NUISANCE.

ALDERMEN.

See JUSTICE OF THE PEACE — MUNICIPAL CORPORATIONS.

ALIEN.

Advertisement for Labourers—*Promise of Employment.*] — The defendants had published in a Seattle newspaper this advertisement: — "Wanted, first-class machinists, Apply Vancouver Engineering Works, Ltd., Vancouver, B.C." — Held, that the advertisement did not contain a promise of employment within the meaning of the Alien Labour Act, as amended by 1 Edw. VII. c. 13, s. 4. *Downie* v. *Vancouver Engineering Works, Limited*, 24 Occ. N. 284, 10 B. C. R. 367.

Chinese Immigrants — *Transit—Railway Company — Detention.*] — Where immigrants of Chinese origin are merely passing through Canada, under a contract with a railway company for their transportation to a point or destination beyond the limits of Canada, the railway company (under the provisions of 63 & 64 V. c. 32 (D.), since repealed by 3 Edw. VII. c. 8), were justified in detaining them, and in refusing them permission to remain in Canadian territory, they not having complied with the provisions of 63 & 64 V. c. 32, then in force, applicable to Chinese immigrants entering Canada with intention to remain therein. *Wing Toy* v. *Canadian Pacific R. W. Co.*, Q. R. 13 K. B. 172.

Chinese Immigrants, who are refused admission in the United States, and do not appeal from the decision so rendered against them, are not entitled to a writ of habeas corpus, while being transported from the United States to China, in conformity with the agreement between the United States and the Canadian Pacific Railway Company. *Chew* v. *Canadian Pacific R. W. Co.*, 5 Q. P. R. 453, 6 Q. P. R. 14.

Chinese Immigration Act, 1900 — *Deportation of Chinamen—Habeas Corpus.*] —Held, that where a Chinaman, who contracts with a transportation company for his passage from China through Canada to the United States, on the understanding that if he is refused admittance to the States he will be deported to China by the company, is refused admittance to the States and is being deported, he will not be granted his discharge on habeas corpus proceedings, as the contract is not illegal, and under the Chinese Immigration Act, 1900, deportation is proper. *In re Lee San*, 24 Occ. N. 162, 10 B. C. R. 270.

Jurisdiction of Quebec Courts — *Property in Quebec — Service of Process — Subject of Action.*]—The Courts of the province of Quebec have jurisdiction in an action for an account against an alien, who has been regularly served with process at a place therein where he owns property. The fact

that he resides in a foreign country, when he owns property in Quebec, does not oust the jurisdiction of the Courts, even when the action for account has its foundation in a claim by the plaintiff for the administration of the estate of her deceased mother, who at the time of her death owned property both in this province and in such foreign country, and who at such time resided in such foreign country. *De Bigaré* v. *De Bigaré*, Q. R. 14 K. B. 26.

See CONSTITUTIONAL LAW — CRIMINAL LAW — EVIDENCE — PARTNERSHIP — TRADE NAME.

ALIENATION OF AFFECTIONS.

See HUSBAND AND WIFE.

ALIMONY.

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ALLEGIANCE.

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AMALGAMATION.

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AMENDMENT.

See APPEAL—ARREST—BANKS AND BANKING — BILLS OF EXCHANGE — COMPANY — CONTRACT — CRIMINAL LAW — EJECTMENT—EXECUTION — FRAUD AND MISREPRESENTATION—JUDGMENT —PARTIES —PLEADING—PRACTICE—TRIAL —WRIT OF SUMMONS.

ANIMALS.

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ANNUITY.

See BANKRUPTCY AND INSOLVENCY—LIMITATION OF ACTIONS — SHERIFF — TRUSTS AND TRUSTEES—WASTE—WILLS.

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I. BRITISH COLUMBIA—APPEAL TO COUNTY COURT.

From Summary Conviction — *Notice of Appeal—Description of Offence.*]—A notice of appeal from a conviction for playing in a common gaming house, which describes the offence for which the appellant was convicted as "looking on while another was playing in a common gaming house," is insufficient. *Rex* v. *Mah Yin*, 9 B. C. R. 319.

Magistrate's Conviction — *Entry—Recognizance.*] — An appeal from a summary conviction cannot be received or heard unless the recognizance required by s. 71 (c) of the Summary Convictions Act has been entered

into on or before the day on which the appeal is entered for hearing. *Regina* v. *King*, 7 B. C. R. 401.

Procedure on Appeal — *Water Clauses Consolidation Act—Gold Commissioner.*] — The appeal under s. 36 of the Water Clauses Consolidation Act, from the decision of the Gold Commissioner to a County Court Judge, is a trial de novo. *In re Ross and Thompson*, 24 Occ. N. 34, 10 B. C. R. 177.

Small Debts Court—*New Witness.*] — An appeal from the Small Debts Court is by way of a rehearing, and witnesses may be called although not called at the trial. *Malkin* v. *Tobin*, 7 B. C. R. 386.

Summary Convictions Act, B.C. — Necessity for entry of appeal. *Gibson* v. *Adams* (B.C.), 2 W. L. R. 72.

II. British Columbia — Appeal to Supreme Court.

Amending Judge's Notes of Evidence.]—On the hearing of an appeal from the decision of a County Court Judge, counsel for the appellant applied to introduce further evidence alleged to have been omitted from the Judge's notes of evidence taken at the trial. The Court refused the application, holding that where a party desires to introduce, on an appeal, evidence alleged to have been omitted from the Judge's notes of evidence, he should first apply to the Judge to amend his notes. *Rendell* v. *McLellan*, 23 Occ. N. 57, 9 B. C. R. 328.

Appeal Book—*Paging.*] — The pages of appeal books should be numbered at the top of the pages. *Haggerty* v. *Lenora Mount Sicker Copper Mining Co.*, 22 Occ. N. 106, 9 B. C. R. 6.

Costs—*Appeal Partly Successful.*] — An appellant who is substantially successful is entitled to the costs of appeal. The fact that a respondent is successful in some parts of an appeal is not sufficient to deprive an appellant who is substantially successful of his costs. *Centre Star Mining Co.* v. *Rossland Miners' Union*, 24 Occ. N. 198, 10 B. C. R. 48.

Decision of County Court on Appeal from Magistrate's Court.] — An appeal does not lie, even by leave, to the Supreme Court from the order of a County Court Judge made on appeal to him from the decision or conviction of a magistrate under the Provincial Summary Convictions Act. *In re Lambert*, 7 B. C. R. 396.

Entry of Appeal—*Extension of Time—Application—Forum.*] — An appeal was not entered in time for the sittings of the full Court for which the notice of appeal had been given, and an application was made to extend the time and for leave to enter the appeal for next sittings:—Held, that when the full Court is sitting, such an application is properly made to it. *Mecredy* v. *Quann*, 9 B. C. R. 117.

Interim Injunction — *Trial Begun.*] — A motion to dissolve an interlocutory injunction was refused. Notice of appeal was given before trial, but when the appeal came on to be heard the trial had commenced, though it had not been concluded. The Court refused to interfere. *Dunlop* v. *Haney*, 7 B. C. R. 455.

Introducing Fresh Evidence on Appeal.]—Motions by the appellants to admit in the full Court further evidence on the hearing of appeal from a judgment at the trial were dismissed:—Held, that an application to admit further evidence which might have been adduced at the trial, should be supported by the affidavit of the applicant indicating the evidence desired to be used, and setting forth when and how the applicant came to be aware of its existence, what efforts, if any, he made to have it adduced at the trial, and that he is advised and believes that if it had been so adduced, the result would probably have been different. *Marino* v. *Sproat*, 23 Occ. N. 31, 9 B. C. R. 335.

Notice of Appeal — *Extension of Time for—Waiver—Security for Costs.*] — The Court has no jurisdiction to extend the time limited by s. 76 of the Supreme Court Act of British Columbia, as amended by Acts of 1899, c. 20, for giving notice of appeal. A respondent by applying for security for the costs of appeal does not waive his right to object that the appeal was not brought in time. *Lung* v. *Lung*, 8 B. C. R. 423.

Notice of Appeal—*Grounds not Argued —Abandonment—Misdirection— Particulars.*] —Points not argued, although included in the notice of appeal, will be considered as abandoned. Grounds of appeal should be so particularized that the opposite party will know beforehand what he has to meet, and when "mis-direction" is alleged, particulars should be stated. *Warmington* v. *Palmer*, 22 Occ. N. 126, 8 B. C. R. 344.

Notice of Appeal—*Sittings—Time.*]—A final judgment was pronounced and entered on the 27th February; notice of appeal for the January sitting of the full Court was given on the 24th October. A sitting of the full Court commenced, according to the statute, on the 3rd November:—Held, that the appeal was brought in time. *Traders National Bank of Spokane* v. *Ingram*, 24 Occ. N. 198, 10 B. C. R. 442.

Preliminary Objection—*Notice of.*]—Notice of a preliminary objection to an appeal to the full Court must be served at least one clear day before the time set for the beginning of the sittings. *McGuire* v. *Miller*, 9 B. C. R. 1.

Place of Hearing — *Notice of Appeal—Striking out—Forum.*]—Under the Supreme Court Act, as amended in 1902, an appeal in a Victoria case can be heard by the full Court sitting in Vancouver without consent. Per Drake, J.—A single Judge has jurisdiction to order a notice of appeal to the full Court to be struck out. *Raser* v. *McQuade* (No. 2), 11 B. C. R. 169.

Refusal to Entertain — *Interlocutory Order — Action Decided Pending Appeal — Costs.*]—This was an appeal from an interlocutory order, and, pending the appeal, the action had been tried and decided. The

full Court ordered that the appeal be struck out of the list, refusing to accede to the request of the appellant's counsel, who wanted the appeal to go on to decide the question of costs. *Fawcett* v. *Canadian Pacific R. W. Co.*, 22 Occ. N. 39, 8 B. C. R. 219.

Reversing Findings of Facts—*Trial without Jury—Commission Evidence—Company—Contract—Ultra Vires.*]—In an action in the Yukon for damages for breach of contract, tried without a jury, the evidence for the defence being evidence taken on commission, the Judge held that the contract sued on was made with the defendant company and not with one Munn as alleged by the defence, and gave judgment for the plaintiffs:—Held, reversing the finding and allowing the appeal, that the Judge had failed to appreciate the commission evidence. Per Drake, J., that the question of ultra vires, not having been revised in the Court below, was not open on appeal. *McKay* v. *Victoria Yukon Trading Co.*, 22 Occ. N. 169, 9 B. C. R. 37.

Right of Appeal—Award — Workmen's Compensation Act. *Lee* v. *Crow's Nest Pass Coal Co.* (B.C.), 1 W. L. R. 527.

Right of Appeal—*Decision of Judge on Appeal from Court of Revision—Preliminary Objection—Costs.*]—See *In re Vancouver Incorporation Act and Rogers*, 23 Occ. N. 72, 9 B. C. R. 373.

Right of Appeal—*Party Interested—Who is—Rivers and Streams Act, s. 12.*]—Section 12 of the Rivers and Streams Act provides that if a "party interested" is dissatisfied with the judgment of the County Court Judge he may appeal to the Supreme Court:—Held, that "party interested" means one who was a party to the proceedings before the Judge appealed from. *In re Smith*, 23 Occ. N. 58, 9 B. C. R. 329.

Right to Intervene—*Water Record.*]—Any one affected by a decision appealed from under s. 36 of the Water Clauses Consolidation Act, may be let in on the hearing of the appeal, even though the month for giving notice of appeal has expired. Such person may make his application on the hearing of the appellant's motion for directions. *In re Water Clauses Consolidation Act*, 21 Occ. N. 192, 8 B. C. R. 17.

Security for Costs—*Stay of Proceedings.*]—An order for security for costs for an appeal to the full Court should provide for a stay of proceedings until security is given. *Kettle River Mines, Limited* v. *Bleasdell*, 22 Occ. N. 163, 8 B. C. R. 350.

Small Debts Court—*Appeal from—Finality of.*]—Appeal to the Full Court from a judgment in the County Court on an appeal from the Small Debts Court:—Held, that the appeal given by s. 29 of the Small Debts Court Act to either a Judge of the Supreme Court or to the County Court, is final. *Larsen* v. *Coryell*, 24 Occ. N. 413, 11 B. C. R. 22.

Summary Convictions Act — *Case Stated—Transmitting Case to District Registry—Condition Precedent.*]—Appeal by way of case stated under the Summary Convictions Act. The appellant had not filed the case in the proper District Registry (New Westminster), as required by s. 86 of the Act, but he did, according to leave obtained, file the case in the Vancouver Registry:—Held, when the appeal came on for hearing, that the transmission of the case to the proper registry, as required by s. 86, is a condition precedent to the jurisdiction conferred by ss. 90 and 92, and, as that provision of s. 86 had not been complied with, the Courts could not entertain the appeal. Morgan v. Edwards, 29 L. J. M. C. 108, followed. *Cooksley* v. *Nakashiba*, 21 Occ. N. 492, 8 B. C. R. 117.

Time—*Date of Decision—Entry of Order.*]—An order deciding a garnishee issue was dated the 26th March, settled by the Judge on the 15th July, and entered on the 25th July. Notice of appeal was served on the 19th July:—Held, that the appeal was brought in time. *Manley* v. *Mackintosh*, 10 B. C. R. 84.

Time—*Extension after Expiry—Jurisdiction.*]—On this appeal the question of the Court's jurisdiction to extend the time limited for appeal after the time limited had once expired came up, and counsel for the appellant wished to argue that the Court had such jurisdiction and that the decision in Sung v. Lung, 8 Brit. Col. L. R. 423, was wrong. The Court announced that, if it became necessary to decide the point, all the Judges would be summoned to hear argument.—A decision on the point was not necessary, so it was not argued. *Noble Five Mining Co.* v. *Last Chance Mining Co.*, 23 Occ. N. 252, 9 B. C. R. 514.

Yukon Appeal—*Final Judgment—Right of Appeal—Leave to Appeal to Privy Council—Costs.*]—In an action by executors against the appellant to recover certain sums of money due to their estate, the Judge of the Territorial Court, at the request of the plaintiffs, selected one of the items, and adjudicated on the evidence taken that the action in respect thereof be dismissed:—Held, that this was, within the meaning of the Yukon Territorial Act, 1899, s. 8, a final judgment in respect thereof, notwithstanding that the remaining items in suit were referred, and the costs were reserved. No appeal therefrom to the British Columbia Court lay after the expiration of 20 days. Special leave having been granted to appeal from a decree of the Supreme Court of Canada on a petition stating that the construction of the said statute was a matter of general public importance, without stating that it had been repealed:—Held, that, as the omission was immaterial and bona fide, the appellant should not be deprived of his costs. Judgment in Belcher v. McDonald, 33 S. C. R. 321, reversed. *McDonald* v. *Belcher*, [1904] A. C. 429.

Yukon Cases—*Amount in Controversy—Counterclaim.*]—Appeal from a judgment in the Territorial Court of the Yukon Territory. The plaintiffs sued for $408 damages sustained by their steamer as the result of a collision with the defendants' steamer. The defendants counterclaimed for damages. At the trial the plaintiffs' claim was dismissed, and the defendants on their counterclaim got judgment for $735. The plaintiffs appealed:—Held, that the appeal must be limited to the judgment on the counterclaim, as the claim was not for an appealable amount. *Canadian Development Co.* v. *Le Blanc*, 21 Occ. N. 400, 8 B. C. R. 173.

Yukon Cases—*Extensions of Time—Terms—Appeal Books.*]—The Court may extend on terms the time for appealing to the full Court from the Territorial Court of the Yukon. The respondent is entitled to a copy of the appeal book. *Banks* v. *Woodworth*, 7 B. C. R. 385.

Yukon Cases—*62 & 63 V. c. 11, s. 7—Application to Pending Cause.*]—The Act 62 & 63 V. c. 11, giving the right of appeal to the Judges of the Supreme Court of British Columbia sitting together as a full Court in cases from the Yukon, as therein specified, does not apply to a case tried before the Act came into force and decided after. *Canadian and Yukon Prospecting and Mining Co.* v. *Casey*, 7 B. C. R. 373.

Yukon Cases—*62 & 63 V. c. 11, s. 7—Application to Pending Cause.*]—The Act 62 & 63 V. c. 11, s. 7, which gives a right of appeal to the Supreme Court of British Columbia in cases from the Yukon Territory, as therein specified, applies to an action pending when the Act came into force, but tried and decided afterwards. *Courtnay* v. *Canadian Development Co.*, 21 Occ. N. 61, 7 B. C. R. 377.

III. Exchequer Court of Canada—Appeal to.

Salvage Action—*Judgment of Local Judge in Admiralty—Practice—Remission for Further Evidence.*]—Under the provisions of Rules 159 and 162 of the general Rules and Orders regulating the practice and procedure in Admiralty cases in the Exchequer Court of Canada, the Court, in entertaining an appeal from the decision of a local Judge in Admiralty in a salvage case, may direct that further evidence be taken before the local Judge in order to dispose of an issue raised on the appeal. In such a case the appeal is by way of rehearing. *Vermont S. S. Co.* v. *The "Abby Palmer,"* 24 Occ. N. 387, 9 Ex. C. R. 1.

IV. New Brunswick—Appeal to Supreme Court.

County Court Appeal—*Interference—Assumed Findings of Fact—Rejection of Evidence—Absence of Prejudice.*]—On an appeal from the judgment of a County Court, where the Judge has tried the cause without a jury and entered a judgment for the respondent, and the return does not contain a statement of his findings on the facts, it will be assumed by the appellate Court that he found the facts in favour of the respondent, and the judgment will not be disturbed if there is evidence to justify such finding. A judgment will not be reversed on appeal on the ground that evidence was improperly rejected if the record shews that the party offering the evidence could not have been prejudiced by the rejection. *Johnson* v. *Jack*, *Johnson* v. *Bank of Nova Scotia*, 35 N. B. Reps. 492.

County Court Appeal—*Right of Appeal—Neglect to Move for New Trial.*]—The Court will not refuse to hear an appeal because the appellant neglected to take out a summons for a new trial in the County Court until the time had expired for which the signing of judgment had been stayed, and did not ask for a further stay or offer any excuse for the delay, no term having elapsed. *Read* v. *McGivney*, 36 N. B. Reps. 513.

Findings of Fact—*Equity Judge—Review.*]—In an equity appeal, where the Judge in Equity, in the opinion of the appellate Court, disregarded or did not give due weight to evidence of witnesses taken under commission, the Court may review his findings on the facts as well as the law. *Fairweather* v. *Lloyd*, 36 N. B. Reps. 548.

Grounds for Appeal—*Costs—New Trial.*]—It is not a ground for an appeal from an order for a new trial of a County Court action because the verdict was against the weight of evidence, that costs should not have been imposed in granting the new trial. *Macrae* v. *Brown*, 36 N. B. Reps. 353.

Matrimonial Cause—*Adultery—Credibility of Witnesses—Question for Trial Judge.*]—In the Court of Divorce and Matrimonial Causes the amount of credence to be given to the witnesses is entirely for the Judge who hears the case. Therefore on the trial of a libel filed by the wife for a divorce a vinculo matrimonii on the ground of the adultery of the husband, when the presiding Judge accepted the evidence of a single witness to prove the adultery, as to which fact she was not corroborated, though on other matters she was, and entirely rejected the uncontradicted statements of several witnesses called to prove immoral conduct on the part of the wife:—Held, that he had a right so to do, and the Court on appeal would not on that account disturb the decree. *Bell* v. *Bell*, 34 N. B. Reps. 615.

Right of Appeal—*County Court—Decision of Judge.*]—Where questions of fact, which have not been passed upon by the Judge below, are not involved, an appeal will lie directly to the Supreme Court from a decision of a County Court Judge. *Patterson* v. *Larsen*, 36 N. B. Reps. 4.

V. North-West Territories—Appeal to Supreme Court.

Costs—*Leave to Appeal—Time to Inscribe.*]—Rules 500 and 501 of the Judicature Ordinance are independent of each other; Rule 501 does not apply to an appeal as to costs; by virtue of Rule 500, an appeal as to costs lies irrespective of any of the limitations contained in Rule 501, (1) without leave, where, by law, the costs are not—and (2) with leave, where, by law, the costs are —left to the discretion of the Court or Judge. Where, therefore, the grounds of appeal were that the Judge had ordered costs to be paid out of a fund, out of which he had no power to order them to be paid:—Held, that leave to appeal was not necessary. Time for inscribing appeal, and enlargement of time, discussed. *In re Demaurez*, 4 Terr. L. R. 281.

Ground not Taken Below—*Notice of Appeal.*]—On appeal to the Court in banc, counsel for the defendants (appellants) having sought to raise for the first time the point that, although there had been a dedication

of the land in question as a highway, such dedication was made and accepted subject to such obstructions as existed upon it at the time of dedication, the Court considering that the point was not covered by any of the grounds stated in the appellants' notice of appeal:—Held, that the appellants were not at liberty to raise the point at this stage. *Town of Edmonton* v. *Brown*, 1 Terr. L. R. 454.

Leave to Appeal—*Powers of Court in banc—New Trial—Neglect to Give Evidence.*]—The Judicature Ordinance, R. O. 1888 c. 58, s. 435, provides that "no appeal shall lie from the judgment or order of the Court presided over by a single Judge or of a Judge of the Court to the Court in banc, without the special leave of the Judge or Court whose judgment or order is in question, unless the title to real estate or some interest therein is affected, or unless the matter in controversy on the appeal in matters of contract exceeds the sum of $500 and in matters of tort exceeds the sum of $200, exclusive of costs; or unless the matter in question relates to the taking of an annual or other rent, customary, or other duty or fee, or a like demand of a general or public nature affecting future rights:"—Held, that, where a trial Judge had not granted leave to appeal in a case in which, by virtue of this section, leave to appeal was necessary, the Court in banc had no jurisdiction to entertain an appeal, or to give leave to appeal, even, semble, had it appeared that the Judge had said that the applicant might apply to the Court in banc for leave. Semble, where a party fails in his case by reason of his neglecting to give necessary evidence, of which at the time of the trial he had knowledge, he should be allowed a new trial to permit him to supply the evidence, only under special circumstances. *Chalmers* v. *Fysh*, 1 Terr. L. R. 434.

Notice of Appeal—*Amendment—Special Leave.*]—Notwithstanding that the case is of such a character as to require special leave to appeal, the Court in banc has power to amend the notice of appeal by adding a ground not taken when leave was granted; such an amendment is a matter for the exercise of the discretion of the Court, and such discretion will not, in such a case, be exercised without very great precautions. *Western Milling Co.* v. *Darke*, 2 Terr. L. R. 40.

Notice of Appeal—*Amendment of.*]—As a general rule on the argument of an appeal leave to amend the notice of appeal will be given for the purpose of correcting errors of dates and other trifling matters and on special terms. *Sexsmith* v. *Murphy*, 1 Terr. L. R. 311.

Notice of Appeal—*Time.*]—See *In re Donnelly*, 5 Terr. L. R. 270.

Right of Appeal—*Amount in Controversy.*]—The plaintiff sued for $617.85, and defendants with their defence, while denying liability, brought into Court $367 as being sufficient to satisfy the plaintiff's claim; the trial Judge found the plaintiff entitled to $543.22, and applied the $367 in Court, leaving, with an adjustment of interest, a balance due to the plaintiff of $182.43:—Held, that the amount in controversy exceeded $200, and the defendant was entitled to appeal without special leave. *McDougall* v. *McLean*, 1 Terr. L. R. 436.

Security for Costs of—Grounds for ordering—Poverty of appellant—Disposition of property. *Dakota Lumber Co.* v. *Rinderknecht* (N.W.T.) 1 W. L. R. 481, 2 W. L. R. 86, 275.

VI. NOVA SCOTIA—APPEAL TO SUPREME COURT.

County Court Appeal — *Findings of Jury — Necessity for Intermediate Application.*]—An appeal was taken directly to the Supreme Court of Nova Scotia from the findings of the jury in a case tried in a County Court:—Held, following Belden v. Freeman, 21 N. S. Reps. 106, that there should have been an application in the first instance to the Judge of the County Court for a new trial, and that the appeal should have been from his decision on that application, and that the present appeal must be quashed. *White* v. *Hissix*, 35 N. S. Reps. 432.

Right of Appeal—*Decision of Commissioner of Mines — Quashing appeal—Judgment—Estoppel — Mandamus.*]—Where an appeal from a decision of the Commissioner of Mines for Nova Scotia, on an application for a lease of mining land, is quashed by the Supreme Court of the Province, on the ground that it was not a decision from which an appeal could be asserted, the judgment of the Supreme Court is final and binding on the applicant, and also on the Commissioner, even if he is not a party to it. The quashing of the appeal would not necessarily be a determination that the decision was not appealable, if the ground had not been stated. In the present case the quashing of the appeal precluded the Commissioner or his successor in office from afterwards contending that the decision was appealable. If the Commissioner, after such appeal is quashed, refuses to decide again upon the application for a lease, the applicant may compel him to do so by writ of mandamus. *Drysdale* v. *Dominion Coal Co.*, 24 Occ. N. 166, 34 S. C. R. 328.

Right of Appeal—*Order in Chambers — Discretion of Judge — Refusal to Allow Cross-examination.*]—On an application at Chambers to set aside, as false, frivolous, and vexatious, the pleas pleaded by the defendant to an action brought against him as the acceptor of a bill of exchange discounted by the plaintiffs, the defendant applied for leave to cross-examine the manager of the plaintiffs on the affidavit upon which the motion was founded:—Held, that the matter was one within the discretion of the Chambers Judge, and that there was no appeal from his refusal to permit the cross-examination applied for. *Bank of Montreal* v. *Bent*, 34 N. S. Reps. 489.

Right of Appeal—*Waiver—Enforcement of Judgment.*]—The plaintiff recovered judgment for damages against the defendant, taxed costs, and made a demand under threat of issuing an execution for the amount of damages and costs. The defendant paid the amount. Subsequently the plaintiff appealed from the judgment, asking for an increase of damages:—Held, that it was not com-

petent for the plaintiff, after obtaining the fruits of the judgment, to assert an appeal. *Flinn* v. *Keefe*, 24 Occ. N. 137.

Security for Costs of — *Insolvent Appellant.*]—A motion for security for costs of an appeal, made on the ground that the defendant, the appellant, was insolvent and that the plaintiff's judgment was still unsatisfied, was dismissed with costs, to be set off against the costs in the cause. *Dixon* v. *Dauphinee*, 34 N. S. Reps. 546.

VII. ONTARIO — APPEAL TO COURT OF APPEAL.

Bond—Form—Irregularity — Obligees — Motion to set aside — Costs. *Re Strathy Wire Fence Co.*, 2 O. W. R. 834, 1031, 3 O. W. R. 889.

Conditional Allowance of—*Reduction of Damages—Election—Further Appeal.*] — After the plaintiff's damages had been assessed by a jury, the trial Judge dismissed the action. The plaintiff appealed, and the Court of Appeal ordered that, if the plaintiff elected to reduce the damages assessed by the jury, her appeal should be allowed with costs, and judgment entered for her for the reduced amount with costs, or otherwise that there should be a new trial:—Held, that the plaintiff was entitled to have a clause inserted in the order of the Court protecting her, in the event of an appeal by the defendant to the Supreme Court of Canada, against her election to reduce the damages. *Fahey* v. *Jephcott*, 21 Occ. N. 519, 2 O. L. R. 353.

Consolidation of Two Appeals — Directions for printing. *Bready* v. *Grand Trunk R. W. Co.*, *Hughes* v. *Grand Trunk R. W. Co.*, 2 O. W. R. 1169.

County Court Appeal—Jurisdiction of Divisional Court. *Christie* v. *Cooley*, 6 O. W. R. 214.

Delay in Setting Down—Extension of time—Waiver of right of appeal—Proceeding in Master's office — Consent. *Boulton* v. *Boulton*, 2 O. W. R. 884, 5 O. W. R. 177.

Dispensing with Copies of Evidence for Use of Judges. *City of Hamilton* v. *Kramer-Irwin Rock Asphalt and Cement Paving Co.*, 1 O. W. R. 111, 2 O. W. R. 25, 3 O. W. R. 343, 347.

Effect of Allowing — *Non-appealing Party—Costs.*]—Action to restrain a township corporation and a contractor from constructing a drain authorized by by-law of the township. The judgment of the High Court granted an injunction against and ordered costs to be paid by both defendants, and ordered the corporation to indemnify the contractor if he paid them. The corporation appealed to the Court of Appeal, making the contractor a respondent; the latter appeared at the hearing of that appeal, but did not himself appeal. The appeal was allowed with costs:—Held, that the result of allowing the corporation's appeal was that the action should be dismissed as against both defendants, but the contractor should have no costs of the appeal. Semble, that he should have his costs below against the plaintiff. Peterkin v. McFarlane, 6 A. R. 254, Re Gabourie, Casey v. Gabourie, 12 P. R. 252, Esdaile v. Payne, 40 Ch. D. 520, and Dilke v. Douglas, 5 A. R. 43, distinguished. McDermott v. McDermott, 3 Ch. Ch. 38, approved. *Challoner* v. *Township of Lobo*, 21 Occ. N. 201, 1 O. L. R. 292

Extension of Time for—*Application to Opposite Solicitor—Unreasonable Refusal—Costs.*]—Rules 799 and 801, prescribing the times for filing and serving notice of appeal and serving the appeal case, enable the appellant, whenever necessary, to obtain further time from the Court or a Judge; and that being so, the solicitor requiring further time should, in general, before applying to the Court, apply to the solicitor for the respondent, explaining the occasion for it, and the latter ought, in every proper case, to grant the request; any other course of conduct only occasions unnecessary and useless costs. And where application for an extension was made to the solicitor, and, in the opinion of the Judge who heard a motion to extend the time, unreasonably refused, an order was made extending the time and staying execution, without costs to the respondent. *Bodine* v. *Howe*, 21 Occ. N. 154, 1 O. L. R. 208.

Extension of Time — *Application to Opposite Solicitor — Unreasonable terms — Costs.*] — Where the respondent's solicitor refused, except upon more stringent terms than the Court would impose, to extend the time for delivery by the appellant of the draft appeal case and reasons of appeal, and the appellant, declining to accept the terms, moved before a Judge of the Court of Appeal and obtained an order extending the time, the costs of such motion were made costs to the appellant in the appeal. *McGuire* v. *Corry*, 21 Occ. N. 333, 1 O. L. R. 590.

Extension of Time—Laches—Security. *Brown* v. *McGregor*, 1 O. W. R. 398.

Leave to Adduce Further Evidence. *Dodge* v. *Smith*, 1 O. W. R. 46, 803, 2 O. W. R. 561.

Leave to Appeal—*Alimony—Lunatic — Admission to Asylum — Removal—Summary Judgment.*]—On a motion for leave to appeal from the judgment of a Divisional Court, 2 O. L. R. 541, 21 Occ. N. 560, affirming the decision of Meredith, C.J., 2 O. L. R. 289, 21 Occ. N. 525, and holding that the plaintiff in the action was not entitled to alimony, and (2) that on a motion by the plaintiff for summary judgment under Rule 616, judgment dismissing the action was properly given, the Court of Appeal, being of the opinion that the judgment was right, refused leave to appeal. *Hill* v. *Hill*, 22 Occ. N. 107, 3 O. L. R. 202.

Leave to Appeal—Appeal as of right on one branch—Amount involved—Divergence of judicial opinion. *Bentley* v. *Murphy*, 1 O. W. R. 273, 726, 845, 2 O. W. R. 1014.

Leave to Appeal—Attachment of debts—Small amount involved. *McDonald* v. *Sullivan*, 1 O. W. R. 721, 723, 784, 849.

Leave to Appeal—*Case tried with Jury.*] —On an application under s. 76 (a) of 4 Edw. VII. c. 11 (O.) for leave to appeal to

the Court of Appeal direct from a judgment at the trial before a Judge and jury in a case of sufficient importance and difficulty, in addition to the amount of the judgment ($2,500), to justify an appeal, it was objected that the section did not apply to the case of a trial with a jury, but only to trials by a Judge without a jury:—Held, that the plain object of the section was to avoid a double appeal; that it should receive a liberal construction; and that the judgment at or following upon the trial where the issues of fact are tried by a jury is the "judgment, order, or decision" of the Judge within the meaning of the section; and leave to appeal was granted. *Randall* v. *Ottawa Electric Co.*, 24 Occ. N. 394, 8 O. L. R. 701, 3 O. W. R. 146, 173, 1022, 4 O. W. R. 240, 269, 6 O. W. R. 913.

Leave to Appeal—Extension of time—Parties—Service of writ of summons. *Metallic Roofing Co. of Canada* v. *Local Union No. 30, Amalgamated Sheet Metal Workers' International Association*, 1 O. W. R. 573, 644, 2 O. W. R. 183, 266, 819, 844, 5 O. W. R. 95, 709, 6 O. W. R. 41, 283, 10 O. L. R. 108.

Leave to Appeal—Grounds—Conflict of judicial decisions — Municipal corporation—Misfeasance—Dangerous condition of highway—Statutory limitation of action. *Dickson* v. *Township of Haldimand*, 2 O. W. R. 968, 3 O. W. R. 52.

Leave to Appeal—Ignorance of change in law — Consent — Acquiescence. *Burr* v. *Hamilton*, 4 O. W. R. 280.

Leave to Appeal—Important question of law—Construction of statute—Small amount in controversy. *Mason* v. *Lindsay*, 1 O. W. R. 561, 583.

Leave to Appeal—*Judgments on Different Branches of Case — Special Circumstances.*]—In an action which at the trial resolved itself into two branches, (1) the status of some of the parties, and (2) the testamentary capacity of the testator and the validity of the will propounded, the trial Judge dealt with the validity of the will only, and, on an appeal, a Divisional Court dealt with the question of status only: — Held, upon an application for leave to appeal to the Court of Appeal, that, although the applicants had the judgment of two tribunals against them, they had the opinion of one Court only in respect of either branch of the case, and, in view of the value of the estate and the important consequences to them, sufficient special circumstances were shewn to entitle them to leave to appeal. *Kidd* v. *Harris*, 22 Occ. N. 131, 3 O. L. R. 277, 1 O. W. R. 141.

Leave to Appeal—Large sum involved—Debatable question of law. *City of Toronto* v. *Toronto R. W. Co.*, 2 O. W. R. 225, 3 O. W. R. 204, 298, 4 O. W. R. 221, 330, 345, 446, 5 O. W. R. 14, 64, 130, 403, 415, 6 O. W. R. 574, 677, 871.

Leave to Appeal—Master and servant—Injury to servant — Negligence — Defect in machinery—Notice or knowledge—Contributory negligence — Workmen's Compensation Act—Amendment—Court supplementing findings of jury—Grounds of appeal. *Gordanier* v. *John Dick Co.*, 2 O. W. R. 1051, 3 O. W. R. 372, 599.

Leave to Appeal—Mechanics' lien—Action to enforce—"Lands enjoyed with building." *Wentworth Lumber Co.* v. *Coleman*, 3 O. W. R. 618.

Leave to Appeal—Order of Divisional Court—Special grounds — Merits—Jurisdiction of Division Court. *Re Wilkes* v. *Home Life Association of Canada*, 3 O. W. R. 589, 675, 744.

Leave to Appeal—*Mortgage—Tender—Rate of Interest—Costs.*]—Leave to appeal refused. *Middleton* v. *Scott*, 22 Occ. N. 369, 4 O. L. R. 459, 1 O. W. R. 536, 632.

Leave to Appeal—*Order Striking out Jury Notice—Powers of Judge in Chambers—Conflicting Decisions.*]—In an action of covenant upon two mortgages, the defence was that the defendant had been induced to execute them by false and fraudulent representations. The defendant filed and served a jury notice, which was struck out by a Judge in Chambers, whose order was affirmed by a Divisional Court. A motion by the defendant for leave to appeal to the Court of Appeal was refused:—Held, that the order sought to be appealed against involved no question of law or practice on which there had been conflicting decisions or opinions by the High Court, or by Judges thereof: R. S. O. c. 51, s. 77, s.-s. (4), cl. (c). The power of a Judge in Chambers to strike out a jury notice has never been doubted. *People's Building and Loan Association* v. *Stanley*, 22 Occ. N. 254, 4 O. L. R. 90, 1 O. W. R. 399, 469, 572, 592, 2 O. W. R. 122.

Leave to Appeal — *Promissory Note — Presentment — Notice of Dishonour.*] — See *Wiedeman* v. *Guittard*, 22 Occ. N. 129.

Leave to Appeal — *Public Schools — Selection of School Site — Grounds of Appeal.*]—Motion for leave to appeal from the order of a Divisional Court allowing an appeal from an order of a Judge in Chambers and granting a mandamus to a township corporation requiring them to pass a by-law for the issue of debentures for $1,000 for the purchase of a school site and the erection of a school house:—Held, that the circumstance of the first order having been made in Chambers, and the additional fact that the applicants for leave to appeal were the respondents in the Divisional Court, and would have been entitled to appeal as of course if the motion had been heard in the first instance by a Judge sitting in Court, were material factors — when coupled with reasons of a substantial kind for questioning the judgment complained of—in affecting the discretion to be exercised. An important question was raised as to the true construction of a somewhat obscurely phrased section of the Public Schools Act. Plausible grounds of objection to the construction placed by the Divisional Court upon the legislative provisions in question were presented. Questions relating to the validity or invalidity or binding effect or otherwise of an award purporting to be made in pursuance of these provisions were also involved; and the matter was of some public interest. Leave granted upon the usual terms. *In re Cartwright School Trustees and Township of Cartwright*, 22 Occ. N. 288, 4 O. L. R. 278, 1 O. W. R. 387, 477, 2 O. W. R. 340. *Hunter* v. *Boyd*, 1 O. W. R. 79, 2 O. W. R. 724, 1055.

Leave to Appeal — *Question of Costs—Solicitor—Payment by Salary—Taxation of Costs against Opposite Party—Right to Costs—Municipal Corporation — By-law.*] — The solicitor of a municipal corporation was appointed under the terms of a by-law which provided for his receiving a yearly salary of $1,800 for all services performed by him, including costs of litigation incurred on behalf of the corporation, and any costs awarded to the corporation were to be paid over to the city treasurer. This by-law was amended by a by-law providing that all costs payable to the corporation in any action should be paid to the solicitor as part of his remuneration, in addition to his salary. After the passing of the amending by-law the corporation claimed to have the right to tax profit costs in an action against the corporation, which had been dismissed with costs by a judgment given before the passing of such amending by-law. —Leave to appeal to the Court of Appeal from an order of a Divisional Court (22 Occ. N. 408, 4 O. L. R. 656) refusing to allow such profit costs, having been moved for:—Held, that, having regard to the litigation and the decisions on the subject, leave should not be granted.—Semble, that the date of the judgment governed the plaintiffs' liability to costs. *Ottawa Gas Co.* v. *City of Ottawa*, 23 Occ. N. 87, 5 O. L. R. 246, 6 O. L. R. 187, 1 O. W. R. 647, 697, 2 O. W. R. 579.

Leave to Appeal—Question of practice—Use of company's name as plaintiff in actions—Discretion. *Saskatchewan Land and Homestead Co.* v. *Leadley*, 2 O. W. R. 745, 850, 917, 944, 1075, 1112, 3 O. W. R. 133, 191, 4 O. W. R. 39, 378, 5 O. W. R. 449. *Saskatchewan Land and Homestead Co.* v. *Moore*, 2 O. W. R. 916, 944, 1075, 1112, 4 O. W. R. 39, 378.

Leave to Appeal—Question of substance—Joinder of plaintiffs and causes of action. *Hinds* v. *Town of Barrie*, 1 O. W. R. 775, 2 O. W. R. 995.

Leave to Appeal—Refusal of leave to proceed in action against company in liquidation. *Re Pakenham Pork Packing Co.*, 6 O. L. R. 582, 2 O. W. R. 951, 983, 4 O. W. R. 22.

Leave to Appeal—Security for costs—Discretion — Peculiar circumstances — Solicitor. *Allen* v. *Crozier*, 2 O. W. R. 485, 736, 895.

Leave to Appeal—Special circumstances—Absence of. *Scott* v. *Township of Ellice*, 2 O. W. R. 880, 4 O. W. R. 38, 93.

Leave to Appeal—*Special Circumstances—Defamation — Misdirection — Evidence — Damages—Discretion.*]—Upon motion by the defendant for leave to appeal from an order of a Divisional Court affirming the judgment at the trial, upon the verdict of a jury awarding the plaintiff $100 damages in an action for libel:—Held, that the defendant had failed to shew special circumstances. The verdict was small, and the jury seemed to have arrived at it upon a charge to which the only exception urged was a reference to a former action, and, if the Judge erred in not passing that over, there was nothing to shew that any substantial wrong was occasioned by it. The weight of authority was against the proposition that a defendant in a libel action may set up in mitigation of damages acts and doings of the plaintiff arising long after the alleged libel, and not having reference to it; but the matter was to some extent one of the exercise of discretion by the trial Judge, and leave to appeal against that ought only to be given in exceptional cases. *Downey* v. *Stirton*, 21 Occ. N. 155.

Leave to Appeal—Special circumstances—Dispensing with security. *Kidd* v. *Harris*, 1 O. W. R. 141, 3 O. L. R. 277.

Leave to Appeal—Special circumstances—Order relating to discovery. *McKenzie* v. *McLaughlin*, 1 O. W. R. 89.

Leave to Appeal — *Status of Judicial Officer.*] — A Divisional Court reversed an order of a Judge in Chambers, which stayed proceedings in these actions and dismissed a motion for a reference to the drainage referee a. an official referee. The Divisional Court decided that the drainage referee was an official referee for the purposes of the Arbitration Act: — Held, that leave to appeal should be granted on the ground that the decision involved the status, jurisdiction, and authority of a judicial officer, and the validity of the proceedings which might be taken by him under the order of the Divisional Court. *McClure* v. *Township of Brooke, Bryce* v. *Township of Brooke*, 22 Occ. N. 254, 4 O. L. R. 102, 1 O. W. R. 274, 324, 835.

Leave to Appeal—*Taxation of Costs—Several Causes of Action—Judgment.*]—An application by the defendant for leave to appeal from an order of a Divisional Court dismissing an appeal from an order of a Judge in Chambers upon appeal from taxation of costs. The action was for slander. The statement of claim contained four paragraphs setting forth the slander in various ways. There was a verdict and judgment with costs for plaintiff on two paragraphs, and the same for the defendant on the other two. The defendant contended that the general costs should be apportioned throughout. But the taxing officer taxed to the plaintiff the general costs of the cause, less costs applicable to the paragraphs on which he failed, and to the defendant the costs of the issues arising on the latter, and his ruling was affirmed:—Held, not a case in which leave to appeal should be granted. There is no good reason why a judgment framed as was the judgment here, should not lead to the same result as the former Rule of Court. Sparrow v. Hill, 8 Q. B. D. 479, and Jenkins v. Jackson, [1891] 1 Ch. 89, referred to. *Davis* v. *Hord*, 22 Occ. N. 285, 4 O. L. R. 466, 1 O. W. R. 418, 471.

Leave to Appeal—Winding-up—Contributory—Amount in controversy—Interest—Costs—Merits. *Re Wiarton Beet Sugar Co., Kydd's Case*, 5 O. W. R. 542, 637, 6 O. W. R. 491, 590.

Leave to Appeal from Judgment at Trial—*Court of Appeal.*] — Motion by defendant for leave to appeal direct to the Court of Appeal from the judgment at the trial, passing over a Divisional Court. Leave to appeal granted, the question involved being a mixed question of law and fact and one in which an appeal to the Supreme Court of Canada would lie. *Molsons Bank* v. *Stearns*, 5 O. W. R. 479, 6 O. W. R. 667, 10 O. L. R. 95.

Leave to Appeal from Judgment at Trial—Grounds. *Canada Carriage Co.* v. *Lea*, 5 O. W. R. 86, 6 O. W. R. 633.

Leave to Appeal from Order of Divisional Court—Extending time—Delay —Costs. *Molsons Bank* v. *Eager*, 6 O. W. R. 93, 180, 595.

Leave to Appeal from Order of Divisional Court — Malicious arrest. *O'Donnell* v. *Canada Foundry Co.*, 4 O. W. R. 402, 5 O. W. R. 215, 477.

Leave to Appeal from Order of Divisional Court—Railway — Collision at crossing—Question of law—Duty to look for trains. *Wright* v. *Grand Trunk R. W. Co.*, 5 O. W. R. 802, 6 O. W. R. 175.

Leave to Appeal from Order of Divisional Court—*Trifling Amount—Question of Fact—End to Litigation.*]—Motion by plaintiff for leave to appeal from order of a Divisional Court, 5 O. W. R. 298, reversing the judgment of Anglin, J., at trial, 4 O. W. R. 121. Leave to appeal refused, the judgment being for $75 only, and could not be increased even were the proposed appeal successful. The question was whether there were special reasons for treating the case as exceptional and allowing a further appeal: 4 Edw. VII. c. 11, s. 76 (1) (g). *Clipsham* v. *Town of Orillia*, 5 O. W. R. 786, 9 O. L. R. 713.

Leave to Appeal from Order of Judge of High Court on Appeal from Report—Grounds. *O'Leary* v. *Perkins*, 5 O. W. R. 257.

Leave to Cross-appeal Nunc pro Tunc — *Parties — Costs.*] — *McDermott* v. *Hickling*, 23 Occ. N. 40, 1 O. W. R. 19, 768.

Motion to Quash Appeal of Third Party against Plaintiff—Useless proceeding: *Gaby* v. *City of Toronto*, 1 O. W. R. 440, 606, 635, 711.

Notice of Appeal—*Extending Time.*]—Under the present practice relief will be granted against a slip in practice, such as in this instance the failure to give notice of appeal in time, whenever the justice of the case requires it, and no injury to the opposite party which cannot be compensated for by costs or otherwise has resulted. In considering what justice requires in such a case, regard is to be had to the bona fides of the applicant; the delay, whether great or trifling, as affecting the question of prejudice to the opposite party; and, especially where the application is made after default, whether the appeal appears to be groundless or frivolous. Where, therefore, a bona fide intention to appeal had been made out, the points raised were open to argument, and the delay was very short, no sittings of the Court having been lost, leave to serve notice of appeal was given. *Ross* v. *Robertson*, 24 Occ. N. 216, 7 O. L. R. 464, 3 O. W. R. 158, 513.

Notice of Appeal—*Time—Pronouncing or Entry of Judgment.*]—A judgment in a mechanics' lien action, tried by a local Master, was signed on the 12th March, but dated the 24th February, being the day on which the Master had signed a memorandum of his findings, a copy of which he on the same day sent by mail to the solicitors for each of the parties. The memorandum contained no reference to the costs of the action, but they were disposed of by the judgment as signed. There was no arrangement between the solicitors and the Master that his findings were to be sent by mail:—Held, that the month within which notice of intention to appeal from the judgment must, by Rule 799, be given, ran from the signing of the judgment on the 12th March. *Wallace* v. *Bath*, 24 Occ. N. 288, 7 O. L. R. 542, 3 O. W. R. 426.

Order for New Trial—Stay of execution, pending appeal from—Effect on new trial—Motion for removal of stay. *Uylaki* v. *Dawson*, 6 O. W. R. 569, 738, 10 O. L. R. 683.

Reversal of Judgment on Questions of Fact: *Lewis* v. *Dempster*, 1 O. W. R. 602.

Right of Appeal — *Loan Corporations Act — Intra Vires—Penalty—Prohibition — Conviction.*]—Appeal by defendants under s.-s. 4 of s. 117 of the Loan Corporations Act R. S. O. 1897 c. 205, from their conviction by the police magistrate for the city of Toronto of the offence of having, acting as agents for the preferred Mercantile Company of Boston (incorporated), entered into a contract contrary to the provisions of s. 117:—Held, confirming the conviction, that there was no right of appeal. *Rex* v. *Pierce*, 25 Occ. N. 70, 4 O. W. R. 411, 5 O. W. R. 464, 9 O. L. R. 374.

Right of Appeal—*Order of Judge Removing Stay of Execution — Discretion—Grounds for Removal.*]—An appeal lies to the Court of Appeal from an order of a Judge thereof, in Chambers, under Rule 827, directing that the execution of the judgment appealed from shall not be stayed pending the appeal. Such an order is not a purely discretionary one; a proper case must be made out for allowing the respondent to enforce what has not yet become a final judgment, the appeal being a step in the cause. A Judge in Chambers having ordered the removal of the stay, his order was reversed by the Court, where the appeal appeared to be prosecuted in good faith and on substantial grounds, and the effect of an execution would practically be to close up the appellant's business. *Centaur Cycle Co.* v. *Hill*, 22 Occ. N. 253, 24 Occ. N. 209, 1 O. W. R. 229, 377, 401, 639, 2 O. W. R. 1025, 3 O. W. R. 255, 354, 4 O. L. R. 92, 493, 7 O. L. R. 411.

Right of Appeal—*Practice on Appeal—Companies—Ontario Winding-up Act—Final Order.*] — Section 27 of the Ontario Joint Stock Companies Winding-up Act, R. S. O. 1897 c. 222, contains the code of proceedings on an appeal from any order or decision of the Court under that Act, no provision being made in the Consolidated Rules or elsewhere. There is no provision that reasons for and against the appeal are required, or any delivery or settlement of the proposed case. The practice when the case has come before a single Judge has been to send up the original papers and have the appeal heard upon them. Semble, that an order of a County Court Judge rescinding an order previously made by him under s. 41 of the above Act for the dissolution of a company, is a final order, and therefore an appealable one. *In re Equitable Savings, Loan, and Building Association*, 22 Occ. N. 386, 4 O. L. R. 479, 6 O. L. R. 26, 1 O. W. R. 571, 2 O. W. R. 366.

Right of Appeal—Surrogate Court case—Divisional Court—Second appeal: *Haynes* v. *Edmonds*, 1 O. W. R. 340.

Right of—Election case—Dismissal of charges of corrupt practices: Re Lennox Provincial Election: *Perry* v. *Carscallen*, 2 O. W. R. 190; *Re South Oxford Provincial Election*, *Patience* v. *Sutherland*, 1 O. W. R. 795, 2 O. W. R. 196, 6 O. L. R. 203.

Right of—Order directing new trial—Second trial taking place before appeal heard—Abandonment—Quashing: *Webb* v. *Canadian General Electric Co.*, 2 O. W. R. 322, 865, 1113, 3 O. W. R. 853.

Security for Costs of Appeal—*Joint Appeal—Security Furnished by One Party—Payment into Court—Abandonment—Motion for Payment Out—Costs—Set-off—Increased Security.*]—Two defendants appealed to the Court of Appeal from a judgment of the High Court; the notice of appeal was a joint one; and $200 was paid into Court, as security for the respondents' (plaintiffs') costs of appeal, by one of the appellants, but in the name of both and for the joint benefit:—Held, that the appellant who had paid the money in was not entitled, upon abandoning his appeal, to have the money paid out to him, the other appellant desiring and intending to avail himself of the deposit and to proceed with the appeal. The first appellant's motion for payment out being dismissed with costs to the other appellant, and it appearing that by the judgment appealed against the first appellant was entitled to be indemnified by the other against all amounts payable by the first under the judgment, and to recover from the other any amount so paid and his costs of the action, &c.:—Held, that the costs of the motion should be set off against anything the first appellant might already have paid, or might ultimately have to pay, under the provisions of the judgment referred to, as the result of the appeal. Held, under the circumstances of the case, that the appeal would be more expensive than usual, and that the security should be increased to $400, but that, upon the true construction of Rule 830, s.-ss. 1, 4, 8, where security is given by payment into Court, it cannot be increased to more than $400. *Centaur Cycle Co.* v. *Hill*, 22 Occ. N. 253, 24 Occ. N. 209, 1 O. W. R. 229, 377, 401, 639, 2 O. W. R. 1025, 3 O. W. R. 255, 354, 4 O. L. R. 92, 493, 7 O. L. R. 411.

Security on Appeal—*Extension of Time for Allowance and Setting Down Appeal—Delay—Merits.*]—After judgment was given declaring the plaintiff entitled to the value of certain bonds, which the defendants had failed to deliver over, such value to be determined by a reference to the local Master, and after a long interval, without anything having been done under the reference, it was transferred to the Master in Ordinary, and, after the finding of the Master, and appeals and cross-appeals therefrom, the plaintiff for the first time claimed interest on such value from the date of the breach, and moved to have the judgment amended so as to include such interest. The motion was refused, whereupon the plaintiff gave notice of appeal to the Court of Appeal, but did not furnish the necessary security until after the time for appealing had elapsed:—Held, that, in the circumstances, the time for the allowance of the security and the setting down of the appeal should not be extended. *Ray* v. *Port Arthur, Duluth and Western R. W. Co.*, *Ray* v. *Middleton*, 24 Occ. N. 334, 7 O. L. R. 737, 2 O. W. R. 345, 3 O. W. R. 160, 724.

Security on Appeal—*Money Paid into Court—Payment out after Purpose Answered—Further Appeal.*]—A party who has paid money into Court as security upon his appeal to the Court of Appeal is entitled, after his appeal has been allowed with costs, to take the money out, although his opponent is prosecuting a further appeal to the Supreme Court of Canada or the Judicial Committee of the Privy Council. An appeal to the Court of Appeal is a step in the cause, but a further appeal is not so. *Centaur Cycle Co.* v. *Hill*, 22 Occ. N. 253, 24 Occ. N. 209, 1 O. W. R. 229, 377, 401, 639, 2 O. W. R. 1025, 3 O. W. R. 255, 354, 4 O. L. R. 92, 493, 7 O. L. R. 411.

Settling Appeal Case—Evidence on various issues—Construction of contract—Limited appeal. *City of Hamilton* v. *Kramer-Irwin Rock Asphalt, etc., Co.*, 1 O. W. R. 111, 2 O. W. R. 25, 3 O. W. R. 343, 347.

Settlement of Book—*Appointment—Onus.*]—Having regard to Rules 798 et seq., relating to appeals to the Court of Appeal, the burden of procuring from "the Court appealed from, or a Judge thereof" (Rule 798), an appointment to settle the appeal case or book, the parties being unable to agree, is upon the appellant. Rule 801 (3) enables the respondent to move in the matter, if so disposed; but it is the appellant's duty to enter the case with the registrar and set down the appeal for argument; this he cannot regularly do without depositing the appeal books (Rule 812); and before they are deposited they must be settled. *Oatman* v. *Michigan Central R. R. Co.*, 21 Occ. N. 334, 1 O. L. R. 636.

Stay of Execution of Judgment for Partition Pending Appeal—Security—Motion to remove stay. *Monro* v. *Toronto R. W. Co.*, 1 O. W. R. 25, 316, 813, 2 O. W. R. 207, 3 O. W. R. 14, 299, 4 O. W. R. 392.

Stay of Execution Pending Appeal—Continuance of injunction dissolved by judgment appealed from. *Klees* v. *Dominion Coat and Apron Supply Co.*, 2 O. W. R. 841, 937, 3 O. W. R. 937, 6 O. W. R. 200.

Suspension of Injunction Pending Appeal. *Taylor* v. *Township of Collingwood*, 3 O. W. R. 368, 553, 6 O. W. R. 261.

Stay of Proceedings—*Judgment—Certificate.*]—After the decision of the Court of Appeal has been certified by the registrar, the case is no longer pending in the Court of Appeal, and, by Rule 818, the subsequent proceedings are to be taken as if the decision had been given in the Court below. A Judge of the Court of Appeal has, therefore, no power, under the Judicature Act, R. S. O. 1897 c. 51, s. 54, or 60 & 61 V. c. 34, s. 1 (D.), or otherwise, after certificate, to make an order staying proceedings upon the judgment of the Court of Appeal pending an application for leave to appeal therefrom to the Supreme Court of Canada. *Hargrove* v. *Royal Templars of Temperance*, 21 Occ. N. 432, 2 O. L. R. 126. See also *S. C.*, 22 Occ. N. 1, 31 S. C. R. 385.

Time—*Late Entry—Refusal of Consent—Confirmation — Responsibility for Delay — Costs.*]—The defendants on the 19th May gave notice of an appeal to the Court of Appeal from a judgment delivered on the 22nd April, and gave security on the 22nd May. Reasons for appeal were not served till the 10th September, and reasons against appeal not till the 13th October. The next sittings of the Court of Appeal was set for the 10th November. The appeal case was not prepared in time to enter the case on the 6th November, and the plaintiff's solicitor refused to consent to its being entered on the 10th for the sittings beginning on that day. The case was entered without consent on the 17th November, and a motion was made to confirm the entry:—Held, that the plaintiff's solicitor should have consented to the proposed entry on the 10th November, and the subsequent entry should be confirmed; and, as both parties were nearly equally blameable for delay, there should be no costs. *McLaughlin* v. *Mayhew*, 23 Occ. N. 42, 5 O. L. R. 114, 1 O. W. R. 308, 2 O. W. R. 10, 590.

VIII. Ontario — Appeal to Divisional Court of High Court.

County Court Appeal—*Final Order.*]—A motion by the defendant to set aside a judgment for default of defence in a County Court action as irregular and void, was dismissed by the County Court Judge, who gave the defendant leave, on payment of $5, to move on the merits for leave to defend:—Held, that this was a final order and that an appeal lay therefrom. O'Donnell v. Guinane, 28 O. R. 389, distinguished. *Voight Brewery Co.* v. *Orth*, 23 Occ. N. 168, 5 O. L. R. 443, 2 O. W. R. 304.

County Court Appeal—*New Evidence.*]—Under Rule 498, the High Court may entertain an application, in a proper case, to admit new evidence on a County Court appeal, notwithstanding R. S. O. c. 55, s. 51, s.-s. 3, under which such an application must be made before the County Court, and this although the time for applying for a new trial had expired. *Butler* v. *McMicken*, 21 Occ. N. 71, 32 O. R. 422.

County Court Appeal—*Order Dismissing Appeal from Taxation of Costs—Final or Interlocutory.*]—An order made by the Judge of a County Court in a County Court action dismissing an appeal from a ruling as to the scale of costs upon taxation of the plaintiffs' costs of the action awarded by the judgment, is in its nature interlocutory and not final, within the meaning of s. 52 of the County Courts Act, R. S. O. 1897 c. 55, and no appeal lies therefrom to a Divisional Court of the High Court. Blakey v. Latham, 43 Ch. D. 23, followed. Babcock v. Standish, 19 P. R. 195, distinguished. In Kreutziger v. Brox, 32 O. R. 418, the question of the right to appeal was not raised or considered. *Leonard* v. *Burrows*, 24 Occ. N. 219, 7 O. L. R. 316, 3 O. W. R. 186.

County Court Appeal—*Order Dismissing Motion to Commit—Finality.*]—An appeal by the plaintiffs from an order of the Judge of a County Court dismissing a motion by the appellants to commit the defendant for refusing to be sworn and examined as a judgment debtor, upon the ground that a proper foundation had not been laid for his examination by a return of nulla bona to a fi. fa., or an affidavit stating that such would be the return:—Held, that no appeal lay, because the order appealed against was not in its nature final, but merely interlocutory, within the meaning of s. 52 of the County Courts Act, R. S. O. c. 55. *New Hamburg Manufacturing Co.* v. *Barden*, 21 Occ. N. 377.

County Court Appeal—*Proceedings not Certified.*]—Held, by Meredith, J., dissenting, that an appeal from an order in a County Court action was not properly before the Court because the proceedings were not certified. *Lucas* v. *Holliday*, 24 Occ. N. 305, 8 O. L. R. 541, 3 O. W. R. 732.

County Court Appeal—Right of appeal—New trial not moved for. *Smith* v. *Bloomfield*, 2 O. W. R. 481.

County Court Appeal—Right of appeal—Nonsuit—Negligence—Evidence for jury—New trial. *Camp* v. *Armstrong Cartage and Warehouse Co.*, 3 O. W. R. 686.

County Court Appeal—Right of appeal—Summary trial of interpleader issue. *Vipond* v. *Griffin*, 2 O. W. R. 532.

County Court Appeal—*Right of Appeal—Order Refusing to Vary Minutes of Judgment—Duty of Judge to Certify Proceedings—Set-off of Costs.*]—An order of a County Court Judge in an action in a County Court dismissing an application to vary minutes under Con. Rule 625 (2) is an interlocutory and not a final order; and no appeal lies from it to the High Court. Semble, per Britton, J., in Chambers, that the fact that there may be no appeal from such an order is no reason why the Judge should not certify the papers; the question whether or not there is an appeal from such an order is for the Court appealed to, and such certificate should as a rule be given upon request; the Judge's duty being ministerial only.—Semble, also, that the setting off of costs (which was the matter in question on the motion to vary the minutes) is no part of what is ordinarily understood as settling minutes of judgment.—A motion for a mandamus to the Judge to certify the proceedings was dismissed by Britton, J., and the dismissal was affirmed by the Court. *In re Taggart* v. *Bennett*, 23 Occ. N. 224, 6 O. L. R. 74, 2 O. W. R. 184, 419, 513.

County Court Appeal—Right of appeal—Final order—Order striking out part of defence as disclosing no reasonable answer—Rules 261, 298—Pleading—Cheque. *Smith* v. *Traders Bank*, 6 O. W. R. 748, 11 O. L. R. 24.

County Court Appeal—Weight of evidence — Correcting error. *Jackson* v. *McLaughlin*, 2 O. W. R. 159.

District Court Appeal—Extension of time—Leave to set down—Terms—Costs—Condition precedent. *Young* v. *McKay*, 3 O. W. R. 447.

Divisional Court—*County Court—Right of Appeal from — New Trial.*] — Judgment having been pronounced by a junior Judge

in a County Court action, a motion by way of appeal from or to set aside such judgment and to enter judgment for the defendants, or in the alternative for a new trial, was made to the senior Judge; and on such appeal the judgment was set aside and judgment entered for the defendants dismissing the action:—Held, that an appeal lay to the Divisional Court by the unsuccessful party to such appeal; and the fact that a new trial in the alternative was asked for was immaterial. The sub-sections of s. 51 of the County Courts Act, R. S. O. 1897 c. 55, applicable, are s.-ss. 1, 2, and 5, and not s.-s. 3. *Leishman* v. *Garland*, 22 Occ. N. 109, 3 O. L. R. 241, 1 O. W. R. 22.

Divisional Court—*Surrogate Court—Notice of Appeal from—Description of Appellate Court.*]—On a motion to quash an appeal to a Divisional Court subsequent to the passing of 58 V. c. 13, s. 45 (O.), on the ground that the notice of appeal did not specify the Court to which the appeal was taken, and that the bond filed followed the Surrogate form "To the Court of Appeal:"—Held, that the intention to appeal expressed in the notice was sufficient, and that the words "the Court of Appeal" in the bond might be read as an equivalent of "the proper appellate tribunal;" and a motion to quash was dismissed. *Taylor* v. *Delaney*, 22 Occ. N. 136, 3 O. L. R. 380, 1 O. W. R. 208, 409.

Division Court Appeal—*Certified Copy of Proceedings—Filing—Notice of Appeal—Time—Extension.*]—An order refusing a new trial of a Divisional Court plaint was made on the 25th August; the clerk certified a copy of the proceedings on the 29th August, and it was filed in the High Court on the 4th September; notice of appeal was not given for the October sittings of the High Court (Divisional Court); but on the 12th October the appellant obtained an order in the Division Court extending the time for filing the certified copy of the proceedings, and on the 17th October obtained and filed another copy, and gave notice to the opposite party of having done so and of the appeal for the November sittings:—Held, that the order extending the time was inoperative because the certified copy had already been filed; and, the delay in giving notice of appeal not having been accounted for, the appeal must be quashed. *Heise* v. *Shanks*, 21 Occ. N. 139, 1 O. L. R. 48.

Division Court Appeal—*Notice of Grounds—Failure to Give—Amendment.*]—Where the defendants appealing from the judgment of a Division Court, procured and filed a certified copy of proceedings within the two weeks prescribed by s. 158 of the Division Courts Act, and set down the appeal to be heard at an unnecessarily early sittings of a Divisional Court of the High Court, but neglected to give the plaintiff notice of the setting down of the appeal and of the grounds of it, the Court, upon objection taken by the plaintiff when the appeal came on for hearing, postponed the hearing until the next sittings, for which the defendants were still in time, in order that they might give a proper notice. Semble, that so soon as the certified copy of the proceedings is filed, if filed within the proper time, and the case is set down, if set down within the proper time, and for the proper Court, the appeal is properly lodged, and the other matters are matters done in the appellate Court, as to which the Court may have the power of amendment or enlargement of the time. *Smith* v. *Port Colborne Baptist Church Trustees*, 21 Occ. N. 163, 1 O. L. R. 195.

Division Court Appeal—*Notice of Setting Down.*]—The giving of the notice of setting down for argument and of the appeal and of the grounds thereof, required by s. 158 of the Division Courts Act, is a condition precedent to the right to appeal to a Divisional Court from a judgment in a Division Court, and where this notice has not been given the Divisional Court has no jurisdiction to deal with the appeal. *Bradley Co.* v. *Wilson Lumber Co.*, 24 Occ. N. 317, 8 O. L. R. 184, 4 O. W. R. 66.

Division Court Appeal—Notice of Setting down—Default of appellant—Waiver of cross-appeal. *Walter* v. *Malone*, 3 O. W. R. 774.

Division Court Appeal—*Right of Appeal—Amount in Dispute.*] — The plaintiff brought an action in a Division Court for $100.75, the amount of a promissory note for $64.87 and $35.38 interest on it, and recovered judgment for $83.90; the trial Judge finding against an alleged release set up by the defendant, but only allowing $19.13 for interest instead of $35.38 as claimed. A motion for a new trial was refused:—Held, that "the sum in dispute upon the appeal" under s. 154 of the Division Courts Act, R. S. O. 1897 c. 60, was $83.90, and, as it did not exceed $100, a motion to quash an appeal to the High Court was allowed. Petrie v. Machan, 28 O. R. 504, distinguished. *Lambert* v. *Clark*, 24 Occ. N. 129, 7 O. L. R. 130, 3 O. W. R. 363.

Extension of Time for—Delay—Merits. *Mitchell* v. *Sylvester*, 6 O. W. R. 615, 893.

From County Court—Interlocutory order—Examination of judgment debtor and transferee. *Re Gault* v. *Carpenter*, 1 O. W. R. 404.

From Ruling of Master in Ordinary—Forum—Weekly Court or Divisional Court—Matter of practice. *Monro* v. *Toronto R. W. Co.*, 1 O. W. R. 25, 316, 813, 2 O. W. R. 207, 3 O. W. R. 14, 299, 4 O. W. R. 392.

Judge of High Court—*Right of Appeal from Order of County Court Judge Quashing Quo Warranto Proceedings.*]—See *Rex ex rel. McFarlane* v. *Coulter*, 22 Occ. N. 414, 4 O. L. R. 520, 1 O. W. R. 636.

Leave to Appeal—*Grounds.*]—Petition for special leave to appeal from the judgment of the Supreme Court of Canada, 35 S. C. R. 133, dismissed where the petitioners were appellants to that Court and no important question of law was raised. *Ewing* v. *Dominion Bank*, [1904] A. C. 806.

Leave to Appeal—*Supreme Court of Canada.*]—Special leave to appeal from a decree of the Supreme Court of Canada, 34 S. C. R. 74, was refused, the petitioner having elected to appeal to that Court and not to

His Majesty direct, and no question of law being raised of sufficient importance to justify a further appeal. Ex p. Clergue, [1903] A. C. 521, followed. *Canadian Pacific R. W. Co.* v. *Blain*, [1904] A. C. 453.

Master's Report—Extending time for—Special circumstances—Terms. *Randall* v. *Berlin Shirt and Collar Co.*, 5 O. W. R. 256, 646.

Master's Report—Time—Leave to appeal—Terms—Costs. *Smellie* v. *Watson*, 2 O. W. R. 118, 3 O. W. R. 475.

Motion to Quash Appeal—*Acquisition of Lands at Tax Sale—Sale by Tender—Resolution of Council to Accept Lower Tender—Action by Higher Tenderer to Restrain Sale—Insufficient Reasons for Accepting Lower Tender.*]—This was a motion to quash appeal by defendant corporation to a Divisional Court from the judgment of Magee, J., upon an action to restrain defendants, the corporation of the City of Belleville, from proceeding with a sale to defendant Caldwell of certain lots acquired by the corporation under the Assessment Act in satisfaction of arrears of taxes. This action was dismissed by Street, J., and the plaintiff appealed to a Divisional Court, which held (5 O. W. R. 310), that the plaintiff was entitled to succeed, unless the defendant corporation could prove at a further trial good reasons which induced them to sell to defendant Caldwell. The defendant corporation elected to have a further trial, and it took place before Magee, J., without a jury, at Belleville, on 2nd May, 1905:—Held, plaintiff not entitled to have his offer accepted nor to prevent the corporation from selling for less than the amount of his offer, but he was entitled to an injunction to restrain them from closing the sale to Mr. Caldwell on the basis only of the action of the special committee or of the council, 6 O. W. R. 1. Upon motion to quash above appeal, it was held that the mere payment of money as directed by a judgment is not a bar to an appeal from that judgment by the party making such payment, (reference to Pierce v. Palmer, 12 P. R. 308), and if the existing injunction was removed and the appellants were declared to be at liberty to carry out the sale, there was nothing to support the contention that the defendant Caldwell could not purchase the lands in question; also that there was nothing to prevent his co-defendants from taking steps by appeal to relieve themselves from an onerous judgment which they allege to have been pronounced in error. *Phillips* v. *City of Belleville*, 6 O. W. R. 129, 10 O. L. R. 178.

Order of Judge in Chambers — *Matter of Practice—Increasing Costs.*]—See *Dodge* v. *Smith*, 21 Occ. N. 162, 1 O. L. R. 46; *Bateman* v. *Mail Printing Co.*, 21 Occ. N. 559, 2 O. L. R. 416.

Order of Judge in Court—*Motion to Quash By-law.*]—An appeal from the decision of a Judge in Court refusing to quash a by-law lies either to a Divisional Court or the Court of Appeal; but the appellant must elect his tribunal, and can have only one appeal. *In re Ross and Township of East Nissouri*, 21 Occ. N. 287, 1 O. L. R. 353.

Questions of Fact.]—*Hand* v. *Sutherland*, 2 O. W. R. 263.

Right of Appeal—Leave—Judgment as to costs. *Russell* v. *Eddy*, 5 O. L. R. 379, 2 O. W. R. 164.

Reversal of Order of Judge on Appeal from Report—Further appeal. *Pennington* v. *Hosinger*, 1 O. W. R. 270, 507.

Setting down — Christmas vacation. *Hislop* v. *Joss*, 1 O. W. R. 9.

Surrogate Court Appeal — *Security—Affidavit.*]—An appeal to a Divisional Court from an order of a Surrogate Court is not duly lodged and will be quashed if security has not been given, and an affidavit of the value of the property affected filed, as required by Rule 57 of the Surrogate Court Rules of 1892, which are made applicable by s. 36 of the Surrogate Courts Act, R. S. O. c. 59, notwithstanding the provision of Con. Rule 825 that no security for costs shall be required on a motion or appeal to a Divisional Court. In re Wilson, Trusts Corporation of Ontario v. Irvine, 17 P. R. 407, applied and followed. *In re Nichol*, 21 Occ. N. 184, 1 O. L. R. 213.

IX. Privy Council—Appeal to.

Admiralty Case—*Rules Established by Colonial Courts of Admiralty Act, 1890 (Imp.)—Costs of Appeal—Bail—Amount.*]—See *The "Cape Breton"* v. *Richelieu and Ontario Navigation Co.*, 36 S. C. R. 592.

Intention to Apply for Leave—*Stay of Judgment Appealed from—Supreme Court of Canada.*] — The Superior Court cannot, upon a simple declaration of a party that he intends to apply to the Judicial Committee of the Privy Council for leave to appeal from a final judgment of the Supreme Court of Canada, stay the execution of that judgment. *McDougall* v. *Montreal Street R. W. Co.*, Q. R. 24 S. C. 509.

Interference on Appeal — *Concurrent Findings of Fact by Courts Below.*] — See *Archambault* v. *Archambault*, [1902] A. C. 575.

Jurisdiction—*Judgment — Reference to Court for Opinion—Leave to Appeal.*]—Held, following Union Colliery Co. v. Attorney-General for British Columbia, 27 S. C. R. 637, that the opinion of the Court rendered under R. S. M. c. 28, upon a constitutional question submitted by an order of the Lieutenant-Governor in council, was not a judgment, decree, order, or sentence within the meaning of the Imperial order in council of the 26th November, 1892, relating to appeals from the Court of Queen's Bench for Manitoba, and that such Court has no jurisdiction to grant an application for leave to appeal to His Majesty in Council under that order from such an opinion:—Held, also, that, although it was shewn that the enforcement of the Liquor Act would deprive the province of a revenue far exceeding £300 per annum, and would prejudicially affect the very large investments of persons engaged in the liquor traffic, it could not be said that any questions respecting property or civil rights to the value of £300 were involved in the decision sought to be appealed from. *In re The Liquor Act*, 21 Occ. N. 416, 13 Man. L. R. 323.

Leave to Appeal — Amount involved. *Centre Star Mining Co.* v. *Rossland-Kootenay Mining Co.* (B.C.), 1 W. L. R. 313, 336.

Leave to Appeal — *Forum for Application—Security.*]—A petition for leave to appeal to the Privy Council cannot be granted by a Judge in Chambers unless sufficient security is offered at the same time. *Palliser* v. *Consumers' Cordage Co.*, 7 Q. P. R. 299.

Leave to Appeal—*Mines—Constitutional Question—Cross-appeal without Notice—Consolidation—Security—Cost of Printing Record.*]—The suppliants obtained leave to appeal from the judgment of the Supreme Court of Canada, 23 Occ. N. 34, 32 S. C. R. 586, dismissing three petitions of right, and in part reversing the judgment in 7 Ex. C. R. 414. The Board also granted the Crown leave to cross-appeal, and directed that the Supreme Court record should be accepted; that the three cases should be consolidated; that the security deposit should be £100 in each case; that each side should bear one-half the cost of transcribing and printing the Privy Council record; and that the appeal and cross-appeal should be heard together, upon one printed case lodged on each side. *Chappelle* v. *The King*, *Cormack* v. *The King*, *Tweed* v. *The King*, 23 Occ. N. 163.

Leave to Appeal—*Rescission—Petition.*] —See *Ontario Mining Co.* v. *Seybold*, [1903] A. C. 73.

Leave to Appeal—*Terms—Costs.*]—See *Canadian Pacific R. W. Co.* v. *Roy*, [1902] A. C. 220.

Leave to Appeal—*When Granted.*]—See *In re Tomey Homma*, 21 Occ. N. 424, 8 B. C. R. 76.

Ontario Appeal—*R. S. O. 1897 c. 48, s. 1—Admission of Appeal—Order of Court—Appealable Case.*]—Under R. S. O. 1897 c. 48, s. 1, it is essential that an appeal to the King in council should be admitted by the Court or Appeal. The Court is bound to exercise its judgment whether any particular case is appealable or not; and where it appears by its order that it has left that question open, the appeal is incompetent. *Gillett & Co. Limited* v. *Lumsden*, [1905] A. C. 601.

Right of Appeal — *Amount in Controversy—Patent of Invention.*]—An action for infringement of a patent of invention, wherein the plaintiff claims an injunction and $15,000 damages, which he consents in writing to reduce to $25, in order to escape costs of an enquête, is not, whatever may be the value of the patent, a cause in which an appeal lies as of right to the Privy Council. *Came* v. *Consolidated Car Heating Co.*, 4 Q. P. R. 256, Q. R. 11 K. B. 114.

Security—*Delay—Extension of Time—Record Returned.*]—Where leave to appeal to the Privy Council has been granted by the Court of King's Bench sitting in appeal, from a judgment rendered by the latter tribunal, and a delay having been fixed for putting in security, the delay has expired without security being furnished, and without any application having been made for an extension of the delay before the expiration thereof, and the record has thereupon been transmitted to the Court below, the Court of King's Bench, or a Judge thereof, has ceased to have jurisdiction over the cause, and cannot grant an application, made subsequently, for the extension of the delay for putting in security. *Asbestos and Asbestic Co.* v. *William Scuter Co.*, 21 Occ. N. 251, 3 Q. P. R. 491, Q. R. 10 Q. B. 61.

Stay of Proceedings — *Motion for.*] — A Judge in Chambers of the Supreme Court of Canada will not entertain an application to stay proceedings pending an application for leave to appeal from the judgment of the Court to the Judicial Committee of the Privy Council. *Adams* v. *Bank of Montreal*, 31 S. C. R. 223.

X. QUEBEC—APPEAL TO CIRCUIT COURT.

Judgment of Board of Delegates — *Choice of Forum for Appeal—Time for Appeal.*]—Where an appeal from a judgment of a board of delegates of two counties may be taken either in a district like that of Montreal, in which every juridical day is a term day, or in another district like that of Iberville, in which the terms are fixed by proclamation of the Crown, during certain months of the year, the appellant is absolutely free to take his appeal in either of such two districts. 2. It is the situation of the municipalities in different districts which fixes the jurisdiction of the Circuit Court of one or other of such districts. 3. The time for lodging an appeal under Art. 1070, C. M., is always only a modality of the procedure followed as to time in the district in which the appellant is taking his appeal. 4. To decide the contrary would be to deprive the appellant of his choice between the jurisdiction of the Circuit Court of the district of Montreal and of that of the district of Iberville. *Arbec* v. *Lussier*, Q. R. 20 S. C. 543.

XI. QUEBEC—APPEAL TO COURT OF KING'S BENCH.

Abandonment—*Fresh Appeal—Payment of Costs.*] — Where, owing to the neglect of the appellant to furnish security within the time fixed, an appeal has been declared to be abandoned, the appellant cannot launch a fresh appeal from the same judgment before paying the costs of the first appeal. *Cain* v. *Bartels*, Q. R. 10 K. B. 323.

Abandonment—*Notice—Intervention.*]—An abandonment of an appeal is only valid when notice thereof has been served upon all the parties to the cause. Where notice has not been served upon all the parties, the appeal is to be regarded as pending, and there is nothing to hinder a person from intervening to protect his right in appeal. *McNally* v. *Prefontaine*, 3 Q. P. R. 401.

Inscription—*Incomplete Record—Power of Superior Court to Set aside.*]—The Superior Court has no jurisdiction to grant a motion to set aside an inscription in appeal, upon the ground that the appellant since the inscription has not taken the necessary proceedings to complete the record and bring it before the Court of Appeal. *Bayard* v. *Royal Electric Co.*, 6 Q. P. R. 318.

Inscription—*Time—Service of Notice—Omission of Date.*]—The delivery of the inscription of an appeal to the registrar and the serving of notice thereof on the opposite party on the last day allowed by law, is a valid inscription of an appeal.—The inscription of an appeal may be notified by a bailiff of the Superior Court. The omission of the date of the judgment appealed against in the inscription is not a fatal irregularity, provided that the judgment has been otherwise designated. *McAvoy* v. *Willig*, Q. R. 14 K. B. 59.

Leave to Appeal—*Interlocutory Judgment—Husband and Wife—Separation—Reconciliation.*]—In an action for separation from bed and board, a judgment declaring that the allegations of reconciliation have been proved, reserving to the parties the right to discuss the consequences of the reconciliation upon the proceeding pending between them, is not an interlocutory judgment from which an appeal can be permitted under art. 46, C. P. *Christin* v. *Lafontaine*, 6 Q. P. R. 207.

Leave to Appeal—*Custody of Children.*]—A judgment refusing to the wife the custody of her children pending an action for separation from bed and board, is one from which leave to appeal will be granted, although such an appeal would appear to be unwise. *Lachapelle* v. *Lacroix*, 7 Q. P. R. 307.

Leave to Appeal—*Interlocutory Order—Time—Prosecution of Appeal.*] — Obtaining leave to appeal from an interlocutory judgment of the Superior Court does not, by the inception of such appeal, entitle the party obtaining such leave to the 6 months provided by article 1209, 6 P. C., for an appeal to the Court of King's Bench, and if he does not prosecute such appeal within a reasonable time after obtaining such leave, he will lose the right to make it. Hoffnung v. Porter, 7 L. C. J. 301, followed. *Hasburger* v. *Gutman*, Q. R. 13 K. B. 360.

Leave to Appeal—*Interlocutory Judgment — Waiver of Appeal — Compliance with Order.*]—Even if a judgment granting to a foreign plaintiff an additional delay to file a proper power of attorney comes under any of the conditions stipulated in Art. 46 C. P., leave to appeal shall not be granted when it appears that the plaintiff has complied with part of the order of the Court below, by furnishing security for costs, and has also, one day only after the expiry of the delay, filed a power of attorney, which, however, is insufficient. *Canadian Asbestos Co.* v. *Glasgow and Montreal Asbestos Co.*, 5 Q. P. R. 65.

Leave to Appeal—*Interlocutory Order—Exception to Form.*]—When a pleading has been disallowed upon demurrer or exception to the form and there appears to be a reasonable doubt as to the correctness of the judgment, leave to appeal will generally be accorded, almost as a matter of course; but the contrary rule prevails when it is the demurrer or the exception itself which has been disallowed. *Ogilvie* v. *Fraser*, 3 Q. P. R. 546.

Motion to Dismiss Appeal—*Forum.*] A motion to dismiss an appeal on the ground of non-transmission of the record within the time allowed therefor should be made before the Court of King's Bench, the appellate Court, and not before the Superior Court, which is disseised of the cause by the inscription in appeal and the security. *Wright* v. *Phillips*, 4 Q. P. R. 37.

Right of Appeal—*Conviction on Summary Trial—Recorder's Court.*]—No appeal lies to the Court of King's Bench, Crown side, from a conviction by a Recorder's Court upon a summary trial under s. 783 of the Criminal Code. *Rex* v. *Portugais*, Q. R. 10 K. B. 567.

Right of Appeal—*Interlocutory Judgment.*]—In matters in which no appeal lies, such as those mentioned in arts. 43 and 1006, C. P., there is no appeal from an interlocutory judgment any more than from a final judgment. *Crier* v. *David*, 4 Q. P. R. 417.

Right of Appeal—*Interlocutory Judgment—Leave to Prove New Facts—Discretion.*]—No appeal lies from an interlocutory judgment by which a Judge, in his discretion, permits or refuses to permit a party to prove by way of supplementary defence or reply material facts arising after the contestation. *Dupuis* v. *Dupuis*, 5 Q. P. R. 59.

Right of Appeal—*Interlocutory Judgment—Removal of Cause to Another District.*]—An appeal lies from an interlocutory judgment maintaining a declaratory exception and remitting the record to the Court of another district. *Gosselin* v. *Belley*, 4 Q. P. R. 233.

Right of Appeal—*Final or Interlocutory Judgment—Husband and Wife—Separation—Construction of Will—Reference.*]—In an action for separation from bed and board, a judgment holding that a provision in the will of the defendant's father, that the movable and immovable properties bequeathed may not in any manner be liable for the support and maintenance of his wife, does not provide for the exclusion of said properties from the community then on the death of the testator existing between the parties, and ordering the report to be referred back to the practitioner appointed by the Court to take an inventory of the property and assets of the community of property existing between the plaintiff and defendant, and ordering the said practitioner to include therein the properties and immovable effects belonging to the said estate, and revenues thereof derived from the movable property from the time of the testator's death to the time of the dissolution of the community of property, is an interlocutory judgment not falling under the condition imposed by paragraph 2 of art. 46, C. P., and may be remedied by a final judgment. *Stewart* v. *Cairns*, 5 Q. P. R. 235.

Right of Appeal—*From Circuit Court.*]—There is no appeal to the Court of King's Bench from the judgment of the Circuit Court of the chef-lieu of a district. *Senécal* v. *Corporation de L'Ile Bizard*, 3 Q. P. R. 388.

Right of Appeal—*Lapse of Time—Petition of Right—Power of Crown to Waive Delay.*]—A petition of right was dismissed by the Superior Court, Quebec, on the 3rd June, 1890. The petitioner some time afterwards applied to the Lieutenant-Governor in council for redress for the grievance complained of in the petition of right, whereupon

an order in council was passed on the 8th June, 1899, whereby the Crown purported to waive the petitioner's delay in instituting an appeal from the judgment of the Superior Court and to consent to the petitioner's appealing nunc pro tunc. On such appeal coming before the Queen's Bench the Crown took no objection to the jurisdiction, but the Court ex proprio motu, raised the point that it was not competent to entertain an appeal after the expiration of the delays prescribed by law, and dismissed it for want of jurisdiction:—Held, by the Supreme Court of Canada, following Cimon v. The Queen, 23 S. C. R. 64, that it was competent to the Crown to waive the delay, and the Court of Queen's Bench had jurisdiction. *Lord* v. *The Queen*, Q. R. 10 K. B. 97.

Right of Appeal — *Mandamus — Municipal Councillor — Declaration — Right to Seat.*] — No appeal lies to the Court of Queen's Bench from a judgment of the Superior Court in an action of mandamus, under the provisions of c. 40, s. 3, C. C. P., to compel a municipal corporation to recognize the plaintiff as a duly elected and qualified member of their municipal council and to reinstate him in that position, from which they had removed him without lawful cause; and additional conclusions asking for a declaration by the Court of the illegality of the resolution of the council professing to effect the removal, and that defendant abstain pending the suit from acting under the alleged illegal resolution, do not change the nature of the action or remove it from the conditions and restrictions of c. 40, C. C. P. *Village of Lorimier* v. *Bédard*, Q. R. 10 K. B. 95.

Right of Appeal—*Mandamus — Secretary-treasurer of municipality — Taxes.*] — No appeal lies to the Court of Queen's Bench from the judgment of a Superior Court granting a mandamus to the secretary-treasurer of a municipal corporation commanding him to receive municipal and school taxes at the time of a municipal election over which he is presiding. *In re Mosan and Petitclerc*, 3 Q. P. R. 345.

Right of Appeal—*Municipal Matters—Interlocutory Judgment.*]—Article 1006, C. C. P., which states that no appeal lies to the Court of King's Bench from any final judgment rendered under the provisions of c. 40 in matters relating to municipal corporations and offices, also excludes an appeal from an interlocutory judgment in such matters. *County of Wright* v. *Tremblay*, Q. R. 12 K. B. 368.

Right of Appeal—*Municipal Matters — Superior Court — Final Judgment — Exceptions—Circuit Court.*]—There is an appeal from every final judgment of the Superior Court, even in an action to quash a resolution of a municipal council. The only exceptions are those indicated in art. 1006, C. P. C.; in cases of certiorari under art. 1306, C. P. C.; and in cases mentioned in arts. 4178 and 4616, R. S. Q., concerning town corporations. There is no longer an appeal from the Circuit Court of a county town either in municipal matters or others, since the passing of 49 & 50 V. c. 18. *Lachance* v. *Corporation of Ste. Anne de Beaupré*, Q. R. 10 K. B. 223.

Right of Appeal—*Order of Judge—Revision of Taxation.*]—No appeal lies to the Court of King's Bench against a decision of a Judge of the Superior Court, in Chambers, reviewing and confirming the taxation by the prothonotary of the costs adjudged in favour of one of the parties. *La Vallé and Richelieu R. W. Co.* v. *Menard*, Q. R. 11 K. B. 1, 3 Q. P. R. 133.

Right of Appeal — *Prohibition — Refusal.*]—An appeal lies to the Court of King's Bench from a decision refusing to grant a writ of prohibition. *Gaynor and Green* v. *Lajontaine*, 7 Q. P. R. 240.

Security—*Time—Extension.*]—After the expiration of the time fixed by law and the order of a Judge for furnishing security on appeal, a motion to extend the time will not be granted. *Larocque* v. *Rosenthal*, 5 Q. P. R. 386.

Time for Appealing — *Expiration of—Waiver—Petition of Right.*]—The provisions of arts. 1020 and 1209, C. C., limiting the time for inscription and prosecuting of appeals to the Court of Queen's Bench, are not conditions precedent to the jurisdiction of the Court to hear the appeal, and they may therefore be waived by the respondent. Cimon v. The Queen, 23 S. C. R. 62, referred to. Art. 1220, C. C., applies in proceedings by petition of right. *Lord* v. *The Queen*, 21 Occ. N. 253, 31 S. C. R. 165.

Time for Appealing — *Interlocutory Judgment—Sale of Immovables by Sheriff.*]—The time for appealing from an interlocutory judgment begins to run from the day of the pronouncing of the judgment, and not from its transmission to the prothonotary. 2. A judgment ordering a sheriff to sell en bloc immovables seized is a final judgment, from which an appeal lies de plano. *Connolly* v. *Stanbridge*, 4 Q. P. R. 186.

XII. QUEBEC—APPEAL TO SUPERIOR COURT IN REVIEW.

Certificate of Filing Petition for Review—*Leave to Serve—Faulty Certificate — Powers of Amendment.*] — A party who omits to serve, with his petition for review of a judgment, the certificate of filing by the prothonotary, may obtain leave to serve and file such certificate. 2. If the certificate of filing by the prothonotary does not indicate the date on which the petition has been deposited, such certificate will be sufficient if the record shews the date and if no prejudice results to the opposite party, the Judge having, by virtue of the provisions of the new Code of Procedure, very large powers of allowing amendments in matters of procedure. *Breton* v. *Chabot*, Q. R. 18 S. C. 154.

Inscription for Review—*Notice—Service—Filing—Time.*]—The fact that notice of inscription in review was served on the opposite party within the eight days allowed for making the deposit, but not returned into Court within such delay, is not a ground for rejecting the inscription, and a motion to reject such inscription will be dismissed, where it is shewn that the notice, after service has been filed on the nearest following juridical day after the expiration of the eight days. *McDonald* v. *Vineberg*, 3 Q. P. R. 548.

Inscription for Review — *Signature—Solicitor.*]—An inscription of a case for review, in order to be valid, must be signed by the solicitor for the appellant, and not in his name by another whom he has authorized. *Drouin* v. *Rosenstein*, 3 Q. P. R. 563.

Jurisdiction to Hear Appeal — *Security—Dispensing with.*]—The deposit required for the purposes of review is not necessary to give jurisdiction to the Court, and the solicitors for the respondent may, by their consent, relieve the appellant from making it. *Jutras* v. *Corporation de St. Francois*, Q. R. 19 S. C. 206.

Leave to Appeal — *Motion for—Time—Vacation.*]—The time allowed for making an application for leave to appeal from an interlocutory judgment runs during the long vacation. *Poirier* v. *City of Montreal*, 7 Q. P. R. 278.

Parties to Appeal—*Defendant en Garantie.*]—The cause was set down for review by the plaintiff. The defendant moved to set aside the setting down and to remit the cause to the district of Arthabasca, on account of the default of the plaintiff to make the defendant en garantie a party to the appeal, she having appeared and pleaded to the principal demand, which was the subject of the appeal; the principal defendant having also pleaded thereto:—Held, that the defendant en garantie was not a necessary party. *Gastonguay* v. *Savoy*, 3 Q. P. R. 398.

Right of Appeal — *Circuit Court—Appeal—Amount involved.*]—There is no appeal from the Circuit Court of the chief place in a district, even if, in an action between landlord and tenant, it has decreed the cancellation of a lease for more than $100. *Palliser* v. *Consumers' Cordage Co.*, 7 Q. P. R. 280.

Right of Appeal—*Death of Defendant—Inscription in name of—Nullity—Motion to Amend.*]—This cause was taken en délibéré sur le mérite on the 10th June, 1899, and final judgment was rendered on the 27th November, 1899. During the délibéré the defendant died, and after the judgment his solicitors, in ignorance of his death, inscribed the case for review in the name of the deceased. The plaintiffs' solicitors made a motion to set aside the inscription, upon the ground that only the legal representatives of the defendant could make it. The solicitors for the defendant made a cross-motion to substitute in the inscription the names of the executors of the defendant's will:—Held, reversing the decision of the Court of Review, that the inscription was void, and the motion to amend it could not be granted. *Fraser* v. *Price*, Q. R. 10 K. B. 511.

Right of Appeal—*Final Judgment—Dismissal of Intervention.*]—A judgment of the Superior Court which dismisses an intervention is a final judgment from which an appeal lies to the Court of Review. The word "final" in art. 52, C. P., borrowed from the English language, and evidently mal-a-propos, corresponds to the word "définitif" applied, in French civil procedure, to appeals from judgments. *Renaud* v. *Pilon*, 4 Q. P. R. 65.

Right of Appeal—*From Circuit Court—Judgment Quashing Resolution of Municipal Council.*]—A judgment of the Circuit Court, sitting at Montreal, quashing, under art. 100, C. M., a resolution of a municipal council which declared the seat of a councillor to be vacant, cannot be reviewed before three Judges of the Superior Court. *Clermont* v. *Corporation of St. Martin*, Q. R. 18 S. C. 220.

Right of Appeal—*Future Rights—Municipal By-law — Telephone Company.*] — A judgment of the Circuit Court condemned the defendants to pay a penalty of $25 for failure to paint their poles erected within the limits of the municipality plaintiff, as provided by a by-law ordering telephone and other poles to be painted and to be kept painted thereafter:—Held, that the demand (which was for $50) did not relate to a matter "in which the rights in future of the parties may be affected," within the meaning of art. 44, cl. 3, of the Code of Procedure, and therefore no appeal lay in such case to the Court of King's Bench sitting in appeal from a judgment of the Circuit Court; and consequently such judgment was not susceptible of revision by the Court of Review. (Art. 52, C. C. P.) *Town of Coaticook* v. *People's Telephone Co.*, 21 Occ. N. 351, Q. R. 19 S. C. 535.

Right of Appeal—*Habeas Corpus.*]—No appeal lies to the Court of Review in matters of habeas corpus ad subjiciendum. *Lorenz* v. *Lorenz*, 7 Q. P. R. 149.

Right of Appeal—*Inscription for Review—Tutor—Judgment.*] — Article 306, C. C., which forbids a tutor to appeal from a judgment without having been authorized to do so by a Judge, upon the advice of a family council, does not apply to an inscription for review, which is only for a re-hearing before the same Court presided over by three Judges. *Beaumont* v. *Lamonde*, 5 Q. P. R. 113.

Right of Appeal—*Interlocutory Judgment—Dismissal of Exception—Objection to Appeal—Costs.*]—A judgment dismissing an exception to the form is only an interlocutory judgment, and is not appealable to the Superior Court in Review. 2. If the respondent in review has not complained by motion that the judgment is only interlocutory, but has raised this point only in his factum and his argument, the inscription in review will be set aside with costs only of a motion to set aside. *Migneron* v. *Yon*, 4 Q. P. R. 179.

Right of Appeal—*Order Striking Out Plea—Stated Case.*]—There is no appeal to the Court of Review from a judgment striking out one of two pleas filed by the defendant on a conjoint statement of the case under art. 512, C. P. *Grenier* v. *Connolly*, 7 Q. P. R. 212.

Security—*Consent to Irregular Deposit—Validity of Inscription—Solicitor's Authority to Consent.*]—In the case of an inscription for review, if the attorneys of the respondent consent to the deposit required by art. 1196, C. P., remaining in the hands of the attorney for the appellant, the Court of Review will not, ex mero motu, declare the inscription irregular and void, especially if the Court is of opinion that the judgment of first instance should be affirmed on the merits. Semble, that in a case where the Court of Review was disposed to reverse the judgment below, it would order that proof should be given of the authority of the attorney to consent on behalf of his client. *Jutras* v. *Corporation de St. Francois*, 3 Q. P. R. 530.

Security—*Deposit—Amount of — Amount in Controversy.*]—An inscription for review in an action to set aside a lease containing a contract for sale, when the value of the immovable in question is more than $400, must be accompanied by a deposit of $75, and the Court will order the party who inscribes to supplement his deposit of $50. *Marsolais* v. *Grenier*, 4 Q. P. R. 392.

Security for Costs—*Amount of.*]—Although an action may appear to be in the nature of a possessory action, if the amount claimed is less than $400 it belongs to the second class of the tariff, and a deposit of $50 made with an inscription in review is sufficient. *Morin* v. *Gagné*, 7 Q. P. R. 82.

Security for Costs—*Amount of — Petition of Creditor.*]—A petition of a creditor of an insolvent to be put in possession of effects belonging to the petitioner which are in the hands of the curator, falls under the head of actions of the second class; and an inscription for review must be accompanied by a deposit of $75. *Brothers* v. *Desmarteau*, 6 Q. P. R. 484.

Security for Costs—*Amount of—Several Respondents.*]—Where there are several defendants who have appeared and pleaded separately in the Court of first instance, the plaintiff who has failed must with his inscription for review make as many deposits as there are defendants. *Acer* v. *Percy*, Q. R. 24 S. C. 232.

Security for Costs—*Amount of—Several Respondents.*] — Where several defendants have appeared and pleaded separately, a plaintiff, whose action has been dismissed and who is appealing, must make as many deposits upon appeal as there are distinct defences. Acer v. Percy, Q. R. 24 S. C. 232, followed. *Germano* v. *Mussen*, 6 Q. P. R. 249.

Security for Costs — *Deposit—Amount Involved.*]—The amount in litigation spoken of in art. 1196, C. P., must exceed the amount due under the judgment for principal, and does not include the amount of costs. 2. In the case of an appeal by the defendant to the Court of Review from a judgment for less than $400 in an action brought for a sum greater than $400, the amount in litigation is less than $400, and the deposit necessary is $50. *Saunders* v. *United Factories, Limited*, 6 Q. P. R. 34.

Security for Costs — *Deposit—Title to Land—Amount Involved.*]—The plaintiff sued to obtain a good title to a property which he alleged that he had bought from the defendant at the price of $150 and improvements, which he alleged were worth $350:—Held, that he must, under art. 1106, C. P., make a deposit of $75 to obtain a review of the judgment dismissing his demand. *David* v. *Chenevert*, 6 Q. P. R. 24.

XIII. Supreme Court of Canada—Appeal to.

Acquiescence — *Exception — Motion to Vary Minutes—Costs.*]—Where a respondent, on an appeal to the Court below, has failed to set up the exception resulting from acquiescing in the trial judgment, as provided by art. 1220 of the Code of Civil Procedure, he cannot, afterwards, take advantage of the same objection by motion to quash a further appeal to the Supreme Court of Canada. An application to vary the minutes of judgment, in respect of matters which had not been mentioned at the hearing of the appeal, was granted but without costs. *Chambly Manufacturing Co.* v. *Willett*, 24 Occ. N. 204, 34 S. C. R. 502.

Allowance of — Application of money paid into Court on appeal to Court of Appeal —Contract—Construction—Conditions—Certificate of engineer — Repairs to pavements of streets — Municipal corporations. *City of Hamilton* v. *Kraemer-Irwin Rock Asphalt and Cement Paving Co.*, 1 O. W. R. 111, 2 O. W. R. 25, 3 O. W. R. 343, 347.

Allowance of—*Forum—Judge of Court of First Instance.*]—When judgment is rendered by the Court of Review affirming a judgment of the Superior Court, sitting in a rural district, the party who wishes to appeal to the Supreme Court of Canada, and furnish security for costs, must apply for leave to do so to the Judge of the district where the action was brought. *Daigle* v. *Quebec Southern R. W. Co.*, 6 Q. P. R. 403.

Allowance of—Leave to appeal—Necessity for—No application for. *Bisnaw* v. *Shiclas*, 3 O. W. R. 309.

Allowance of—*Motion to Extend Time—Jurisdiction of Single Judge of Court Appealed from.*]—A Judge of the Court of Appeal has no jurisdiction to extend the time for the allowance of the security proposed to be given upon an appeal intended to be brought from the judgment of that Court to the Supreme Court of Canada in a case where no such appeal can be brought without leave; although it be impossible to move for such leave owing to the fact that neither Court sits in vacation. But the power of the full Court of Appeal or of the Supreme Court to grant leave or to allow the appeal under the provisions of 60 V. c. 24 (O.), does not depend upon a single Judge making such an order. *Tabb* v. *Grand Trunk R. W. Co.*, 24 Occ. N. 335, 8 O. L. R. 281, 514, 4 O. W. R. 116, 135.

Amendment of Petition—*Discretion—Supreme Court Act. s. 63.*]—See *Hill* v. *Hill*, 24 Occ. N. 73, 34 S. C. R. 13.

Amount in Dispute.]—In an action by the lessee of lands leased for 4 years and 9 months at a rental of $250 per annum, to have the lease cancelled as being simulated:—Held, that no amount of $2,000 or upwards was in dispute, and that, as the appeal did not relate to any title to land or tenements nor to annual rents within s. 29 (b) of R. S. C. c. 135, it could not be entertained by the Supreme Court of Canada. *Frechette* v. *Simmoneau*, 20 Occ. N. 433, 31 S. C. R. 12.

Amount in Dispute.]—Where the Court of King's Bench affirmed the judgment of the Superior Court dismissing the action, but varied it by ordering the defendant to pay a portion of the costs:—Held, that, though $2,117 was demanded by the action, the defendant had no appeal to the Supreme Court of Canada, as the amount of the costs which he was ordered to pay was less than $2,000.

Allan v. Pratt, 13 App. Cas. 780, and Monette v. Lefebvre, 16 S. C. R. 387, followed. *Beauchemin* v. *Armstrong*, 24 Occ. N. 111, 34 S. C. R. 285.

Amount in Dispute—*Assessment—Title to Land.*] — In proceedings by the city of Montreal to collect the amount assessed on the defendants' land, an opposition to the seizure, alleging that the claim was prescribed, was maintained, and the city sought to appeal to the Supreme Court:—Held, that there was nothing in controversy between the parties but the amount assessed on the defendants' land, and that being less than $2,000, the Court had no jurisdiction to entertain the appeal. *City of Montreal* v. *Land and Loan Co.*, 24 Occ. N. 79, 34 S. C. R. 270.

Amount in Dispute—*Future Rights.*]—In an action for séparation de corps, the decree granted separation and ordered the husband to pay $1,500 per year alimony. It was paid for some years, and the husband having died his widow brought suit to enforce payment from his universal legatees. The Court of King's Bench having reversed the judgment of the Superior Court in her favour, she sought to appeal to the Supreme Court of Canada:—Held, that, as she was only entitled to one year's alimony when the suit commenced, the appeal would not lie, notwithstanding the fact that if she had succeeded in the King's Bench she could have executed the judgment for more than $3,000. The amount demanded establishes the right to appeal, and if that is less than $2,000 the appeal will not lie, though more than $2,000 may be recovered:—Held, also, that future rights were not bound by the judgment appealed from by reason of its effect on her right to further payment of the alimentary allowance. *Winteler* v. *Davidson*, 24 Occ. N. 79, 34 S. C. R. 274.

Amount in Dispute—*Life Pension.*]—Action for $62.50, the first monthly instalment of a life pension, at the rate of $750 per annum claimed by the plaintiff, for a declaration that he was entitled to such annual pension from the defendants, payable by equal monthly instalments of $62.50 each, during the remainder of his life, and for judgment for such payments during his life. It was shewn that the cost of an annuity equal to the pension claimed would be over $7,000:—Held, following Rodier v. Lapierre, 21 S. C. R. 69, Macdonald v. Galivan, 28 S. C. R. 258, La Banque du Peuple v. Trottier, ib. 422, O'Dell v. Gregory, 24 S. C. R. 661, and Talbot v. Guilmartin, 30 S. C. R. 482, that the only amount in controversy was that of the first monthly instalment, and that the Supreme Court of Canada had no jurisdiction to hear an appeal. *Lapointe* v. *Montreal Police Benevolent and Pension Society*, 35 S. C. R. 5.

Amount in Dispute — *Reddition de Compte—Contestation.*]—An action en reddition de compte concluded with a demand for $1,000. The defendant filed an account for over $8,000, and by his pleas claimed a small balance as due him. The plaintiff replied by contesting several items of the account filed, and, abandoning his former conclusions, claimed whatever should be found due him on the contestation. He recovered $2,200 in the Superior Court, which the Court of Queen's Bench affirmed. On appeal to the Supreme Court of Canada:—Held, that more than $2,000 was in controversy, and the appeal would lie. Motion for approval of security granted with costs. *Bell* v. *Vipond*, 21 Occ. N. 328, 31 S. C. R. 175.

Amount in Dispute—*Retrait.*] — The judgment appealed from condemned the defendants to pay $775.40, the balance remaining after deducting $1,524.60 realized on a sale of property made by consent pendente lite. The amount demanded was $2,300.20, so that the plaintiffs' full claim was in fact sustained:—Held, that, as the amount recovered was different from that demanded, and the amount of the original demand exceeded $2,000, the Supreme Court of Canada had jurisdiction to entertain an appeal. Joyce v. Hart, 1 S. C. R. 321, Levi v. Reed, 6 S. C. R. 482, and Labergе v. Equitable Life Assurance Society, 24 S. C. R. 59, followed. Cowen v. Evans, 22 S. C. R. 328, Mitchell v. Trenholme, ib. 351; Lachance v. Société de Prêt ét des Placements, 26 S. C. R. 200, and Beauchemin v. Armstrong, 34 S. C. R. 285, distinguished. *Dufresne* v. *Fee*, 35 S. C. R. 8.

Amount in Dispute—*Statutes—Repugnancy.*]—Paragraph (f) of s. 1 of 60 V. c. 34 (D.), which provides that, where an appeal from the Court of Appeal for Ontario depends on the amount in dispute, such amount shall be understood to be that demanded, and not that recovered, if they are different, has no operation, being repugnant to (c), which requires the matter in controversy on the appeal to exceed $1,000 to give jurisdiction. Where two clauses of the same statute, coming into force at the same time, are repugnant, the clause placed last in point of arrangement cannot be held to supersede the other as expressing the latest mind of Parliament. *Hunter* v. *City of Ottawa*, 20 Occ. N. 431; S. C., *sub nom. City of Ottawa* v. *Hunter*, 31 S. C. R. 7.

Amount in Dispute—*Title to Land—Future Rights—Extending Time.*] — L. had given a mortgage to the Standard Loan and Savings Co. as security for a loan, and had received a certain number of the company's shares. All the business of that company was afterwards assigned to the defendants, and L. paid the latter the amount borrowed, with interest, and $460.80 in addition, and asked to have the mortgage discharged. The company refused, asserting that L., as a shareholder in the Standard Co., was liable for its debts, and demanded $79.20 therefor by way of counterclaim. An action by L. for a declaration that the mortgage was paid and for repayment of the $460.80 was dismissed (3 O. L. R. 191, 22 Occ. N. 60), but on appeal the Court of Appeal ordered judgment to be entered for L. for $47.04 (5 O. L. R. 471, 23 Occ. N. 165, 2 O. W. R. 370). The defendants appealed to the Supreme Court:—Held, that the appeal would not lie; that no title to lands or any interest therein was in question; that no future rights were involved within the meaning of s. 1 (d) of 60 & 61 V. c. 34; and that all that was in dispute was a sum of money less than $1,000, and therefore not sufficient to give jurisdiction to the Court:—Held, also, that the time for bringing the appeal cannot be extended after the expiration of the 60 days from the pronouncing or entry of the judgment appealed from. *Lee* v. *Canadian Mutual Loan and*

Investment Co., 24 Occ. N. 47; *S. C., sub nom. Canadian Mutual Loan and Investment Co.* v. *Lee*, 34 S. C. R. 224.

Amount in Dispute—*Waiver—Consent.*] —The case on appeal to the Supreme Court of Canada cannot be filed unless security for the costs of the appeal is furnished as required by s. 46 of the Act. The giving of such security cannot be waived by the respondent, nor can the amount fixed by the Act be reduced by his consent. *Holstein* v. *Cockburn*, 35 S. C. R. 187.

Appeal per Saltum—*Extension of Time —Jurisdiction of Judge of Court Below.*]—A Judge of the Court appealed from has no jurisdiction to extend the time for appealing per saltum to the Supreme Court of Canada. After the expiration of 60 days from the signing, entry, or pronouncing of judgment, leave to appeal per saltum to the Supreme Court of Canada cannot be granted. *Barrett* v. *Le Syndicat Lyonnais du Klondyke*, 33 S. C. R. 667.

Appeal per Saltum—*New Grounds.*]—Per Taschereau, C.J.—Where leave to appeal per saltum has been granted on the ground that the Court of last resort in the province has already decided the question in issue, the appellant should not be allowed to advance new grounds to support his appeal. *Miller* v. *Robertson*, 24 Occ. N. 205, 35 S. C. R. 80.

Binding Decision on Former Appeal —*Supreme Court of Nova Scotia—Quashing Appeal—Judgment—Estoppel — Mandamus.*] —See *Drysdale* v. *Dominion Coal Co.*, 24 Occ. N. 166, 34 S. C. R. 328.

Bond—*Form of.*]—In addition to the defects to which attention was drawn in Jamieson v. London and Canadian L. and A. Co., 18 P. R. 413, and Young v. Tucker, ib. 449, the form of bond given in Cassels' Practice, 2nd ed., p. 220, is also defective in not setting forth to whom the penalty is payable, and also in not stating that the bond is signed and sealed by the obligors. *Liscomb Falls Co.* v. *Bishop*, 24 Occ. N. 186.

Bond—*Insufficiency—Time for Filing New Bond—Extension—Judge of Court Below.*] —If a security bond given to guarantee the costs of an appeal to the Supreme Court of Canada is found insufficient by the Registrar of that Court, and a delay is granted by him to furnish another bond, a Judge of the Court of King's Bench can enlarge the delays for perfecting the appeal. *Armstrong* v. *Bauchemin*, 6 Q. P. R. 128.

British Columbia—*New Trial.*] — An action and counterclaim in the Supreme Court of British Columbia. Judgment was given for the plaintiff upon his claim (which was not in dispute), and the counterclaim was dismissed. The counterclaim was for damages for breach of contract to deliver 37 cars of hay, and the trial Judge held that the letter of acceptance of the plaintiff's offer to sell was conditional, and the parties were never ad idem. On appeal to the full Court this judgment was reversed, and a new trial of the counterclaim ordered. The case was tried anew before a Judge with a jury, and a verdict for the defendants (plaintiffs by counterclaim) was given. The plaintiff moved for leave to appeal per saltum to the Supreme Court of Canada:—Held, that, even if the full Court had, by its judgment directing the new trial, determined the question as to the existence of an enforceable contract, the plaintiff might still succeed before the full Court, and so it was not a case for granting leave to appeal per saltum. *Oppenheimer* v. *Brackman and Ker Milling Co.*, 24 Occ. N. 275.

Constitutional Question — *Abandonment.*]—Where a motion to quash an appeal has been refused, on the ground that a decision upon a constitutional question is involved, the subsequent abandonment of that question cannot affect the jurisdiction of the Supreme Court of Canada to entertain the appeal. *Pharmaceutical Association of Quebec* v. *Livernois*, 24 Occ. N. 8, 31 S. C. R. 43.

Delays Occasioned by the Court — *Jurisdiction—Controversy Involved—Title to Land.*]—An action au petitoire was brought by the corporation of the city of Hull against the respondents claiming certain real property which the government of Quebec had sold and granted to the city corporation for the sum of $1,000. The Attorney-General for Quebec was permitted to intervene and take up the fait et cause of the plaintiffs, without being formally summoned in warranty. The judgment appealed from was pronounced on the 25th September, 1903. Notices of appeal on behalf of both the plaintiff and the intervenant were given on the 3rd November, and notices that securities would be put in on the 10th November, 1903, on which latter date the parties were heard on the applications for leave to appeal and for approval of securities before Wurtele, J., who reserved his decision until one day after the expiration of the sixty days immediately following the date of the judgment appealed from, and on the 25th November, 1903, granted leave for the appeals and approved the securities filed:—Held, that the plaintiffs could not be prejudiced by the delay of the Judge, in deciding upon the application, until after the expiration of the sixty days allowed for bringing the appeals, and, following Couture v. Bouchard, 21 S. C. R. 281, that the judgment approving the securities and granting leave for the appeals must be treated as if it had been rendered within the time limited for appealing when the applications were made and taken en délibéré:—Held, also, that, as the controversy between the parties related to a title to real estate, both appeals would lie to the Supreme Court of Canada notwithstanding the fact that the liability of the intervenant might be merely for the reimbursement of a sum less than $2,000. *Attorney-General for Quebec* v. *Scott*, 24 Occ. N. 110, 34 S. C. R. 282.

Discretion—*Amendment — Formal Judgment.*]—The Supreme Court should not interfere with the exercise of discretion by a provincial Court in refusing to amend its formal judgment. Such amendment is not necessary in a mining case, where the mining regulations operate to give the judgment the same effect as it would have if amended. *Creese* v. *Fleischman*, 24 Occ. N. 51, 34 S. C. R. 279.

Factum—*Irrelevant Comments.*] — Comments in the appellants' factum relating to a

judgment of the Wreck Commissioner's Court, which did not form any part of the record, were ordered to be struck out, with costs to the respondents. *The "Cape Breton" v. Richelieu and Ontario Navigation Co.*, 36 S. C. R. 564.

Interference in Matter of Procedure.]—See *Gibson* v. *Nelson*, 35 S. C. R. 181.

Interlocutory Judgment — *Quebec.*]—The Court of King's Bench, or a Judge thereof, has no jurisdiction to grant leave to appeal to the Supreme Court of Canada from a judgment of the Court of King's Bench, confirming an interlocutory judgment of the Superior Court. *Desaulniers* v. *Payette*, Q. R. 12 K. B. 182.

Leave to Appeal—*Appeal per Saltum—Winding-up Act—Defective Proceedings.*] — Leave to appeal per saltum, under s. 26 of the Supreme Court Act, cannot be granted in a case under the Dominion Winding-up Act. An application under s. 76 of that Act, for leave to appeal from a judgment of the Supreme Court of New Brunswick, was refused where the Judge had made no formal order on the petition for a winding-up order, and the proceedings before the full Court were in the nature of a reference rather than of an appeal from his decision. *In re Cushing Sulphite Fibre Co.*, 25 Occ. N. 136, 36 S. C. R. 494.

Leave to Appeal — *Criminal Case.*] — The Act of the Dominion Parliament respecting appeals from the Court of Appeal for Ontario to the Supreme Court, 60 & 61 V. c. 34, applies only to civil cases. Criminal appeals are still regulated by the provisions of the Criminal Code. Motion by the prisoner for leave to appeal from the judgment of the Court of Appeal, 4 O. L. R. 225, 22 Occ. N. 225, refused. *Rex* v. *Rice*, 22 Occ. N. 355, 32 S. C. R. 480, 1 O. W. R. 394.

Leave to Appeal.]—*McLaughlin* v. *Lake Erie and Detroit River R. W. Co.*, 1 O. W. R. 266, 428.

Leave to Appeal—*Matters Not of Public Importance.*]—A member of an Order held a benefit certificate entitling him, if he reached the age of seventy years or became entirely disabled, to receive a sum of money based on the membership of the Order. On reaching the age stated, he demanded the amount, and, on the Order refusing to pay, brought an action therefor, the defence to which was, that he had stated his age incorrectly in his application for membership, and violated certain conditions, which, however, the Court held were not set out nor referred to in the certificate. A judgment for the plaintiff at the trial was affirmed by the Court of Appeal, and, the amount recovered being under $1,000, the defendants moved the Supreme Court for special leave to appeal under 60 & 61 V. c. 34, s. 1 (e) :—Held, that the questions involved not being of public importance, and the judgment of the Court of Appeal (2 O. L. R. 79, 21 Occ. N. 372) appearing to be well founded, the leave would not be granted. Fisher v. Fisher, 28 S. C. R. 494, followed. *Hargrove* v. *Royal Templars of Temperance*, 22 Occ. N. 1, 31 S. C. R. 385. (See, also, *S. C.*, 2 O. L. R. 126, 21 Occ. N. 432.)

Leave to Appeal—*Special Leave—Railway Act, 1903—Order of Board of Railway Commissioners — Jurisdiction.*] — Where the Judge entertained doubt as to the jurisdiction of the Board of Railway Commissioners for Canada to make the order complained of, and the questions raised were of public importance, special leave for an appeal was granted, on terms, under the provisions of s. 44 (3) of the Railway Act, 1903. *Montreal Street R. W. Co.* v. *Montreal Terminal R. W. Co.*, 35 S. C. R. 478.

Leave to Appeal—*Special Leave—60 & 61 V. c. 34, s. 1 (D.)*]—Special leave to appeal from a judgment of the Court of Appeal for Ontario (60 & 61 V. c. 34, s. 1 (D.)) may be granted in cases involving matters of public interest, important questions of law, construction of Imperial or Dominion statutes, a conflict between Dominion and provincial authority, or questions of law applicable to the whole Dominion.—Even if a case is of great public interest and raises important questions of law, leave will not be granted if the judgment complained of is plainly right. *Lake Erie and Detroit River R. W. Co.* v. *Marsh*, 35 S. C. R. 197, 24 Occ. N. 363.

Leave to Appeal—Time expired—Application to Judge in Chambers — Subsequent application to Court — Election of forum — Appeal — Discretion. *Hamilton* v. *Mutual Reserve Life Ins. Co.*, 2 O. W. R. 155, 806, 3 O. W. R. 851, 4 O. W. R. 289, 416, 5 O. W. R. 162.

Leave to Appeal — *Time Expired — Special Circumstances.*]—The appellants allowed the delay of 60 days, from date of judgment rendered by the Court of King's Bench, to elapse without applying for leave to appeal to the Supreme Court. Subsequently, they obtained leave to appeal to the Privy Council. They now moved for leave to appeal to the Supreme Court, and offered to desist from its appeal to the Privy Council if the present motion was granted:—Held, that the "special circumstances" referred to in s. 42 of the Supreme and Exchequer Courts Act, are circumstances which would make it unreasonable to impute the failure to act within the prescribed time to the negligence of the party seeking the appeal, e.g., illness, absence, ignorance of the rendering of the judgment, inability owing to poverty to find sureties within the prescribed delay, but not circumstances which did not prevent the application from being made within the proper delay. *City of Montreal* v. *Montreal Street R. W. Co.*, Q. R. 11 K. B. 325.

Matter in Controversy—*Assessment of Damages—Costs.*]—Leave to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal in Lashley v. Goold Bicycle Co., 23 Occ. N. 304, 6 O. L. R. 319, reversing the judgment of Ferguson, J., 22 Occ. N. 372, 4 O. L. R. 350, was sought by the defendants, on the ground of hardship, the judgment being for $1,000 only, exclusive of the costs, which had accumulated until they exceeded $2,000, and also on the ground that the damages had been assessed by mere guess, and were not justified by any reasonable calculation warranted by the circumstances of the case. Leave was refused. *Goold Bicycle Co.* v. *Laishley*, 35 S. C. R. 184.

Matter in Controversy—*Séparation de corps—Money Demand.*]—In an action by a wife for séparation de corps for ill-treatment, the declaration prayed that the husband be condemned to deliver up to the wife her property, valued at $18,000. The judgment in the action decreed separation and ordered an account as to the property:—Held, that no appeal would lie to the Supreme Court from the decree for separation. O'Dell v. Gregory, 24 S. C. R. 661, followed. And the money demand in the declaration, being only incidental to the main cause of action, could not give the Court jurisdiction to entertain the appeal. *Talbot* v. *Guilmartin*, 20 Occ. N. 322, 30 S. C. R. 482.

New Questions Raised on Appeal—*Jurisdiction of Court Below.*]—Questions of law appearing upon the record, but not raised in the Court below, may be relied upon for the first time on an appeal to the Supreme Court of Canada, where no evidence in rebuttal could have been brought to affect them had they been taken at the trial. Gray v. Richardson, 2 S. C. R. 431, and Scott v. Phœnix Assurance Co., Stu. K. B. 354, followed. An objection that a Judge of the Court below had no jurisdiction to render a judgment from which an appeal is asserted, is not proper ground on which to question the jurisdiction of the appellate Court to entertain the appeal. *McKelvey* v. *Le Roi Mining Co.*, 23 Occ. N. 61, 32 S. C. R. 664.

New Trial—*Alternative Relief — Final Judgment.*]—In an action on a policy of insurance on the life of the plaintiff's husband, the defence being misrepresentation and concealment of material facts, the plaintiff obtained a verdict, though the defendants' counsel contended that there was no case to go to the jury. On appeal to the Court of Appeal the defendants claimed judgment for them or in the alternative a new trial, and a new trial was granted (6 O. L. R. 434, 23 Occ. N. 86, 2 O. W. R. 78, 4 O. W. R. 351). The defendants then appealed to the Supreme Court of Canada to obtain the larger relief:—Held, that the appeal did not lie; that it was not an appeal from the order for a new trial; and that the judgment refusing to dismiss the action was not final. *Dillon* v. *Mutual Reserve Fund Life Association*, 24 Occ. N. 47; *Mutual Reserve Fund Life Assn.* v. *Dillon*, 34 S. C. R. 141.

Ontario—*Divisional Court — Constitutional Question.*]—Under s. 26, s.-s. 3, of the Supreme and Exchequer Courts Act, leave to appeal direct from the "final judgment" of a Divisional Court of the High Court of Justice for Ontario may be granted in cases where there is a right of appeal to the Court of Appeal for Ontario; and the fact that an important question of constitutional law is involved, and that neither party would be satisfied with the judgment of the Court of Appeal, is sufficient ground for granting such leave. *Ontario Mining Co.* v. *Seybold*, 31 S. C. R. 125.

Ontario—*Single Judge of High Court.*]—On appeal by B. and others, whose lands were expropriated by the company, to the High Court from the award of arbitrators appointed to determine the value of their lands, the amount of the award was increased: 21 Occ. N. 208. The company, having no right of appeal to the Court of Appeal, according to a late decision of that Court, In re Birely and Toronto, Hamilton, and Buffalo R. W. Co., 25 A. R. 88, 18 Occ. N. 128, applied to a Judge of the Supreme Court of Canada, in Chambers, for leave to appeal direct from the decision of the High Court, under s. 26, s.-s. 3, of the Supreme and Exchequer Courts Act. The application was referred by the Judge to the full Court:—Held, that, to give jurisdiction to a Judge to grant leave to appeal per saltum under s. 26, s.-s. 3, of the Act, it is essential that there should be a right of appeal to the Court of Appeal, and it not being shewn that there was such a right in this case, the motion should be refused. *In re Brennan and Ottawa Electric R. W. Co.*, 21 Occ. N. 309; 31 S. C. R. 311.

Order Dismissing Opposition—*Previous Non-appealable Order for Security—Res Judicata—Review.*]—An order requiring opposants à fin de charge to funish security that lands seized, if sold in execution subject to the charge, should realize sufficient to satisfy the claim of the execution creditor, was held to be interlocutory and non-appealable: 33 S. C. R. 340. Upon default of such security, the opposition was dismissed in the Court below: — Held, on appeal, that the order was the only one which could properly have been made, and that the merits of the former order could not be reviewed. *Desaulniers* v. *Payette*, 35 S. C. R. 1.

Order for New Trial—*Weight of Evidence—Discretion—New Grounds of Appeal.*]—The Court below ordered a new trial upon the ground that the verdict was against the weight of evidence:—Held, that this was not an exercise of discretion with which the Supreme Court of Canada would refuse to interfere; and the verdict of the trial was restored. The argument of an appeal to the Supreme Court of Canada must be based on the facts and confined to the grounds relied on in the Court below. Judgment in 35 N. S. Reps. 94, sub nom. Confederation Life Assn. v. Brown, reversed. *Confederation Life Assn.* v. *Borden*, 34 S. C. R. 338.

Order on Petition for Leave to Intervene.]—There is no appeal to the Supreme Court of Canada from an order on a petition for leave to intervene in a cause, the proceeding being merely interlocutory in its nature. Hamel v. Hamel, 26 S. C. R. 17, followed. *Connolly* v. *Armstrong*, 35 S. C. R. 12.

Petitory Action—*Order Defining Boundary Line.*]—Where, in an action au petitoire and en bornage, the question as to title has been finally settled, a subsequent order defining the manner in which the boundary line between the respective properties shall be established is not appealable to the Supreme Court of Canada. Cully v. Ferdais, 30 S. C. R. 330, followed. *City of Hull* v. *Scott*, 34 S. C. R. 617.

Printed Case—*Expense of—Parties.*] — Held, that in determining the amount to be paid by the party seeking to use for purposes of an appeal to the Supreme Court the appeal books printed by the opposite party, the fact that the party to pay has paid for the copies of the stenographer's notes used in the Divisional Court is not to be considered. If there were no printed books, he would have to print for the Supreme Court, and in paying for the books already printed he is only paying a different person. The question is how much he should pay in order to get the thirty

copies he needs for the Supreme Court. No general scale can be formulated. The thirty books do not represent the whole value of the printer's charge. The books retained by the party printing, or of which he has got the benefit, as well as the bulk of the book and the number actually printed, etc., have to be taken into consideration. The sum of $95 fixed as approximately representing the proportion settled in previous cases. Teetzel v. Dominion Construction Co., 18 P. R. 16, followed. *Trusts and Guarantee Co. v. Hart*, 21 Occ. N. 494.

Public Interest — *Correctness of Judgment.*]—Special leave to appeal from a judgment of the Court of Appeal for Ontario may, under 60 & 61 V. c. 34, s. 1 (e), be granted in cases involving matters of public interest, important questions of law, construction of Imperial or Dominion statutes, a conflict between Dominion and Provincial authority, or questions of law applicable to the whole Dominion. Even if a case is of great public interest and raises important questions of law, leave will not be granted if the judgment complained of is plainly right. *Marsh v. Lake Erie and Detroit River R. W. Co.*, 24 Occ. N. 363.

Questions of Fact.] — Upon issues raised as to matters of fact, the Supreme Court of Canada declined to disturb the concurrent findings of the Courts below, while on a question of law reversing the judgment in Q. R. 11 K. B. 19 and restoring that in Q. R. 21 S. C. 241. *Citizens' Light and Power Co. v. Town of St. Louis*, 34 S. C. R. 495.

Questions of Fact.]—There is no rule of law or of procedure which prevents the Supreme Court or an intermediate Court of appeal from reversing the decision at the trial on the facts. In an action for the price of a tombstone, the defence was that it was not of the design ordered. The trial Judge dismissed the action, but his judgment was reversed by the Court of Appeal (1 O. W. R. 602); and the Supreme Court of Canada affirmed the reversal. *Lewis v. Dempster*, 23 Occ. N. 179, 33 S. C. R. 292.

Questions of Fact—*Concurrent Findings of Courts Below.*]—A judgment based on concurrent findings of fact in the Courts below ought not to be disturbed on appeal to the Supreme Court of Canada if the evidence be contradictory. *D'Avignon v. Jones*, 32 S. C. R. 650.

Questions of Fact—*Final Judgment—Right of Appeal—Leave to Appeal to Privy Council—Costs.*]—In an action by executors against the appellant to recover certain sums of money due to their estate, the Judge of the Territorial Court, at the request of the plaintiffs, selected one of the items, and adjudicated on the evidence taken that the action in respect thereof be dismissed:—Held, that this was, within the meaning of the Yukon Territorial Act, 1899, s. 8, a final judgment in respect thereof, notwithstanding that the remaining items in suit were referred, and the costs were reserved. No appeal therefrom to the British Columbia Court lay after the expiration of 20 days. Special leave having been granted to appeal from a decree of the Supreme Court of Canada on a petition stating that the construction of the said statute was a matter of general public importance, without stating that it had been repealed:—Held, that, as the omission was immaterial and bona fide, the appellant should not be deprived of his costs. Judgment in Belcher v. McDonald, 33 S. C. R. 321, reversed. *McDonald v. Belcher*, [1904] A. C. 429.

Questions of Fact—*Concurrent Findings of Two Courts Below.*] — See *Voilleux v. Orduay, Price v. Orduay*, 24 Occ. N. 109, 34 S. C. R. 145.

Quantum of Damages—*Interference by Court Below — Restoration of Verdict.*] — See *Caghlin v. La Fonderie de Jolictte*, 24 Occ. N. 110, 34 S. C. R. 153.

Question of Fact—*Trial by Judge without Jury—Findings of Fact—Evidence—Reversal by Appellate Court.*]—In an action for damages for personal injuries, the trial Judge, who heard the case without a jury, and before whom the witnesses were heard, held that the expert evidence of the witnesses for the defence was entitled to credit, and dismissed the action. The judgment was reversed in the Court of Review, and the reversal upheld by the Court of Queen's Bench, upon a different appreciation of the weight of evidence by the Judges in those Courts. On appeal to the Supreme Court of Canada:—Held, that, as the judgment at the trial was supported by evidence, it should not have been so reversed. Judgment appealed from reversed and judgment of trial Judge restored. *Village of Granby v. Menard*, 21 Occ. N. 7, 31 S. C. R. 14.

Refusal to Interfere—*Matters of Procedure.*] — The Court, following its usual practice, refused, on an appeal, to interfere with the action of the Courts below in matters of mere procedure, where no injustice appeared to have been suffered in consequence, although there might be irregularities in the issues as joined which brought before the trial Court a demande almost different from the matter actually in controversy. *Finnie v. City of Montreal*, 22 Occ. N. 356, 32 S. C. R. 335.

Refusal to Interfere—*Matters of Procedure—Partnership—Account.*] — The judgment appealed from held that in an action pro socio, it was sufficient for the plaintiff in his statement of claim to allege facts that would justify an inquiry into all the affairs of the partnership and the liquidation of the same, without producing full and regular accounts of the partnership affairs:—Held, that the appeal involved merely a question of procedure in a matter where the appellant had suffered no wrong, and, therefore, that the appeal should be dismissed. *Higgins v. Stephens*, 22 Occ. N. 195, 32 S. C. R. 132.

Refusal to Interfere—*Matters of Procedure—Verdict—Weight of Evidence.*]—The Court refused to interfere with a decision of the Court of Appeal for Ontario in a matter of procedure, viz., whether a verdict of a jury was a general or special verdict. The Court also refused to disturb the verdict on the ground that it was against the weight of evidence, after it had been affirmed by two tribunals below. *Balfour v. Toronto R. W. Co.*, 1 O. W. R. 671, 22 Occ. N. 221, 32 S. C. R. 239.

Right of Appeal — *Amount in Controversy—Conditional Renunciation.*]—Where a conditional renunciation reducing the amount of the claim to a sum less than $2,000 has not been accepted by the defendant, the amount in controversy remains the same as it was upon the original demande, and, if such demande exceeds the amount limited by s. 29 of the Supreme Court Act, an appeal will lie. *Montreal Water and Power Co.* v. *Davie*, 25 Occ. N. 5, 35 S. C. R. 255.

Right of Appeal — *Amount in Controversy.*]—The Supreme Court of Canada has no jurisdiction to entertain an appeal in a suit to annul a procès-verbal establishing a public highway, notwithstanding that the effect of the procès-verbal in question might be to involve an expenditure of over $2,000 for which the appellants' lands would be liable for assessment by the municipal corporation. Dubois v. Village of Ste. Rose, 21 S. C. R. 65. City of Sherbrooke v. McManamy, 18 S. C. R. 594, County of Verchères v. Village of Varennes, 19 S. C. R. 365, and Bell Telephone Co. v. City of Quebec, 20 S. C. R. 230, followed. Webster v. City of Sherbrooke, 24 S. C. R. 52, 268, and McKay v. Township of Hinchinbrooke, ib. 55, referred to. Reburn v. Parish of Ste. Anne, 15 S. C. R. 92, overruled. *County of Toussignant* v. *County of Nicolet*, 22 Occ. N. 355, 32 S. C. R. 353.

Right of Appeal — *Amount in Controversy—Claim and Counterclaim — Leave to Appeal.*]—The plaintiffs claimed $1,500 damages for delay in delivery of iron. The defendants, besides denying the charge of non-delivery in due time, counterclaimed for $1,223 demurrage. At the trial judgment was given for the plaintiffs for $1,000, and the counterclaim was dismissed. Upon appeal to the Court of Appeal the judgment was varied by limiting the damages to the fall in the price of iron during a considerably shorter time than that fixed in the Court below, the amount to be ascertained on a reference. Upon a motion by the defendants to allow a bond given by them as security upon an appeal by them to the Supreme Court of Canada, the plaintiffs' counsel stated that the plaintiffs' claim on the reference would be less than $1,000, and contended that no appeal lay:—Held, however, that, as the plaintiff claimed $1,500, and was not limited by the judgment of the Court of Appeal to any particular sum, the matter in controversy on the appeal exceeded the sum of $1,000, so that the appeal lay. Held, also, that upon the counterclaim the sum of $1,223 was involved, and that an appeal lay in respect thereof. The Court of Appeal declined to grant, ex cautela, leave to appeal to the Supreme Court, the case not being one in which leave, if it were necessary, ought to be granted. *Frankel* v. *Grand Trunk R. W. Co.*, 22 Occ. N. 229, 3 O. L. R. 703, 1 O. W. R. 254, 339, 396.

Right of Appeal — *Amount in Controversy—Contrainte par Corps—Insolvent.*] — On a contestation of a statement of an insolvent trader by a creditor claiming a sum exceeding $2,000, the order appealed from condemned the appellant, under art. 888, C. P. Q., to three months' imprisonment for secretion of a portion of his insolvent estate, to the value of at least $6,000:—Held, that there was no pecuniary amount in controversy, and there could be no appeal to the Supreme Court of Canada. *Clement* v. *Banque Nationale*, 33 S. C. R. 343.

Right of Appeal — *Amount in Controversy—Interest before Action.*]—A judgment for $1,000 damages, with interest from a date before action brought, is appealable under 60 & 61 V. c. 34, s. 1 (e). *McNevin* v. *Canadian Railway Accident Ins. Co.*, 22 Occ. N. 223, 32 S. C. R. 194.

Right of Appeal—*Controverted Election — Judgment Dismissing Petition — Want of Prosecution.*]—There is no right of appeal to the Supreme Court of Canada from a judgment dismissing a petition against the return of a member of the House of Commons for want of prosecution within six months prescribed by R. S. C. c. 9, s. 32, the Controverted Elections Act. *In re Richelieu Dominion Election, Vanasse* v. *Bruneau*, 22 Occ. N. 193, 32 S. C. R. 118.

Right of Appeal—*Controverted Election —Petition—Lost Record—Substituted Copy—Judgment on Preliminary Objections—Discretion of Court Below — Jurisdiction.*] — The record in the case of a controverted election was produced in the Supreme Court of Canada on an appeal against the judgment on preliminary objections, and, in re-transmission to the Court below, the record was lost. Under the procedure in similar cases in the province where the petition was pending, a record was reconstructed in substitution for the lost record, and, upon verification as to its correctness, the Court below ordered the substituted record to be filed. Thereupon, the respondent in the Court below raised preliminary objections, traversing the correctness of a clause in the substituted petition, which was dismissed by the judgment appealed from:—Held, that, as the judgment appealed from was not one upon a question raised by preliminary objections, nor a judgment upon the merits at the trial, the Supreme Court of Canada had no jurisdiction to entertain the appeal, nor to review the discretion of the Court below in ordering the substituted record to be filed. *In re Two Mountains Dominion Election, Ethier* v. *Legault*, 22 Occ. N. 192, 32 S. C. R. 55.

Right of Appeal—Doubt—Allowance of Appeal. *City of Hamilton* v. *Hamilton Street R. W. Co.*, 4 O. W. R. 47, 207, 311, 411, 5 O. W. R. 151, 6 O. W. R. 206, 375.

Right of Appeal — *Extradition—Prohibition—Statute — Public Policy — Criminal Proceedings.*]—A motion for a writ of prohibition to restrain an extradition commissioner from investigating a charge of a criminal nature, upon which an application for extradition has been made, is a proceeding arising out of a criminal charge within the meaning of s. 24 (g) of the Supreme Court Act, as amended by 54 & 55 V. c. 25, s. 2, and in such a case no appeal lies to the Supreme Court of Canada. In re Wendhall, 20 Q. B. D. 832, and Hunt v. United States, 166 U. S. 424, referred to. Appeal quashed with Costs. *In re Gaynor and Greene*, 25 Occ. N. 116; *Gaynor and Greene* v. *United States of America*, 36 S. C. R. 247.

Right of Appeal—*Final Judgment.*] — The trial of an action to adverse an application for a certificate of improvements for a mineral claim was begun, but before the plaintiff closed his case, an adjournment was

granted to permit him to put in proof of the measurement shewing the extent of the encroachment of one mineral claim on the other. During the course of the trial it appeared that the map or plan filed by the plaintiff under s. 37 of the Mineral Act of British Columbia, was not made as a result of a survey, but from measurements taken by the plaintiff's brother. The defendants then urged a dismissal of the action, contending that the map or plan was of no effect, but the trial Judge ordered it to be filed as part of the evidence, and declined to deal with its effect at that stage of the action. The defendants appealed from the trial Judge's refusal to dismiss the action, to the full bench of the Supreme Court of British Columbia, and there contended that the action should have been dismissed, and that a postponement should not have been granted, because the plaintiff had not filed with the Mining Recorder a map made as a result of a survey. With this view the majority of the Court agreed, and directed a judgment to be entered dismissing the action and allowing the appeal. From this judgment the plaintiff appealed to the Supreme Court of Canada:—Held, that under the interpretation of the words "final judgment" in the Supreme and Exchequer Courts Act, s. 24, the judgment appealed from dismissing the action was a final judgment. *Paulson* v. *Beaman*, 22 Occ. N. 425.

Right of Appeal—*Future Rights—Toll-bridge—Exclusive Limits—Infringement of Privilege.*] — The plaintiff's action was for $1,000 damages for infringement of his toll-bridge privileges, in virtue of 58 Geo. III. c. 20 (L.C.), by the construction of another bridge within the reserved limit, and for the demolition of the bridge, etc. The judgment appealed from dismissed the action. On a motion to quash the appeal:—Held, that the matter in controversy affected future rights, and, consequently, an appeal would lie to the Supreme Court of Canada. Galarneau v. Guilbault, 16 S. C. R. 579, and Chamberland v. Fortier, 23 S. C. R. 37, followed. Motion refused with costs. *Rouleau* v. *Pouliot*, 25 Occ. N. 97, 36 S. C. R. 26.

Right of Appeal—*Interest of Appellant—Parties—Sale of Substituted Lands—Res Inter Alios Acta—Res Judicata.*]—Where a person who might have an eventual interest in substituted lands had not been called to the family council nor made a party in the Superior Court to proceedings for authority to sell the lands, the order authorizing the sale was held to be res inter alios acta, and not to prejudice his rights, and therefore he could not maintain an appeal therefrom. *Prevost* v. *Prevost*, 25 Occ. N. 2, 35 S. C. R. 193.

Right of Appeal—*Leave—Order Postponing Hearing of Demurrer—Infringement—Exchequer Court.*]—Unless an order upon a demurrer be a decision upon the issues raised therein, leave to appeal to the Supreme Court of Canada cannot be granted under the provisions of ss. 51 and 52 of the Exchequer Court Act, as amended by 2 Edw. VII. c. 8. *Toronto Type Foundry Co.* v. *Mergenthaler Linotype Co.*, 36 S. C. R. 593.

Right of Appeal—*Matter in Controversy — Future Rights — Hypothec for Rent Charges.*]—In an action for the price of real estate sold with warranty, a plea alleging troubles and fear of eviction under a prior hypothec to secure rent charges on the land, does not raise questions affecting the title nor involving future rights so far as to give the Supreme Court of Canada jurisdiction to entertain an appeal. Bank of Commerce v. Le Cure et les Marguilliers de la Nativité, 12 S. C. R. 25, Wineberg v. Hampson, 19 S. C. R. 369, Jermyn v. Tew, 28 S. C. R. 497, Waters v. Manigault, 30 S. C. R. 304, Frechette v. Simoneau, 31 S. C. R. 13, Toussignant v. County of Nicolet, 32 S. C. R. 353, and Canadian Mutual Loan and Investment Co. v. Lee, 34 S. C. R. 224, followed. L'Association Pharmaceutique de Quebec v. Livernois, 30 S. C. R. 400, distinguished. *Carrier* v. *Sirois*, 25 Occ. N. 121, 36 S. C. R. 221.

Right of Appeal—*Matter in Controversy — Removal of Executors — Acquiescence in Judgment.*]—The Supreme Court of Canada has no jurisdiction to entertain an appeal in a case where the matter in controversy has become an issue relating merely to the removal of executors, though by the action, an account for over $2,000 had been demanded and refused by the judgment at the trial, against which the plaintiff had not appealed. Noel v. Chevrefils, 30 S. C. R. 327, followed. Laberge v. Equitable Life Assurance Society of the United States, 24 S. C. R. 59, distinguished. *Donohue* v. *Donohue*, 23 Occ. N. 147, 33 S. C. R. 134.

Right of Appeal—*Matter Originating in Superior Court—Confirmation of Tax Sale Transfer.*]—The confirmation of a tax sale transfer by a Judge of the Supreme Court of the North-West Territories, under s. 97 of the Land Titles Act, 1894, is a matter or proceeding originating in a Court of superior jurisdiction, and an appeal will lie to the Supreme Court of Canada from a final judgment of the full Court affirming the same; Sedgewick and Killam, JJ., contra. City of Halifax v. Reeves, 23 S. C. R. 340, followed. *North British Canadian Investment Co.* v. *Trustees of St. John School District No. 61, N. W. T.*, 35 S. C. R. 461.

Right of Appeal—*Order for Security—Final Judgment.*]—A judgment granting a motion ordering an opposant à fin de charge to give security that the real estate advertised for sale will be sold for a sufficient price to enable the hypothecary creditors to be paid in full, is an interlocutory judgment, and a Judge of the Court of King's Bench cannot grant leave to appeal therefrom to the Supreme Court of Canada. *Desaulniers* v. *Payette*, 5 Q. P. R. 364.

Right of Appeal—*Order for Security—Final Judgment.*]—An order requiring opposants à fin de charge to furnish security that lands seized in execution, if sold by the sheriff subject to the charge claimed, should realize sufficient to satisfy the claim of the execution creditor, is not a final judgment, and no appeal lies from it to the Supreme Court of Canada. *Desaulniers* v. *Payette*, 33 S. C. R. 340.

Right of Appeal—*Order Quashing By-law—Appeal de Plano—Leave to Appeal.*]—Appeals to the Supreme Court from the judgments of the Court of Appeal for Ontario are exclusively governed by the provisions of 60 & 61 V. c. 34, and no appeal lies as of right

unless given by that Act. Therefore, there is no appeal de plano from an order quashing a by-law, though an appeal is given in such case by the Supreme and Exchequer Courts Act. The Supreme Court will not entertain an application for special leave to appeal under the above Act after a similar application has been made to the Court of Appeal, and leave has been refused. Application for leave to appeal from the decision in 3 O. L. R. 609, 22 Occ. N. 205, refused. *In re Village of Markham and Town of Aurora*, 1 O. W. R. 289, 22 Occ. N. 354, 32 S. C. R. 457.

Right of Appeal—*Possessory Action.*]—Petitory actions always involve titles to lands, in a secondary manner, and consequently are appealable to the Supreme Court of Canada. Pinsonneault v. Hebert, 13 S. C. R. 450, Gauthier v. Masson, 27 S. C. R. 575, Commune de Berthier v. Denis, 27 S. C. R. 147, Riou v. Riou, 28 S. C. R. 52, Couture v. Couture, 34 S. C. R. 716, referred to. Cully v. Ferdais, 30 S. C. R. 322, Emerald Phosphate Co. v. Anglo-Continental Guano Works, 21 S. C. R. 424, and Davis v. Roy, 33 S. C. R. 345, distinguished. *Delisle* v. *Arcand*, 25 Occ. N. 95, 36 S. C. R. 23.

Right of Appeal—*Possessory Action—Landlord and Tenant—Rent.*]—In a possessory action, with conclusions for $200 damages, the defendant admitted the plaintiff's title and claimed the right of occupying the premises as her tenant. The judgment appealed from affirmed a judgment dismissing the possessory conclusions and adjudging $200 for rent:—Held, that the defendant had no right of appeal to the Supreme Court of Canada. *Davis* v. *Roy*, 33 S. C. R. 345.

Right of Appeal—*Recusation of Arbitrator.*] — No appeal lies to the Supreme Court of Canada from a judgment of the Court of Queen's Bench, confirming a judgment of the Superior Court, which dismissed a recusation of an arbitrator appointed in an expropriation by a railway company. *Vallée Est du Richelieu R. W. Co.* v. *Menard*, 5 Q. P. R. 179.

Right of Appeal—*Special Leave—Judge in Chambers—Appeal to Full Court.*]—No appeal lies to the Supreme Court of Canada from an order of a Judge of that Court in Chambers granting or refusing leave to appeal from a decision of the Board of Railway Commissioners under s. 44 (3) of the Railway Act, 1903. *Williams* v. *Grand Trunk R. W. Co.*, 25 Occ. N. 113, 36 S. C. R. 321.

Right of Appeal — *Yukon Territorial Court — Decisions of Gold Commissioner — Finality of Judgment—Mining Lands.*]—The Supreme Court of Canada has jurisdiction to hear appeals from the judgments of the Territorial Court of the Yukon Territory, sitting as the Court of appeal constituted by the Ordinance of the Governor in Council, in respect to the hearing and decision of disputes affecting mineral lands in the Yukon Territory. The Governor in Council has no jurisdiction to take away the right of appeal to the Supreme Court of Canada provided by 62 & 63 V. c. 11 (D.) *Hartley* v. *Matson*, 23 Occ. N. 39, 32 S. C. R. 575.

Security — Stay of proceedings on judgment appealed from—Judgment for costs—Immediate payment—Undertaking of solicitor. *Eggleston* v. *Canadian Pacific R. W. Co.*, *Duggan* v. *Canadian Pacific R. W. Co.* (N. W.T.), 1 W. L. R. 356, 570, 576.

Special Leave—*Error in Judgment—Concurrent Jurisdiction — Mandamus—Malicious Prosecution.*]—Special leave to appeal from a judgment of the Court of Appeal for Ontario, under s. 1 (e) of 60 & 61 V. c. 34, will not be granted on the ground merely that there is error in such judgment. Such leave will not be granted when it is certain that a similar application to the Court of Appeal would be refused. The Ontario Courts have held that a person acquitted on a criminal charge can only obtain a copy of the record on the fiat of the Attorney-General. S., having been refused such fiat, applied for a writ of mandamus, which a Divisional Court granted (21 Occ. N. 432, 2 O. L. R. 315), and its judgment was affirmed by the Court of Appeal (22 Occ. N. 360, 4 O. L. R. 394):—Held, that the mandamus having been granted, the public interest did not require special leave to be given for an appeal from the judgment of the Court of Appeal, though it might have had the writ been refused. The question raised by the proposed appeal is, if not one of practice, a question of the control of provincial Courts over their own records and officers, with which the Supreme Court should not interfere. *Attorney-General* v. *Scully*, 23 Occ. N. 60, 33 S. C. R. 16.

Special Leave—*Forum.*]—A Judge of the Supreme Court of British Columbia may grant special leave for an appeal to the Supreme Court of Canada although he did not sit as a member constituting the full Court which rendered the judgment appealed from. *Oppenheimer* v. *Brakman and Ker Milling Co.*, 32 S. C. R. 699.

Stay of Proceedings—*Order Granting New Trial.*]—The defendant appealed to the Supreme Court of Canada from a judgment of the Supreme Court of Nova Scotia, sitting in banc, granting a new trial. Security on the appeal having been given and allowed, an application was made by the defendant to stay execution and all other proceedings. No opposition was made to the stay of execution, but the plaintiffs objected to a stay of the trial and of all other proceedings:—Held, that the trial and all other proceedings should be stayed pending the appeal, and a Judge of the Court appealed from had jurisdiction to impose such a stay. *Bartlett* v. *Nova Scotia Steel Co.*, 22 Occ. N. 261.

Supplementary Evidence — *Objections not Taken at Trial — Amendment of Pleadings.*]—On the hearing of the appeal, objection was taken for the first time to the sufficiency of the plaintiff's title, whereupon he tendered a supplementary deed to him of the lands in question:—Held, following Exchange Bank of Canada v. Gilman, 17 S. C. R. 108, that the Court could not allow the production of the document, as fresh evidence could not be admitted upon appeal:—Held, also, that the defendant could not raise the question as to the sufficiency of the plaintiff's title for the first time on appeal. It appeared that the allegations and conclusions of the plaintiff's declaration were deficient, and the Court under s. 63 of the Supreme and Exchequer Courts Act, ordered all necessary amendment to be made thereto for the purpose of determining the real controversy between the par-

ties as disclosed by the pleadings and evidence. Judgment in Q. B. S Q. B. 534 varied. *City of Montreal* v. *Hogan*, 21 Occ. N. 6, 31 S. C. R. 1.

Time—Extension — Grounds of proposed appeal—Alteration in position of parties—Transfer of subject matter. *Ross Brothers Limited* v. *Pearson* (N. W. T.), 1 W. L. R. 338, 575, 2 W. L. R. 239.

Time—*Extension—Intention to Appeal—Suspension of Proceedings—Merits.*]—Upon an application to extend the time for appealing from the Court of Appeal to the Supreme Court, the applicant must shew a bona fide intention to appeal held while the right to appeal existed, and a suspension of further proceedings by reason of some special circumstances in consequence of which they were held in abeyance. No such case having been made out, and the Court not being impressed with the merits of the defence, leave to extend the time was refused to two defendants. In re Manchester Economic Building Society, 24 Ch. D. 488, followed. *Smith* v. *Hunt*, 23 Occ. N. 42, 5 O. L. R. 97, 1 O. W. R. 598, 798.

Time—*Limit—Pronouncing or Entry of Judgment.*]—In determining whether the 60 days within which an appeal to the Supreme Court must be taken, run from the pronouncing or entry of the judgment appealed against, no distinction should be made between common law and equity cases. The time runs from the pronouncing of judgment in all cases, except those in which there is an appeal from the Registrar's settlement of the minutes, or such settlement is delayed because a substantial question affecting the rights of the parties has not been clearly disposed of by such judgment. Motion for leave to appeal per saltum refused with costs. *Robert* v. *County of Elgin*, 25 Occ. N. 93; *County of Elgin* v. *Robert*, 36 S. C. R. 27.

Time Expired—Special Circumstances—Refusal by Judge — Appeal to full Court. *Hamilton* v. *Mutual Reserve Life Ins. Co.*, 2 O. W. R. 155, 806, 3 O. W. R. 851, 4 O. W. R. 299, 416, 5 O. W. R. 162.

XIV. YUKON TERRITORY—APPEAL TO TERRITORIAL COURT.

Court en Banc—Extension of time for—Mistake of solicitor — Long delay — Special circumstances. *Munroe* v. *Morrison* (Y.T.), 2 W. L. R. 132, 367.

Decision of Gold Commissioner—Deposit of appeal books—Extension of time for—Forum—Jurisdiction. *Grant and Strong* v. *Treadgold* (Y.T.), 2 W. L. R. 484.

Notice of Appeal—Extending time—Discretion — Solicitor's slip — Terms—Costs—Security. *Alaska Mercantile Co.* v. *Ballantine* (Y.T.), 1 W. L. R. 504, 2 W. L. R. 115.

Security for Costs of—Time for applying for—Application after expiry of time—General rule giving power to enlarge time. *Gold Run Klondike Mining Co.* v. *Charbonneau* (Y.T.), 1 W. L. R. 264.

Yukon Territory Act—*Constitution of Territorial Court for Hearing Appeals.*] — Quære, whether, under the provisions of s. 6 of the Yukon Territory Act, 62 & 63 V. c. 11, and of the North-West Territories Act, R. S. C. c. 50, s. 42, thereby made applicable to the Territorial Court of the Yukon Territory, three Judges of that Court are necessary to constitute a quorum for the hearing of appeals from judgments upon the trial of actions therein? *Barrett* v. *Le Syndicat Lyonnais du Klondyke*, 35 S. C. R. 697.

See APPEAL, II.

APPEARANCE.

Leave to Enter after Judgment.]—Judgment had been entered in default of appearance, and before the return of a summons for an order for the examination of the defendant as a judgment debtor, the defendant entered an appearance by a solicitor, who took out a summons for a stay of proceedings, on the ground that the parties had settled the action:—Held, that the summons must be discharged on the ground that leave to enter an appearance should have been obtained. *Chong Man Chock* v. *Kai Fung*, 21 Occ. N. 320, 8 B. C. R. 67.

Limitation of—*Submission to Judgment—Irregularity.*] — The indorsement on the writ of summons was for a declaration that certain lands (described), being the lands intended to be devised to the plaintiff by the will of J. P., but erroneously described therein, were freed and discharged from the conditions and obligations to which they were subjected by the will in favour of the defendant, and from all bequests, legacies, and other payments charged thereon by the will in favour of the defendant, and for damages against the defendant for wrongful refusal to execute a quit-claim deed of the lands when tendered to him for execution. The appearance entered by the defendant was limited to that part of the plaintiff's claim which asked for damages against the defendant and for costs. The appearance also stated as follows: "Without admitting that the plaintiff is entitled to the declarations asked for in the writ of summons herein, the defendant will make no objection to the making of the declarations asked for, and the defendant is also willing to execute a quit-claim deed in favour of the plaintiff of the lands devised to the plaintiff by the last will . . . ."—Held, that there was no authority in the Rules or in the practice for an appearance limited as was this one, in an action of the character disclosed in the indorsement of the writ of summons. The appearance was set aside and judgment entered for the plaintiff (except as to the claim for damages) with costs. *Padget* v. *Padget*, 22 Occ. N. 137, 1 O. W. R. 160.

Notice.]—It is not necessary to serve a notice of appearance upon the opposite party. *Morin* v. *Jetté*, 5 Q. P. R. 69.

Notice.]—It is not necessary to serve upon the plaintiff notice of an appearance by the defendant. *Meigs* v. *County of Missisquoi*, 6 Q. P. R. 118.

Notice.]—An appearance must be served on the opposite party in the Superior Court. *Janowsky* v. *Great Northern R. W. Co.*, 6 Q. P. R. 440.

Notice—*Practice.*] — A defendant is not obliged to serve upon the plaintiff's attorney a duplicate or certified copy of his appearance; it is sufficient if he delivers it to the registrar within the time prescribed by law. *Cardinal* v. *Pichet*, Q. R. 26 S. C. 523, 7 Q. P. R. 19.

Partnership — Individuals — Form — Amendment. *Oshawa Canning Co.* v. *Dominion Syndicate*, 2 O. W. R. 221, 315.

APPOINTMENT.

See TRUSTS AND TRUSTEES.

APPORTIONMENT.

See COSTS — DAMAGES — LANDLORD AND TENANT.

APPRAISEMENT.

See INSURANCE—LANDLORD AND TENANT.

APPRENTICE.

See MASTER AND SERVANT.

APPROPRIATION OF PAYMENTS.

See PAYMENT—PRINCIPAL AND SURETY.

APPURTENANCES.

See TITLE TO LAND.

AQUEDUCT.

See MUNICIPAL CORPORATIONS.

ARBITRATOR.

See ARBITRATION AND AWARD — NOTICE OF ACTION.

ARBITRATION AND AWARD.

Accounts of Province of Canada — *Common School Fund and Lands—Jurisdiction of Arbitrators—Deed of Submission—Construction.*]—By agreement of submission dated the 10th April, 1893, the provinces of Ontario and Quebec referred to a statutory tribunal the "ascertainment and determination of the amount of the principal of the common school fund and the method of computing" interest thereon, and of the amount for which Ontario was liable. The fund was established by 12 V. c. 200 (C.), and consisted (inter alia) of the proceeds of public lands received by Ontario and paid to the Dominion:—Held, that a claim by Quebec that Ontario should be debited with uncollected prices of land sold by it, being a claim for wilful neglect and default and in the nature of damages, not suggested in but heterogeneous to the matters actually specified in the submission, was not, on its true construction, included therein. Judgment in 31 S. C. R. 516, sub nom. Province of Quebec v. Province of Ontario and Dominion of Canada, In re Common School Fund and Lands, reversed and award of arbitrators restored. *Attorney-General for Ontario* v. *Attorney-General for Quebec*, [1903] A. C. 39.

Action for Money Demand—Plea of payment of amount ascertained by award—Amendment of statement of claim—Allegation of invalidity of award — Demurrer — Procedure in attacking award—Rules of Court—Joinder of claim to set aside award with original demand — Equitable jurisdiction — Time for attacking award. *Johannesson* v. *Galbraith* (Man.), 1 W. L. R. 445.

Agreement to Refer—Stay of action—Inconsistent provisions of agreement—Parties not ad idem. *Kerr* v. *Brown* (N.W.T.), 1 W. L. R. 379.

Appointment of Sole Arbitrator — *Submission—Arbitration Act—Appeal—Order of Judge in Chambers.*]—A submission contained in a policy of insurance provided "that, if any difference shall arise in the adjustment of a loss, the amount to be paid . . . . shall be ascertained by the arbitration of two disinterested persons, one to be chosen by each party, and, if the arbitrators are unable to agree, they shall choose a third, and the award of the majority shall be sufficient:"—Held, reversing the decisions of a Divisional Court, 1 O. W. R. 87, 192, 3 O. L. R. 93, 22 Occ. N. 94, and of Street, J., 2 O. L. R. 201, 21 Occ. N. 332, that the submission was not one providing for a reference "to two arbitrators, one to be appointed by each party," within the meaning of the Arbitration Act, R. S. O. 1897 c. 62, s. 8; and, therefore, one party having failed, after notice from the other, to appoint an arbitrator, the other could not appoint a sole arbitrator. Re Sturgeon Falls Electric Light and Power Co. and Town of Sturgeon Falls, 2 O. L. R. 585, 21 Occ. N. 595, approved:—Held, also, that the order of Street, J., dismissing an application to set aside the appointment of a sole arbitrator, was not made by him as persona designata, but was a judicial order from which an appeal lay. *Excelsior Life Ins. Co.* v. *Employers' Liability Assurance Corporation, In re Faulkner*, 23 Occ. N. 215, 5 O. L. R. 609, 2 O. W. R. 348, 3 O. W. R. 391.

Appointment of Sole Arbitrator — *Cheese and Butter Companies Act—Rules.*]—By reason of s. 16, R. S. O. 1897 c. 201, there is no jurisdiction to appoint an arbitrator to decide a dispute between a cheese and butter manufacturing association and one of the members, with reference to the withdrawal of a member, unless and until the association makes rules in accordance with

s. 6 of that Act in reference to the expulsion of members. *In re Camden Cheese and Butter Manufacturing Co. and Hart*, 24 Occ. N. 291, 3 O. W. R. 837.

Appointment of Third Arbitrator—*Parol Appointment—Agreement—Revocation—Injunction.*]—Certain rights and easements of the plaintiffs were expropriated by a gas company under an Act enabling the company to make such expropriation and providing for the determination, by arbitration, of the amount of remuneration to be paid. The plaintiffs appointed C. to be one of the arbitrators, and the company appointed B. The plaintiffs claimed a declaration that D., who was alleged to have been agreed upon by C. and B. as the third arbitrator, was not duly appointed, and an injunction to prevent him from acting, (1) because the appointment of D. was not agreed to by C., (2) because the appointment was not made in writing, and (3) because the appointment, if agreed to by C. in the first instance, was revoked by C. withdrawing his consent thereto before action brought:—Held, that the onus of establishing the grounds relied upon was upon plaintiffs. The question as to whether C. did or did not assent to the appointment of D. was one of fact, and, the finding of the trial Judge on the point being adverse to the plaintiffs, and the weight of evidence being in favour of the finding, there was no reason for setting it aside. In the absence of anything to require the appointment of the third arbitrator to be made in writing the same law would govern as in the appointment of an umpire under a submission, which may be made by parol if no particular mode of appointment be prescribed. D. having been appointed, and having consented to act, his appointment could not be revoked by subsequent dissent of the parties. *Kedy* v. *Davison*, 34 N. S. Reps. 233.

Arbitrator—*Disqualification.*]—An alderman of the city of St. John is disqualified to act on behalf of the city as one of a board of arbitrators to determine the value of land expropriated by the city under 61 V. c. 52. *In re Abell*, 21 Occ. N. 511, 2 N. B. Eq. Reps. 271.

Arbitrator's Fees — *Recovery of* — *Promise* — *Consideration.*] — Where there is evidence of an express promise, founded on good consideration, to pay an arbitrator for his services, it is misdirection to withdraw the same from the jury. *Pinder* v. *Cronkhite*, 34 N. B. Reps. 498.

Building Contract—*Completion of Work*—"*All Matters in Dispute*"—*Arbitrators*—*Delegation of Duty.*]—The action was to recover a balance on a building contract, alleging completion. The defendant denied completion, and counterclaimed against the plaintiff on several grounds. After the record had been entered for trial the parties entered into an agreement to refer to two named arbitrators and a third one to be appointed by the latter "all matters whatsoever in dispute" between them. The arbitrators thus appointed having made their award in the plaintiff's favour, he moved, under Rules 754-764 of the King's Bench Act, to have the award made a judgment of the Court:—Held, dismissing the motion with costs, that the award was bad on the following grounds:—1. It shewed on its face that the work under the plaintiff's contract had not been completed, so that the plaintiff was not entitled to recover anything at all in this action. 2. From evidence taken on the hearing of the motion it was clear that the arbitrators had not taken into consideration "all matters whatsoever in dispute," but had failed to deal with a number of such matters which had been brought to their attention. Bowes v. Fernie, 4 My. & Cr. 150, Wilkinson v. Page, 1 Hare 276, and Russell on Arbitration, 8th ed., p. 172, followed. 3. The arbitrators had attempted to delegate to another person (unascertained) their authority to decide whether the sum of $110, part of the amount awarded, should or should not be paid; see Tandy v. Tandy, 9 Dowl. 1044. *Blakeston* v. *Wilson*, 23 Occ. N. 27, 14 Man. L. R. 271.

British Columbia Arbitration Act—*Setting aside Award—Misconduct of Arbitrator—Partiality — Evidence — Jurisdiction of Majority—Decision in Absence of Third Arbitrator—Judicial Discretion.*]—A reference under the British Columbia Arbitration Act authorized two out of three arbitrators to make the award. After notice of the final meeting, the third arbitrator failed to attend on account of personal inconvenience and private affairs, but both parties appeared at the time appointed and no objections were raised on account of the absence of the third arbitrator. The award was then made by the other two arbitrators present:—Held, reversing the judgment in 10 B. C. R. 48, 23 Occ. N. 272, that, under the circumstances, there was cast upon the two arbitrators present the jurisdiction to decide whether or not, in the exercise of judicial discretion, the proceedings should be further delayed or the award made by them alone in the absence of the third arbitrator, and it was not inconsistent with natural justice that they should decide upon making the award without reference to the absent arbitrator:—Held, further, that, although the third arbitrator had previously suggested some further audit of certain accounts that had already been examined by the arbitrators, there was nothing in this circumstance to impugn the good faith of the other two arbitrators in deciding that further delay was unnecessary. Where it does not appear that an arbitrator is in such a position with regard to the parties or the matter in dispute as might cast suspicion upon his honour and impartiality, there must be proof of actual partiality or unfairness in order to justify the setting aside of the award. *In re Doherer and Megaw's Arbitration*, 24 Occ. N. 113, 34 S. C. R. 125.

Clerical Error in Award—*Motion to Refer Back—Railway Act of Canada.*]—Motion for an order referring back to the arbitrators, to enable them to correct a clerical error, an award made under the Dominion Railway Act:—Held, that if the Provincial legislation (R. S. O. 1897 c. 62) applied, the motion was needless, the arbitrators having power (s. 9 (c)) to correct the mistake. If that legislation were not applicable, there was no power to remit the award, nor to correct the error upon this motion. Except under power conferred by statute, or by the parties, the Courts would not correct errors in awards, either directly or through the arbitrators; and the Railway Act of Canada does not authorize the re-opening of a reference. *In re McAlpine and Lake Erie and Detroit River*

K. W. Co., 22 Occ. N. 98, 3 O. L. R. 230, 1 O. W. R. 100, 484.

Compensation for Closing up Streets — Municipal corporations—Railway—Laying tracks on highway. *Re Medler and City of Toronto*, 1 O. W. R. 545, 3 O. W. R. 534.

Disqualification of Arbitrator — *Interest as Ratepayer — Certiorari.*] — By the Nova Scotia Acts of 1902, c. 80, the corporation of the town of Glace Bay were empowered, for the purpose of obtaining a water supply, to enter upon any lands in the county of Cape Breton, and it was provided that the damages, if any, payable to the owner of such land, should be determined by arbitration. Objection was taken to the award of damages, on the ground that C. F., one of the arbitrators appointed under the Act, was not a disinterested party, he having been assessed as a ratepayer in the town:—Held, that if the arbitrators were acting in a judicial capacity, c. 39, R. S., applied, and the fact of one of the arbitrators being a ratepayer afforded no valid objection to the award made by him; that, if the arbitrators were not acting in a judicial capacity, a writ of certiorari would not lie to remove into the Supreme Court any award made by them. *Rex* v. *Town of Glace Bay*, 24 Occ. N. 140, 36 N. S. Reps. 456.

Leave to Enforce Award—*Time—Motion to Set aside.*]—An application under s. 13 of the Arbitration Act, R. S. O. 1897 c. 62, for an order giving leave to enforce an award, need not be made within six weeks after the publication of the award. Section 45 of the Act does not apply to such an application, but only to applications to set aside awards. An order under s. 13 is necessary when the reference has been made out of Court. Objections properly the subject of a motion to set aside the award were not considered upon appeal from an order under s. 13. *In re Lloyd and Pegg*, 23 Occ. N. 171, 5 O. L. R. 389, 2 O. W. R. 103.

Motion to Set aside Award.]—*Re Rae and Oakley*, 6 O. W. R. 716.

Motion to Set aside Award—*Evidence*—Findings—Agreement not to appeal. *Re Adams and Bridley, Levy, and Weston Machinery Co.*, 3 O. W. R. 445.

Municipal Corporation — *Purchase of Electric Light Plant—Appointment of Sole Arbitrator—Notice—Arbitration Act — Municipal Act.*]—By an agreement between the town corporation and the assignor of the company for the establishment and operation for ten years of an electric light plant in the town, it was provided that the town might at any time during the ten years purchase the plant at a valuation fixed by three arbitrators, appointed by each party choosing an arbitrator and they two a third in case of dispute, or by a majority of them. Where a submission provides that the reference shall be to two arbitrators, the Act R. S. O. 1897 c. 62, s. 8 (b), gives power to the party who has appointed an arbitrator (if the other makes default as specified) to appoint that arbitrator as sole arbitrator; and it is provided that the Court or Judge may set aside any such appointment:—Held, that notice of the appointment of the sole arbitrator should be given to the party in default, who, if not notified, is not called upon to move against the appointment:—Held, also, that the agreement was not to be read as suspending the choice of a third arbitrator till there should be a dispute, but it imported that the three arbitrators should act from the outset; and therefore s. 8 (b) did not apply. Excelsior Life Ins. Co. v. Employers' Liability Assurance Corporation, 2 O. L. R. 391, and Gumm v. Hallett, L. R. 14 Eq. 555, considered. Semble, that the arbitration was under the Municipal Act, and s. 8 of the Arbitration Act was not applicable: R. S. O. 1897 c. 223, s. 467. *In re Sturgeon Falls Electric Light and Power Co. and Town of Sturgeon Falls*, 21 Occ. N. 395, 2 O. L. R. 385.

Municipal Corporation — Agreement with electric company—Erection of poles and wires in streets—Use by another company—Authorization—Resolution of council — By-law—Compensation—Action — Reference — Motion to set aside award—Misconduct of arbitrators—Champerty — Decision on questions of law. *City of Ottawa* v. *Ottawa Electric Co.*, 3 O. W. R. 65, 588, 796, 4 O. W. R. 370.

Municipal Corporation — Purchase of property—Voluntary submission — Construction of agreement—"Works and property"—"Franchises and goodwill"—Statutes—Ejusdem generis rule. *Re City of Kingston and Kingston Light, Heat, and Power Co.*, 1 O. W. R. 194, 2 O. W. R. 55, 3 O. W. R. 769, 3 O. L. R. 637.

Non-compliance with Previous Order—*Misconduct of Arbitrator—Refusal to State Case — Proceeding to Execute Award Notwithstanding Motion for Special Case — Remitting Award Back.*] — Motion by company to set aside an award made under agreement of reference containing the following clause: "And it is further agreed that if motion is made to set aside or otherwise respecting the award, the Court may, whether the award be insufficient in law or not, remit the award from time to time to the reconsideration and redetermination of the arbitrator:"—Held, on the authority of Re Palmer and Hoskin, the award should be remitted to the arbitrator for reconsideration under s. 11 of R. S. O. 1897 c. 62, he having failed to comply with the terms of a previous order of 22nd June, 1904, which required him to find and award as to the ownership of the property included in an instrument dated 5th January, 1901, and he had not complied with that order by vesting the property in the Lake Superior Power Co. as the owner thereof. *Re Powell and Lake Superior Power Co.*, 5 O. W. R. 49, 9 O. L. R. 236.

Remitting to Arbitrators — *Incompetency of Arbitrator—Appointing New Arbitrator.*]—Section 11 of the Arbitration Ordinance provides that "in all cases of reference to arbitration the Court or a Judge may, from time to time, remit the matters referred or any of them to the reconsideration of the arbitrators or umpire." Remission was refused because after the submission was entered into one of the arbitrators commenced an action against the party who had nominated him, to recover an amount agreed to be

paid for procuring settlement of the matters in dispute.—Where the instrument of submission names the arbitrators, the Court or Judge has no power to appoint a new arbitrator in lieu of one who has become incompetent. *Re Crawford and Allen*, 5 Terr. L. R. 398.

Scope of Reference — Construction of award—Misconduct of arbitrator—Permitting award to be drawn by solicitor for contestants — Costs — Motion to set aside award. *Re Armstrong and Moyes*, 6 O. W. R. 104.

Setting Aside Award — *Misconduct of Arbitrator—Waiver.*]—A party to an arbitration does not waive his right to object to an award on the ground of misconduct on the part of an arbitrator by failing to object as soon as he becomes suspicious and before the award is made; he is entitled to wait until he gets such evidence as will justify him in impeaching the award. Where two out of three arbitrators go on and hold a meeting, and make an award at a time when the third arbitrator cannot attend, it amounts to an exclusion of the third arbitrator, and the award is invalid. A party by attending at such a meeting and not objecting (although he knew of the third arbitrator's inability to attend) does not waive his right to object afterwards. Per Hunter, C.J.—It is not necessary that there should be absolute proof of misconduct before an award will be set aside on that ground; it is enough if there is a reasonable doubt raised in the judicial mind that all was not fair in the conduct of one or more of the arbitrators. *In re Doherer and Megaw's Arbitration*, 23 Occ. N. 272, 10 B. C. R. 48.

Stated Case — *Matter "arising in the Course of the Reference"—Construction of Contract—Revoking Submission—Discretion—Special Qualifications of Arbitrators—Questions of Law.*]—Arbitrators were appointed under the arbitration clause in an agreement between two companies, whereby, inter alia, one agreed to provide the other daily with a certain quantity of cordwood, which the latter agreed to carbonize into charcoal and to deliver to the former to the maximum quantity of 85,000 bushels per month. The arbitration clause provided that in case of any dispute in regard to the meaning or construction of the agreement or of the mutual obligations of the parties or of any other act, matter, or thing relating to or concerning the carrying out of the true spirit, intention, or meaning of the agreement, the same should be determined by arbitration. One of the claims referred to the arbitrators was for damages for short delivery of charcoal, a shortage being claimed whatever the proper construction of the agreement in that regard. On an application by one of the parties, under s. 41 of the Arbitration Act, R. S. O. 1897 c. 62, for a direction to the arbitrators to state a special case upon which the Court should determine the true construction of the contract as to the amount of charcoal called for per month under it—a matter upon which they had reached and announced a conclusion:—Held, that, the claim referred to leaving the proper construction of the agreement open, this was a question of law "arising in the course of the reference," within the meaning of s. 41, and a special case might properly be directed as to it. 2. That a special case having been directed as to the principal question, it might properly be made to include two other questions in dispute, though, had they been the only questions which the applicants desired to have stated, it would not have been proper to direct a case as to them. 3. A party to a reference is not entitled ex debito justitiæ to have a special case directed whenever a question of law arises in the course of a reference; it is a matter in the discretion of the Court. 4. There is no general rule that when the arbitrators are specially qualified to decide a question of law, this direction should not be given, at all events where the arbitrators have ruled upon the question. Semble, that different considerations apply to the exercise of the discretion to give leave to revoke a submission (s. 3 of the same Act)—a discretion which is to be exercised only under exceptional circumstances. *In re Rathbun Co. and Standard Chemical Co.*, 23 Occ. N. 66, 5 O. L. R. 286, 2 O. W. R. 36, 385, 3 O. W. R. 698, 724, 6 O. W. R. 660.

Statement of Case by Arbitrators — *Time—Remitting Back Award.*] — After an award is made it is too late to make an application for an order under s. 1 of the Arbitration Act, R. S. O. 1897 c. 62, directing the arbitrators to state a case for the opinion of the Court as to the admissibility and relevancy of evidence, or for the arbitrators to state a case for the opinion of the Court. The only case in which the Court will remit matters referred to an arbitrator for reconsideration under s. 11 are: (1) where the award is bad on the face of it; (2) where there has been misconduct on the part of the arbitrators; (3) where there has been an admitted mistake, and the arbitrator himself asks that the matter may be remitted; and (4) where additional evidence has been discovered after the making of the award. Where arbitrators received and gave effect in their award to certain evidence, and after the making of the award gave a certificate to that effect, and that they were in doubt as to whether they should have received the evidence:—Held, that the case did not come within any of the above four cases, and that an order to remit the matter back to the arbitrators should be refused. *In re Grand Trunk R. W. Co. and Petrie*, 21 Occ. N. 529, 2 O. L. R. 284.

Stay of Action—*Partnership—Agreement to Refer—Enforcement.*]—Application by defendants to stay proceedings in an action by the personal representatives of a deceased partner to have the survivors account. Under partnership articles a sole arbitrator was appointed in case one of the partners should die before the expiration of the partnership term:—Held, granting the order to stay proceedings, subject to plaintiffs being permitted at any time upon such material as they deem sufficient, to apply for appointment of a receiver or for an injunction. The right not limited to an application after award was made, reserving, however, a general liberty to apply at any time for the protection of the partnership property and to prevent the improper use or disposition of it pending the settlement of the matters in question. See Compagnie de Senegal v. Woods, 53 L. J. N. S. c. 168. *Royal Trust Co.* v. *Milligan*, 6 O. W. R. 476, 10 O. L. R. 456.

Taking Down Evidence — Objection—Findings of arbitrators — Errors — Setting aside award—Costs—Uncertainty as to. *Re Grimshaw and Grimshaw*, 1 O. W. R. 744.

Time for Commencement of Running of Interest on Amount Awarded — Publication—Confirmation — Judgment. *Re Fielding and Town of Gravenhurst*, 2 O. W. R. 836.

Time for Making Award — *Extension after Lapse.*]—Arbitrators, amiables compositeurs, and experts, become functi officio by the lapse of the delay fixed for the performance of their duties. If the period fixed has expired without any report having been made, the submission becomes inoperative, and the Court cannot thereafter grant an extension of the delay. *Beaudoin* v. *Dubrule*, Q. R. 20 S. C. 575.

Time for Making Award — Last day falling on Sunday—Judicature Act — Partition—Rights of co-parcener—Statute of Limitations—Adverse possession. *Re Mullin and Mullin*, 2 O. W. R. 874.

Time for Making Award — *Power to Extend — Umpire.*] — By the terms of an agreement for submission to arbitration the matters in difference between parties were referred to the award, etc., of M. and B., and in case they disagreed, or failed to make their award before the 1st August then next, then to the award, etc., of such umpire as said arbitrators should nominate and appoint, "so as the said arbitrators or umpire do make and publish his and their award ready to be delivered on or before the 10th day of August next, or on or before any other day to which said arbitrators or umpire shall, by writing indorsed on these presents, enlarge the time for making such award or umpirage:"—Held, per Ritchie, J., and Graham, E.J., that under the terms of the agreement, the power of the arbitrators to consider and deal with the questions submitted absolutely terminated on the 1st August, after which date the umpire was the only person who had authority to make an award:—Held, also, that the arbitrators had no authority to extend the time within which the umpire could make his award, and that, as such time, if not legally extended, expired on the 10th August, and the umpire did not attempt to extend it until the 20th September, the award made by him was irregular and void, and the plaintiff could not recover:—Held, also, that the provisions of the Arbitration Act, Acts of 1895 c. 7, s. 2 (e), were not applicable, a contrary intention being expressed in the submission which fixed the date before which the arbitrator was to make his award or extend the time:—Held, also, that the section, if applicable, would not assist the plaintiff, as the umpire did not begin to extend the time until the 20th September, and the authority of the arbitrators had terminated more than a month previously. McDonald, C.J., and Meagher, J., contra. *Holmes* v. *Taylor*, 33 N. S. Reps. 415.

See CONSTITUTIONAL LAW—INSURANCE—MUNICIPAL CORPORATIONS — RAILWAYS — WATER AND WATERCOURSES.

ARCHITECT.

Contract to Prepare Plans—*Work not Proceeded with — Commission on Estimated Cost.*]—The plaintiff was engaged by the defendants to prepare plans and specifications for an hotel building to cost not more than $4,000 or $5,000, for which he was to receive a commission of two per cent. on the cost, with one per cent. additional for superintendence. Instructions as to size, number of rooms, &c., were given by the defendants. Before the plans were completed changes were made, by additions to the original plan, involving an additional expenditure of $1,500. The plans were approved of by the defendants, when completed, and tenders called for, and the work partly proceeded with. It was then found by the defendants that, owing to an advance in the price of materials, the building would cost much more than they had expected, and the work was stopped:—Held, that the plaintiff was entitled to recover from defendants the stipulated commission of two per cent. on the estimated cost of the building with the additions agreed upon. *Hutchinson* v. *Conway*, 34 N. S. Reps. 554.

Fees—Action for—Counterclaim for negligence—Questions of fact—Appeal. *Russell* v. *McKerchar* (Man.), 1 W. L. R. 138.

Fees—*Tariff—Association of Architects—Registration.*] — An architect, in order to avail himself of the tariff of the Province of Quebec Association of Architects, in support of a claim for services as architect, must establish that he is registered as a member of the association under the Act 61 V. c. 33 (Q.) *Beaulieu* v. *Lapierre*, Q. R. 26 S. C. 1.

Mistake in Estimates — *Liability.*] — Decision of Irving, J., 8 B. C. R. 7, holding the defendant, an architect, not liable for loss caused by error in estimates, affirmed by the full Court. *Grant* v. *Dupont*, 8 B. C. R. 223.

ARREST.

Affidavit to Hold to Bail—*Residence of Parties.*]—In an action for false imprisonment of the plaintiff it appeared that he was arrested upon a capias issued by a justice of the peace:—Held, that the affidavit upon which the capias was granted was sufficient, although it did not state the places of residence of the parties so as to shew jurisdiction. *Temperance and General Life Assce. Co. of North America* v. *Ingraham*, 35 N. B. Reps. 510.

Application for Discharge — *Onus — Intent to Defraud — Former Absconding — Insolvency—Bond — Restoration.*] — The expected departure from Ontario with intent to defraud is an essential ingredient of the case to be made out by the applicant for an order of arrest, but it is a question of fact, and the Judge may infer it from the facts and circumstances shewn by the affidavits. The decision of the Judge who grants such an order is subject to review, but the onus of shewing that he was wrong rests upon the party who complains of it. Under the circumstances of this case the order was rightly made. The former conduct of the defendant in respect to the same debt was a fact or circumstance to be taken into consideration on the question of intent. The impecunious or insolvent condition of the defendant does not, of itself, minimize or rebut the fraudulent intent.

Decision of a Divisional Court, 19 P. R. 207, 20 Occ. N. 305, reversed:—Held, also, that the order of the Court below directing that the bond given by the defendant should be delivered up and the surety therein released, was erroneous; the bond ought to have remained upon the files of the Court, being a record thereof; and the order ought only to have directed that an exoneratur be entered thereon; therefore the bond should be restored. *Beam* v. *Beatty*, 21 Occ. N. 518, 2 O. L. R. 362.

Attachment—*Affidavit—Cause of Action—Subsequent Attaching Creditor—Motion to Set Aside Prior Attachment — Status.*] — An application by a subsequent attaching creditor to set aside a previous attachment under the Absent or Absconding Debtors Act, on the ground that the affidavit upon which the previous attachment was made did not disclose a cause of action, and was not made by the plaintiff or his agent. The affidavit was made by the first attaching creditor's solicitor, and set forth that the defendant was indebted for "money lent, for goods sold and delivered, and for board and lodging," stating the amount due under each head:—Held, that the affidavit on which the first attachment issued was not made by the plaintiff or his agent, as required by the statute, and the affidavit did not shew any cause of action against the defendant; and that the notice of application to set aside the attachment might be amended by adding these grounds of motion; and the application was granted. *Carr* v. *Carr*, 21 Occ. N. 312.

Attachment—*Costs—County Court Appeal.*] — The Supreme Court will not, as a general rule, grant an attachment to enforce the payment of the costs of an appeal from the judgment of a County Court. The costs should be certified and application made to the Court below. *MacPherson* v. *Samet*, 34 N. B. Reps. 559.

Bail Bond—*Discharge—Exoneretur.*] — Application for an order to deliver up the bond, given on the defendant's arrest, to be cancelled, the action having been dismissed:—Held, that the order should be for the entry of an exoneretur on the bond, not for the delivery up of the bond, following the old practice (Allison v. Desbrisay, Cochrane 19), there being no specific Rule in the Nova Scotia Judicature Act, on the subject. *Watson* v. *Leukton*, 23 Occ. N. 336.

Bail—*Renewal—Default — Re-arrest.*] — Default by a defendant arrested upon capias to renew the bail (a bondsman having died), as directed by the order of the Court, is a good ground for ordering him into the custody of the sheriff. *Beliveau* v. *Boschen*, 4 Q. P. R. 62.

Capias—*Affidavit—Amendment—Time and Place of Debt.*]—The affidavit required for the issuing of the writ of capias is not a proceeding susceptible of being amended. 2. Such affidavit must mention the time and place where the indebtedness occurred, within the limits of the provinces of Quebec and Ontario. *Julien* v. *Chuna*, 5 Q. P. R. 413.

Capias—*Affidavit—Debt.*]—A capias will be quashed upon petition if the affidavit does not shew that the debt for which it was sued out is a personal debt, or if it does not indicate the place at which the debt was created or became exigible. *European Importing Co.* v. *Mallekson*, 6 Q. P. R. 255.

Capias—*Affidavit—"Immediately."*] —An affidavit for capias must set forth that the defendant is immediately about to leave the provinces of Quebec and Ontario, and a capias issued upon an affidavit merely, stating that the defendant is about to leave the said provinces, will be quashed on petition to that effect. *Kidd* v. *MacKinnon*, 5 Q. P. R. 177.

Capias — *Affidavit — Information.*] — Where, in an affidavit made to obtain a writ of ca. re., the plaintiff swears that he is informed of the facts upon which he relies to secure the issue of the writ, he must give the name of the person who has furnished him the information, and if he fails to give it the writ of capias will be quashed upon the petition of the defendant. *Lemieux* v. *Bussiere*, Q. R. 18 S. C. 499.

Capias—*Affidavit—Intended Departure—"Immediately."*]—The omission of the word "immediately," in the affidavit for capias, in connection with the intended departure of the debtor, is fatal, and the capias will be quashed and set aside. *Kidd* v. *McKinnon*, Q. R. 20 S. C. 300.

Capias—*Affidavit—Residence of Parties—Place where Debt Contracted.*]—When it appears by the affidavit for capias that the plaintiff as well as the defendant resides in the province of Quebec, it is not necessary to allege specially that the debt was contracted within the Province. *Beauchemin* v. *St. Pierre*, 5 Q. P. R. 484.

Capias — *Affidavit to Hold to Bail — Essentials — Residence of Parties — Place where Debt Created or Payable.*]—It is not sufficient to state only that the debtor resides in the province of Quebec, to give a right to a capias against him; but it is essential to indicate the place where the debt was created or is payable and that such place is within the limits of the province of Quebec or of Ontario. *D'Amico* v. *Galardo*, 7 Q. P. R. 234.

Capias — *Affidavit to Hold to Bail — Falsity of Allegations in—Answer Setting up New Facts—Inscription in Law.*]—A special answer setting up new facts will not be permitted on an application to set aside a writ of capias based on the irregularity of the affidavit and the falsity of the allegations contained in it; such an answer will be struck out on an inscription in law. *Demers* v. *Girard*, 7 Q. P. R. 134.

Capias — *Affidavit to Hold to Bail — Insufficiency of.*]—A capias issued upon an affidavit which does not state that owing to the secretion charged, the plaintiff will be deprived of his recourse against the defendant, is illegal, and will be quashed on petition. *Hochar* v. *Drimer*, 7 Q. P. R. 156.

Capias — *Affidavit to Hold to Bail — Particulars of Damages.*]—An affidavit for the issue of a capias in an action for damages should state the time and place where the acts which caused the damage were committed. *Gourra* v. *Gourra*, 7 Q. P. R. 157.

Capias—*Assignment by Debtor—Previous Fraudulent Acts.*]—A debtor who has made an assignment for benefit of creditors cannot be arrested on a capias for fraudulent acts committed before his assignment. *Demers* v. *Meunier*, 7 Q. P. R. 274.

Capias—*Debt — Partnership — Plaintiff Claiming Fixed Sum — Defendant Leaving Province.*] — In an action accompanied by capias ad respondendum, the plaintiff made affidavit, and also alleged in his declaration that the defendant was personally indebted to him in the sum of $100, the plaintiff being entitled to one-fifth of the profits of a partnership, of which he and the defendant were members, which partnership had realized $500 profits, and that the defendant was about to leave the provinces of Quebec and Ontario with the entire sum. On inscription in law:—Held, that by the alleged illegal appropriation of the entire profits and the intended departure therewith, the defendant's possession of the sum of $500 had changed its nature, and that, without the previous institution of an action pro socio, a personal indebtedness existed on the part of the defendant to a co-partner entitled to a share of the sum illegally appropriated, which was sufficient to justify the issue of a capias under art. 895, C. C. P. *Ferries* v. *Vathakos*, Q. R. 25 S. C. 530.

Capias—*Demurrer — Exception.*] — A demurrer to a capias will not be struck out on exception to the form, the defendant being at liberty to demur instead of proceeding by petition to quash. *Todd* v. *Murray*, 3 Q. P. R. 521.

Capias — *Description of Defendant — Change of Residence—Stamps.*]—In a writ of capias after judgment, it is sufficient to give the same description of the defendant as that contained in the original writ of summons, although the defendant may have meanwhile changed his place of residence; and such a writ is sufficiently stamped, if it bears the stamps required on an alias writ. *Edgerton* v. *Lapierre*, Q. R. 27 S. C. 20.

Capias—*Execution in Another Province.*]—When the Superior Court has jurisdiction with respect to the subject matter of the principal action, it can issue a writ of capias for execution in the province of Ontario, because the code of procedure has only re-enacted the provisions of the laws of the old province of Canada, of which Ontario formed part. *Gravel* v. *Lizotte*, 7 Q. P. R. 201.

Capias—*Petition to Quash—Deposit—Incidental Capias—Declaration—Time.*] — A petition to quash a capias, based not upon the grounds mentioned in art. 919, C. P., but upon formal grounds, is subject to the deposit required with preliminary exceptions. 2. The declaration of an incidental capias must be deposited at the office of the Court within three days after service of the writ. *Radford* v. *Hickey*, 5 Q. P. R. 311.

Capias—*Satisfaction of Debt and Costs—Plaintiff Proceeding After—Exception to the Form.*]—When a person arrested on a capias delivers a certain sum in money and goods to the bailiff in satisfaction of the debt and costs, the plaintiff's proceeding on his writ of capias without returning to the defendant the goods delivered to the bailiff, unlawful though it be, is not such an irregularity as can be taken advantage of by an exception to the form. *Wilkins* v. *Marchildon*, 7 Q. P. R. 31.

Capias—*Security Money—Payment Over —Motion.*]—A plaintiff, who has succeeded upon a capias, cannot demand by motion that the deposit made with the sheriff by way of security shall be paid over to him. *Rosenberg* v. *Belankow*, 5 Q. P. R. 378.

Capias—*Setting Aside—Irregularity—Action for Malicious Prosecution.*]—Action for malicious prosecution. The plaintiff was arrested at Yarmouth under a capias issued under the provisions of the Towns Incorporation Act. The capias was set aside by a stipendiary magistrate, and the plaintiff discharged, because the amount of his travelling fees was not indorsed on the writ, as is required when the person summoned or arrested lives out of the county. The plaintiff then brought this action. The plaintiff urged (1) nullity of the capias; (2) that the affidavit was not made bona fide and that it was false in two particulars, viz., because no debt was due, and because there was no ground for the affidavit, the ordinary method of procedure, by summons, being all that was requisite:—Held, that the capias was not void, and that the affidavit was made bona fide. *Irwin* v. *Lawson*, 21 Occ. N. 354.

Capias—*Writ of Summons — Failure to Serve—Expiry—Nullity—Waiver—Costs.*] — A writ of capias is essentially a writ of summons as well as one authorizing an arrest, and the articles governing the writ of summons, save any special exception made by law, apply to it. Where a writ issued after judgment has not been served within six months after its issue and no Judge's order extending its life has been made within the six months, the writ becomes non-existent. The absolute nullity of the writ is not a mere irregularity which, under art 176, C. P., would be waived by failure to invoke it within the delays prescribed for filing preliminary exceptions, but where such nullity is not so invoked, costs will not be granted. *Demers* v. *Girard*, 7 Q. P. R. 214.

Ca. re. — *Affidavit — Debt — Identity of Plaintiff.*]—The affidavits leading to an order for ca. re. must shew that there is a debt due from the defendant to the plaintiff. It is not sufficient to shew that there is a debt due from the defendant to one who bears the same name as the plaintiff. A statement in an affidavit that deponent has caused a writ of summons to be issued against defendant, without stating in what action the writ was issued, is not sufficient to shew that plaintiff and deponent are one and the same person. *Wehrfritz* v. *Russell*, 9 B. C. R. 79.

Ca. re.—*Costs—Set-off—Stay of Execution.*] — Motion to set aside an order for arrest, it being shewn that the defendant did not intend to leave the province. The Judge directed that the order for arrest be set aside with costs. The plaintiff asked that the costs be set off against the judgment which the plaintiff expected to recover against the defendant. Order for costs to the defendant, but execution therefor stayed for 30 days. *Resnick* v. *Pettis*, 24 Occ. N. 238.

Ca. re.—*Execution in Another Province.*]—A debtor about to leave the province of Ontario may be arrested there upon a capias, by a bailiff of one of the Courts of the province of Quebec. *Schmidt* v. *Carbonneau*, 6 Q. P. R. 211.

Ca. re.—*Form of Writ—Summons to Set Aside—Appearance—Costs—Terms.*] —Held, on a summons to set aside a writ of ca. re., that it was bad because it did not state the nature of the cause of action. 2. It is not necessary for a person arrested under a writ of ca. re, to enter an appearance before applying for his discharge. 3. The defendant having asked for costs, the order for his discharge should provide that no action be brought against the plaintiff or the sheriff by reason of the capias or the arrest. *Wehrfritz* v. *Russell*, 22 Occ. N. 217, 9 B. C. R. 50.

Ca. re.—*Irregularity or Nullity—Waiver by Giving Bail.*]—After the issue of the writ in an action, a summons was issued intituled "in the matter of an intended action:"—Held, that it was wrongly intituled. A Judge has power to direct a summons to be issued and made returnable in a registry other than that where the writ was issued. By the giving of special bail, a defendant arrested on a capias waives his right to object to the writ. *Tanaka* v. *Russell*, 22 Occ. N. 128, 9 B. C. R. 24.

Ca. re.—*Partnership Action.*] — There is no ground for the issue of a capias in a partnership action in which a fixed sum is claimed from the defendant, being the plaintiff's share in the profits of the partnership, the whole of which the defendant has appropriated. *Ferrics* v. *Vathakos*, 6 Q. P. R. 388.

Ca. re. — *Service Out of Province — Validity.*] — The service, in the province of Ontario, of a capias issued in the province of Quebec, according to the permission of a deputy prothonotary, allowing the service to be made in Ontario on any day and at any hour, is valid. *Bernard* v. *Carbonneau*, 6 Q. P. R. 194.

Ca. sa.—*Concurrent Writ—Expiry of Original—Invalid Arrest—Application for New Writ—Concealment of Material Facts.*]—A concurrent writ of ca. sa. should not be issued after the original writ with which it is concurrent has expired by lapse of time under Con. Rule 874, and a concurrent writ so issued will be set aside as having been improperly issued. The right to make a motion to be discharged from custody upon the merits and upon the ground of concealment by the plaintiff of material facts upon the application founded upon Con. Rule 1047, is confined to the case of an order for arrest made before judgment, and does not extend to a ca. sa. The defendant had been arrested under an invalid concurrent writ of ca. sa., and was in the custody of a sheriff, to the knowledge of the plaintiffs' solicitor, who prepared an affidavit entirely suppressing the fact of the arrest, upon which he obtained an order for and issued a new writ of ca. sa. Upon an appeal to a Divisional Court from an order of a Judge in Chambers refusing to set aside the latter order and writ, and a motion to be discharged:—Held, that the application should not be treated as an appeal upon new material from the discretion of the Judge who made the order, as such an application, having for its object the setting aside of the order and writ, must upon the authorities have failed: Damer v. Busby, 5 P. R. at p. 389. It was really an application to the undoubted jurisdiction of the Court to set aside, in its discretion, orders which had been made by the wilful concealment or perversion of material facts; and a clear case had been made out and the order and writ should be set aside and the prisoner discharged from custody. *Merchants Bank* v. *Sussex*, 22 Occ. N. 387, 4 O. L. R. 524, 1 O. W. R. 572, 584.

Ca. sa.—*Description of Plaintiff—Fee.*]—In a capias issued after judgment the plaintiff may be described as he was in the original action, and this even if he has changed his domicil since the institution of the action. 2. Upon a capias after judgment the fee is the same as upon an alias writ. *Edgerton* v. *Lapierre*, 6 Q. P. R. 434.

Cause of Action—*Tort—Negligence.*]—Under the provisions of paragraph 4 of art. 833, C. P. C., a defendant in an action for personal wrong is subject to arrest; in this case the claim was for damages resulting from injuries sustained by plaintiff by a bicycle ridden by the defendant. *Chouinard* v. *Raymond*, Q. R. 18 S. C. 319.

Coercive Imprisonment — *Judicial Surety—Age Privilege — Personal Notice — Property—Time — Appeal.*] — A person who becomes security for costs on an appeal bond is a judicial surety and consequently has no age privilege exempting him from coercive imprisonment: art. 833, C. C. P. 2. The appearance of the surety, to oppose the issue of a rule nisi for coercive imprisonment, is equivalent to "personal notice" under art. 837, C. C. P. 3. Discussion of the personal and immovable property of the surety, who has made default to pay his bond, is not necessary before the institution of proceedings against him for coercive imprisonment. 4. The creditor is not obliged to wait during the six months allowed for an appeal from a judgment against the surety, before taking proceedings against him for coercive imprisonment. *Burland* v. *Lamoureux*, Q. R. 25 S. C. 98, 6 Q. P. R. 106

Coercive Imprisonment—*Jurisdiction—Amount of Judgment — Adding Costs to.*] — The costs cannot be added to the damages adjudged to make the amount up to $50 in order to justify an application for arrest in an action for personal wrongs. *Campbell* v. *Jaslow*, 7 Q. P. R. 78.

Coercive Imprisonment — *Order for — Notice of Proceeding on—Petition to Set Aside Order.*]—A petition against a judgment will not be entertained, where it is alleged that such judgment was not in fact rendered, if the petitioner has not inscribed en faux against such judgment. 2. No notice to the party is required before putting into execution an order for coercive imprisonment upon a writ or order of the Court in terms of art. 838, C. P. *Clément* v. *Bilodeau*, 6 Q. P. R. 60.

Coercive Imprisonment.— *Pleading — Conclusion of Declaration.*]—If a plaintiff's claim in its nature is such that it may afford ground for coercive imprisonment in execution of the judgment, conclusions to that effect

may be made in the declaration, provided the judgment sought is for a sufficient amount. *Meloche* v. *Lalonde*, 6 Q. P. R. 268.

Coercive Imprisonment—*Proceedings—Irregularity.*]—Proceedings leading to coercive imprisonment ought to be marked with certainty and full regularity and no rule will be maintained if the proceedings are irregular. *Mutual Life Assurance Co. of Canada* v. *Lionais*, 6 Q. P. R. 359.

Coercive Imprisonment — *When Writ may Issue.*]—A writ of contrainte par corps can only be enforced according to law (ordinance 1667, title 34, article 11) fifteen days after "signification" of the judgment which orders it; and, at all events, fifteen days after the date of the judgment. *Demers* v. *Payette*, Q. R. 26 S. C. 534.

Contrainte par Corps—*When Claimable—Action for Damages—Malice.*]—An action for damages against a person who has out of malice closed a tap used for the purpose of supplying his co-tenant with water, is not an action in which the plaintiff can claim contrainte par corps in default of payment of the damages awarded; and a claim for that relief will be struck out upon demurrer. *Phaneuf* v. *Knight*, 5 Q. P. R. 70.

Contrainte par Corps—*Executor—Account.*]—Civil imprisonment of a testamentary executor will not be ordered in an action in contestation of his account and to recover the alleged share of the plaintiff in the reliquat of such account. *Morris* v. *Meehan*, 6 Q. P. R. 43.

Contrainte par Corps — *Judgment — Moneys Collected—Judicial Authority.*]—To be subject to arrest by virtue of art. 833, C. P., a person must have had the care of moneys or other effects by virtue of judicial authority, and not otherwise. 2. A secretary-treasurer engaged by the syndics of a parish to raise the amount of a note for the construction of a church is not subject to arrest upon a judgment condemning him to restore moneys received by him in such capacity. *Syndics of the Parish of St. Antoine de Longueuil* v. *Gingras*, 3 Q. P. R. 557.

Contrainte par Corps — *Judgment Debtor — Concealment of Property.*]—Held, affirming the judgment in Q. R. 16 S. C. 393, that in the law of the Province of Quebec, even since the new Code of Procedure, the capias ad respondendum still exists, and may be issued not only before but after judgment, as a means by which a creditor may arrest his debtor who, in order to defraud and cause the creditor to lose his remedy, conceals and abstracts his (the debtor's) property. 2. Article 897, C. P. C., does not contradict art. 832. The latter only applies to contrainte par corps, while the former refers to a capias, two absolutely different things. *Elliott* v. *Quebec Bank*, Q. R. 9 K. B. 532.

Contrainte par Corps — *Release—Assignment of Property—Security—Time.*] —A debtor in respect of damages adjudged against him for slander, and upon the point of being imprisoned under a writ of contrainte par corps, may obtain a stay of the writ if he makes an assignment of his property, provided that he furnishes security to place himself in the custody of the sheriff whenever he shall be required to do so. But the transfer of the property effected by the contrainte par corps does not permit of his being released before the expiration of the time allowed to creditors to contest it. *Fréchette* v. *Prevost*, 4 Q. P. R. 404.

Contrainte par Corps—*Right to—Personal Injuries—Accident.*]—Injuries caused by a simple accident resulting from the negligence of a person, without any intention on his part to injure, are not personal injuries on account of which coercive imprisonment can be ordered against such person. *Chartrand* v. *Smart*, Q. R. 23 S. C. 304, 5 Q. P. R. 173.

Contrainte par Corps—*Service on Defendant's Attorney.*]—After judgment against the defendant in an action for libel, the plaintiff made a motion for a rule nisi for contrainte par corps:—Held, that service of notice of such motion upon the defendant's attorney ad litem, authorized by an order of the Court, was legal and valid. *Lumb* v. *Kellan*, 4 Q. P. R. 42.

Contrainte par Corps—*Writ—Exhaustion—Deputy-prothonotary.*]—A writ or order of the Court or Judge for coercive imprisonment is exhausted by the imprisonment of the debtor, followed by his liberation, and no new arrest or imprisonment can thereafter be executed in virtue of the said writ. 2. A writ or order for coercive imprisonment cannot be issued by a deputy-prothonotary of the Court, and an imprisonment effected in virtue thereof is illegal. *Gaudet* v. *Archambault*, 6 Q. P. R. 27.

Commitment in Civil Matter—*Habeas Corpus — Jurisdiction — Irregularities — Valuation of Goods—Bailiff—Contrainte par Corps—Costs.*]—A person who is restrained of his liberty under a warrant of commitment granted in a civil matter by a Court or Judge having jurisdiction, is not entitled to liberation under a writ of habeas corpus (art. 1114, C. C. P.), and more particularly where no excess of jurisdiction is shewn. 2. Even if it were assumed that, notwithstanding the terms of art. 1114, the Court has power to inquire into the regularity of the proceedings, the absence in the rule and commitment of a valuation of the goods, upon payment of which the guardian in default to produce goods would be entitled to be released, cannot be invoked by him as a ground for asking his liberation,—such valuation, under art. 658, C. C. P., being a right to be exercised by the guardian in default, and not a duty imposed upon the seizing creditor. 3. A bailiff of the Superior Court has concurrent jurisdiction with the sheriff, for the execution of a writ for coercive imprisonment. 4. The fact that the writ of contrainte par corps, under which the petitioner for habeas corpus is detained, calls on him to pay, in addition to the debt and taxed costs, the costs of the writ of contrainte and of the arrest and commitment of the petitioner, is not an irregularity. *Ex p. Kenotasse*, Q. R. 13 K. B. 185, 6 Q. P. R. 89.

Discharge—*Terms — Action — Costs — Discretion.*]—Where an order to arrest is made upon materials which justify it, although the defendant may be discharged from

custody under it upon fresh affidavits, the Judge may, in his discretion, impose terms of bringing no action, and may withhold costs. *Sullivan* v. *Allen*, 21 Occ. N. 161, 1 O. L. R. 53.

Disobedience of Decree for Payment of Money.]—Where the defendant made default in paying to the plaintiff, under the decree of the Court, a sum of money received by the defendant as a donatio mortis causa in favour of the plaintiff, an order was granted for an execution against his body. An order for an execution against the body of a party in default under a decree for payment of money will not be granted where the Court is satisfied that the party in default has no means, and has not made a fraudulent disposition of his property, and his arrest is sought for a vindictive purpose, or to bring pressure to bear upon his friends to come to his assistance. *Thorne* v. *Perry*, 21 Occ. N. 542, 2 N. B. Eq. Reps. 276.

Intent to Quit Ontario—Alimony—Desertion of wife—Return to Ontario—Fraudulent Intent—Discharge—Terms—Restraint on disposition of property. *Southorn* v. *Southorn*, 2 O. W. R. 1189, 3 O. W. R. 51.

Intent to Quit Ontario—Discharge—Disposition of property. *Thompson* v. *Greene*, 3 O. W. R. 310.

Intent to Quit Ontario—Intent to Defraud—Foreigner. *Henry* v. *Ward*, 1 O. W. R. 222, 655, 2 O. W. R. 422.

Intent to Quit Province—*Negativing—Order Set Aside—Appeal—Inference—Effete Order—Costs.*]—The defendant was arrested under an order for arrest granted on the affidavit of the plaintiff's solicitor that he had probable cause for believing, and did believe, that the defendant, unless he was arrested, was about to leave the Province. The order for arrest was set aside, and the bond directed to be delivered up to be cancelled by order of a Judge, who was satisfied, on reading the affidavits produced before him, that the defendant, at the time of his arrest, was not about to leave the Province:—Held, that the order was one that the Court on appeal would not interfere with. 2. Following Hunt v. Harlow, 1 Old. 709, that a statement of belief that the defendant is about to leave the province being all that is required under the practice to procure an order for arrest, the defendant is entitled to be discharged if he negatives that intention, unless the plaintiff can state facts from which it can be clearly inferred that it was the intention of the defendant to leave. 3. That such an inference was not to be drawn from affidavits merely tending to shew that defendant was keeping out of the way to avoid service of an order for his examination under the Collections Act. —4. That it would be futile to allow the plaintiffs' appeal, as, at the time the order for the defendant's examination under the Collections Act was served, the order for arrest was effete, and the bond cancelled, and no stay of proceedings had been obtained, and the liability of the sureties could not be restored. 5. That while the defendant was entitled to have the plaintiffs' appeal dismissed with costs, the costs must be set off against the plaintiffs' judgment in the action. *McLaughlin Carriage Co.* v. *Fader*, 34 N. S. Reps. 534.

Judgment against Married Woman—Proprietary liability—Form of order—Intent to quit Ontario. *Doull* v. *Doelle*, 4 O. W. R. 525, 5 O. W. R. 238, 253, 413, 6 O. W. R. 39.

Judgment Debtor—*Application for Discharge — Interest in Real Estate — Growing Crops—Tenancy by the Curtesy.*]—A judgment debtor, having made application to be discharged from custody under an execution issued out of a justice's court, in the course of his examination disclosed that he and his wife resided upon land of which his wife had the fee, and that there were growing crops upon it created by his labour:—Held, that, as this disclosed an interest in real property that could not be taken under an execution issued out of a justice's Court, the debtor could not be discharged. The husband's estate of curtesy exists during the lifetime of the wife. *Ex p. Geldert—In re Geldert* v. *Boar*, 34 N. B. Reps. 612.

Order for—Defendant in custody on criminal charge — Motion to set aside order — Forum. Greer v. Powell, 2 O. W. R. 94.

Order for—Intent to quit Ontario—Motion for discharge—Bail—Rule 1047. *Adams* v. *Sutherland, Josh* v. *Sutherland*, 6 O. W. R. 434, 10 O. L. R. 645.

Order for Discharge — *Jurisdiction — Facts Appearing in Order—Disclosure—Certiorari.*]—An order of discharge made by a clerk of the peace under 59 V. c. 28, s. 32 (N.B.), which states that the party discharged had been in custody in the county of Victoria by virtue of an order of render made by the police magistrate of the district of Andover and Perth Civil Court; that due notice of disclosure had been given; and that the hearing took place at the time and place mentioned in the notice; and is signed by the clerk of the peace for the county of Victoria, is a sufficient statement on the face of the order of the territorial jurisdiction of the officer making the same, and will not be quashed on certiorari. If there is evidence from which the officer making the order for discharge might be satisfied that a full disclosure had been made, the Court will not set aside the order, even though not satisfied that the disclosure is a full one, or of the bona fides of it. *Rex* v. *Straton, Ex p. Porter*, 36 N. B. Reps. 388.

Order for Imprisonment of Debtor—*Right of Appeal—Certiorari—Debtor Divesting Himself of Property—Payment of Another Debt—Statement of Grounds for Order —Evidence Given in Former Proceeding.*]—The fact that, by 61 V. c. 28, s. 8 (N.B.), amending 59 V. c. 28, an appeal to the Supreme Court is given from an order of imprisonment under ss. 46, 48, 49, 51, and 53 of the latter Act, does not deprive a party affected by such order of his right to a certiorari, and the Court will grant the writ, if, in their opinion and discretion, the circumstances warrant it. An order for imprisonment made by a County Court Judge on the ground that the debtor, since being arrested and held to bail, has divested himself of the

means of paying the debt for which he is sued, is bad if it does not shew on its face the grounds upon which it was issued; the mere payment of a bona fide debt, after he is sued, is not such a divesting of property as will render the debtor liable to imprisonment under the Act; and an order based upon the evidence given in a former proceeding against the debtor, and not re-proved upon the hearing of the application for the order in question, is bad. *Rex* v. *Forbes, Ex p. Dean*, 36 N. B. Reps. 580.

Order for—*Notice to Defendant.*]—Under art. 837, C. P. C., an arrest cannot be allowed except upon a special order granted by the Court after notice personally served on the party liable to arrest. *Ridgeway* v. *Buckworth*, Q. R. 18 S. C. 126.

Personal Injuries—*Judgment—Damages—Res Judicata—Assignment for Creditors.*]—The law understands by injury what is said, written, done, or omitted with the design of offending some one in his honour, and by the word personal it includes trespass even without the design of dishonouring. 2. Arrest cannot be ordered for damages caused to some one in his property only. 3. A judgment awarding damages to a person as well for rehabilitation of the molestation to which the defendant has exposed him, as for compensation for the loss of time and disbursements which he has incurred, without making a distinction between these two heads of damages, attributes no part of the sum awarded to personal injuries; and if it did so, it would not afford the answer of res judicata to an application for the arrest of the defendant for non-payment of the sum fixed by such judgment. 4. A debtor who makes an abandonment of his assets, regular and not contested, is exempt from arrest for a cause arising before the filing of his schedule. *Bédard* v. *Grosboillot*, 3 Q. P. R. 372, Q. R. 18 S. C. 363.

Privilege—*Witness—Order for Committal—Habeas Corpus — Order under Collection Act—Excessive Fees—Remedy.*]—The applicant was arrested at the city of Halifax, at which place he resided, by the sheriff of the county of Halifax, under an order for his arrest, on the 11th February, 1904, while he was going to his place of business and returning to his home, about three-quarters of an hour after he had left the Police Court at Halifax, where he had attended to prosecute and give evidence as a necessary and material witness for the Crown in a prosecution instituted by himself the previous day for an aggravated assault committed on him on the 6th February, 1904. On a motion to discharge the prisoner from custody, the sheriff to an order in the nature of a habeas corpus, under R. S. N. S. c. 181, "Of securing the Liberty of the Subject," returned the above order for arrest as the cause of the prisoner's detention:—Held, dismissing the application, that, in all the circumstances, and as the Judge's order was of a punitive and quasi-criminal character, the prisoner as a witness was not privileged from arrest under it. 2. That the order was one that could not be impeached under habeas corpus proceedings. 3. That in view of s. 37 of the Collection Act, which makes the judgment of the Judge upon the appeal under the Act final, the prisoner's remedy, if any, was either to tender the amount properly due or to sue for the penalty for taking excessive fees provided by s. 2 of R. S. N. S. c. 185, but that in any event, under s. 40 of the Collection Act, even if the present application lay, as the evidence taken upon the examination shewed that there was ground for making this order, the application should be refused. *In re Brine*, 24 Occ. N. 145.

Privilege—*Execution—Inferior Court — Action on Limit Bond—Assignment by Sheriff on Same Day—Holiday—Sitting of Court.*]—The arrest of a person, having privilege by reason of his being an officer of a Superior Court, under an execution issuing out of the City Court of S., is not void, nor does such privilege afford any defence to an action on a limit bond entered into by such officer in order to obtain his discharge. If two things are done upon the same day, it will be assumed that that which ought to have been first done was so done; therefore in an action upon a limit bond by the assignee of the sheriff, it was held, in the absence of proof to the contrary that, though the assignment and the writ commencing the action was dated upon the same day, the bond was assigned before the writ was issued. The assignment by the sheriff being a mere formality, only going to shew that the assignee was satisfied with the security, the date thereof was immaterial. Where a Court was by statute bound to sit on a certain day in each week unless Christmas Day, New Year's Day, or any other legal holiday should fall upon such day: — Held, that a day proclaimed by the Governor-General and the Lieutenant-Governor as a holiday for a general public thanksgiving was a legal holiday within the meaning of the Act, and that the Court was not bound to sit upon such a day. *Dibblee* v. *Fry*, 35 N. B. Reps. 282.

Simple Arrest—*Motion to Quash Writ—Impeaching Debt.*]—By the new code of procedure, on a petition to quash a simple writ of arrest, the existence of the debt may be impeached; one of the essential allegations of the affidavit made on obtaining the writ being the existence of a debt. *Quebec Bank* v. *Halle*, Q. R. 13 K. B. 44.

See CRIMINAL LAW — MALICIOUS PROCEDURE—PARLIAMENT—SHERIFF—TRESPASS.

ARREST OF JUDGMENT.

See JUDGMENT.

ARSON.

See CRIMINAL LAW.

ARTICLED CLERK.

See SOLICITOR.

ASSAULT.

Action for—*Bar—Conviction.*]—A defendant charged with having committed an assault with intent to do bodily harm, on being asked by the justice whether he would be tried before him summarily or by a jury, elected to be so tried by him, and pleaded guilty. This was objected to by the prosecutor, when the justice stated that he would first ascertain the extent of the assault. After hearing the evidence he adjudicated upon the case and drew up a conviction imposing on the defendant a fine and costs, which the latter paid:—Held, that the justice was acting under the special statutory authority for the trial of indictable offences conferred by ss. 783 (c) and 786, under which the defendant is not relieved from civil proceedings for the same assault. *Clarke* v. *Rutherford*, 2 O. L. R. 206.

Action for—*Justification — Trespass — Ouster—Damages.*]—A plaintiff, who knew the rules of an industrial establishment in which persons from outside were not allowed to speak or communicate with the employés, without special permission, cannot recover from the defendant, manager of such establishment, damages for assault and battery, where the manager ordered him to leave the premises, and, upon his refusal to do so, used ordinary force to eject him; and even if the plaintiff should shew that he was seriously injured by such assault, the action will still be dismissed if it is established that in the course of the resistance and altercation the plaintiff assailed the defendant. *McKitrick* v. *Sangster*, 3 Q. P. R. 449.

Action for—*Particulars.*] — The plaintiff sued for damages for an assault and battery on the 9th April, 1903, on the S.S. "Dahome," then being in Demerara; also for an assault and battery on board the "Dahome," then being on the high seas:—Held, that, as the month of April might cover an assault and battery other than that of the 9th, there ought to be particulars in order to prevent surprise at the trial. An assault is such an easy thing to commit that notice of the particular occasion should be given. *Watson* v. *Leukton*, 23 Occ. N. 247.

Justification—*Removal of Intruder from Legislative Building—Authority of Speaker—Licensee — Damages.*] — To an action for assault, the defendant pleaded that he was chief messenger of the House of Assembly, and that it was one of his duties as such to preserve order and decorum in the House, and about the precincts and corridors thereof; that the plaintiff was creating a disturbance in the House, etc., and interfered with the members of the House in the discharge of their duties, and that the defendant, having first requested the plaintiff to cease making such disturbance, which the plaintiff refused to do, removed her, using no more force than was necessary; that the House of Assembly, through the Speaker, ordered the defendant to remove the plaintiff. It appeared on the trial that, at the time of the alleged assault, the House was not in session, and the jury were instructed that the defence that the defendant was an officer appointed for the purpose of preserving decorum, referred to a disturbance while the House and Committee were in session. The jury found in favour of the plaintiff and assessed the damages at $500:—Held, per Townshend, J., that the alleged assault having taken place outside the portion of the province building exclusively assigned to and occupied by members during the session, the Speaker had no authority, as such, to interfere with the plaintiff, and the justification pleaded by the defendant, that he acted under the orders of the Speaker, would not protect him; that while the damages awarded were high, that was a matter peculiarly for the jury. Per Meagher, J., that no sufficient justification had been established, and the verdict could not be disturbed. Per Graham, E.J., that the plaintiff was only entitled to be, or remain, in and about the corridors, by virtue of some license, express or implied; that questions should have been submitted to the jury as to whether the plaintiff was there bona fide transacting business; whether a reasonable time had not expired; and whether there was not a disturbance constituting an abuse of the license; that either the Speaker or defendant had a right to request the defendant to depart, and had a superior right, which would justify her removal on her refusal to go; that evidence of the defendant acting in the preservation of order was proper evidence to be submitted to the jury. Per McDonald, C. J., that the sergeant-at-arms, or any officer of the House, under the direction of the Speaker, may remove from the House and its precincts, during the session of the legislature, any person who obtrudes himself into the House, or its corridors, or remains there without permission, and in defiance of orders, causing annoyance, discomfort, or interruption to members; that the plaintiff being in the House against the orders of the Speaker, and conducting herself in such a manner as to incommode members in the transaction of public business, her removal was justified. *Hubert* v. *Payson*, 36 N. S. Reps. 211. Reversed, 24 Occ. N. 168, 34 S. C. R. 400.

Police Constable—*Acting Virtute Officii —Malice—Reasonable and Probable Cause—Excess of Violence—R. S. O. 1897, c. 88.*]—The defendant, a police constable of a city, on being directed by the clerk of the market having the superintendence of the market grounds and buildings, and of the persons, horses, and vehicles frequenting it, acting in the supposed performance of, and with a bona fide intention of discharging his duty without any malice, compelled the plaintiff, a driver of a watering cart, to move with his cart from a position he had taken in the market place, in consequence of which a scuffle ensued in which the plaintiff was assaulted and injured. In an action for the assault, the jury found in favour of plaintiff and awarded $300:—Held, on appeal, that the defendant came within the protection afforded by R. S. O. 1897 c. 85, which applies even to officers acting illegally, where they do so in the supposed performance of their duty. 4 O. W. R. 4, 24 Occ. N. 349, 8 O. L. R. 251. Judgment appealed by plaintiff to the Court of Appeal, which restored the judgment at the trial. Kelley v. Barton, 26 O. R. 608, affirmed in 22 A. R. 522, followed. *Moriarity* v. *Harris*, 6 O. W. R. 232, 10 O. L. R. 610.

See CRIMINAL LAW—PARLIAMENT—TRESPASS.

ASSESSMENT AND TAXES.

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I. Assessment Roll.

Contestation—*Prescription — Interruption — Injunction.*] — The contestation of a special assessment roll by a person named therein has not the effect of interrupting prescription as regards other persons subject to such assessment. 2. Even where the party contesting obtains a temporary order enjoining the city against making any collection under the roll attacked, prescription is not interrupted as regards other persons named in the assessment roll, where the making of such order is not objected to by the city, and where no steps are subsequently taken by the city to obtain its rescission. *City of Montreal* v. *Land and Loan Co.*, Q. R. 23 S. C. 461.

II. Charge on Land.

Cost of Road-work—*Personal Liability of Purchaser.*]—A municipal corporation has no right of action to recover the costs of road-work against the subsequent purchaser of the land assessed, but must first take judgment against the person liable for such work. *Township of Roxton* v. *De Lorimier*, Q. R. 24 S. C. 57.

School Rates — *Hypothec—Registration—Judgment—Sale — Interest — Costs — Prescription.*]—School rates constitute a privileged claim upon immovables (art. 2009, 2011, C.C.), and are exempt from the formality of registration (art. 2084, C.C.). 2. Where, under a specific provision of the law, a hypothec exists without registration, a judgment upon the debt does not need to be registered in order to preserve the hypothec, nor does sale purge the property therefrom. 3. The hypothec also covers interest and the costs of a personal judgment against the debtor, such interest and costs being accessories of the debt (art. 2017, C.C.). 4. An action and judgment against the principal debtor interrupt the three years' prescription as against those who acquire the property from him. *Westmount School Commissioners* v. *Pitt*, Q. R. 24 S. C. 7.

School Rates—*Hypothec—Registration—Personal Liability of Purchaser.*]—A person who acquires land after the imposition of a school assessment upon it, is not personally liable for the payment thereof, although the assessment is a special charge upon such property, bearing hypothec without registration. *Roxton School Commissioners* v. *De Lorimier*, Q. R. 24 S. C. 48.

School Rate—*Illegality—Quashing.*] —A motion to quash the rate brought into the Supreme Court by certiorari, 24 Occ. N. 95. In fixing the rate the assessors levied no poll tax, as required by law, thus increasing the tax on property of all the ratepayers:—Held, that the whole rate should be quashed. *In re Cape Breton School Section No. 121*, 24 Occ. N. 238.

School Taxes—Returns of treasurers of school districts — Confirmation — Unoccupied and unpatented lands—Homestead holdings—Liens of loan company — Constructive occupancy. *Re Attorney-General for North-West Territories and Canada Settlers Loan and Trust Co.* (N.W.T.), 1 W. L. R. 225.

III. Collection of Taxes.

Distress—Tender of part—Statute labour — Illegal assessment — Statute — Imperative provision — Costs — Set-off — Solicitor's lien. *Waechter* v. *Pinkerton*, 2 O. W. R. 645, 6 O. L. R. 241.

"Owner"—*Agent for Mortgagees — Conditional Purchase.*] — The plaintiff agreed with mortgagees in possession of the mortgaged land to purchase it at a sum equal to principal, interest, and costs, such purchase to be carried out so soon as the mortgagees should obtain a final order of foreclosure, and in the meantime that he should, as their agent, manage the property:—Held, that the plaintiff, who had not been assessed for the property in question, and against the name the taxes in question had not been charged on the collector's roll, was not an "owner" of the premises within s. 35, s.-s. 3, of the Assessment Act, R. S. O. 1897 c. 224, whereby the collector is authorized to levy unpaid taxes "upon the goods and chattels of the owner of the premises found thereon;" and such taxes could not be levied upon his goods. *Lloyd* v. *Walker*, 22 Occ. N. 256, 4 O. L. R. 112, 1 O. W. R. 383.

"Owner" — *Agreement for Purchase — Part Performance—Local Improvement Rates—Distress Warrant — Abandonment of Distress.*]—A purchaser, who has gone into possession and made part payment of the purchase money under an agreement for the sale of land unexecuted by the vendor, which provides for payment by the purchaser of the taxes, rates, and assessments rated or charged from the date of the agreement, is an "owner" within s. 135 of the Assessment Act, and is liable for the taxes accruing during his occupancy, although they may have been assessed against a former owner. Local improvement rates grouped with other taxes under the Assessment Act, and included in the collector's roll, are taxes, in a broad sense, and may be collected or realized by uniform statutory process. 2. A warrant of distress specifying two bailments is unobjectionable. 3. Where one bailiff had rightly entered and

seized, and had afterwards withdrawn by reason of the misstatements of the owner, it was held competent for another bailiff to return forthwith and continue the first lawful taking. McDougall v. McMillan, 25 C. P. 75, 92, followed. *Sawers* v. *City of Toronto*, 22 Occ. N. 25, 380, 2 O. L. R. 717, 4 O. L. R. 624, 1 O. W. R. 656.

Notice or Demand — *Removal of Goods — Warrant for Distress — "Good Reason to Believe"—Onus.*]—It is essential to the validity of a notice or demand under R. S. O. c. 224, s. 134 (1), that it should, as required by s.-s. (2), contain a schedule specifying the different rates, etc. The question whether the collector has such "good reason to believe" a ratepayer is about to remove his goods as would justify him in obtaining a magistrate's warrant of distress under s. 135 (4) is one for the jury, the onus being upon the collector to prove that he had:—Held, under the circumstances of this case, that he had not, and that the plaintiff was entitled to recover damages for illegal distress. *McKinnon* v. *McTague*, 21 Occ. N. 207, 1 O. L. R. 233.

Personal Property — *Illegal Distress—Action for—Mortgagee's Bailiff.*]—Under s. 135 *a* (1) 3 added to the Assessment Act, R. S. O. 1897 c. 224, by 62 V. (2) c. 27, s. 11, goods which are not in the possession of the person assessed in respect of them cannot be distrained for the taxes assessed against them. Goods which had been mortgaged were when seized in the possession of the mortgagee's bailiff, who had taken possession upon default:—Held, that the bailiff had a right to bring an action for illegal distress. *Donahue* v. *Campbell*, 2 O. L. R. 124.

Warrant—*Payment under Constraint — Illegal Arrest—Action for.*]—A warrant for taxes alleged to be due to the defendants was issued by the town treasurer and placed in the hands of a constable for collection. The constable went to the plaintiff's place of business to collect the amount, but, it being Saturday night, an arrangement was made between the constable and plaintiff that the latter would go up on Monday morning and see about the taxes. The plaintiff went to the treasurer's office and contended that the amount claimed in the warrant had been paid, but, as the treasurer insisted that the amount had not been paid, the plaintiff handed him the amount claimed. It appeared that the amount in dispute was due in respect of a property which the plaintiff sold to Y., who agreed to pay the taxes upon it, and paid the same to the treasurer, intimating that it was paid on account of the plaintiff's property, but that the treasurer appropriated the amount in payment of a like amount due by Y. personally. The plaintiff brought an action for illegal arrest, and claimed as special damage, "amount wrongfully extorted from the plaintiff, as set forth in paragraph 4 of the pleading, $8.25." Paragraph 4, referred to, detailed the issue of the warrant "whereby the plaintiff was unlawfully compelled to pay an illegal demand of the defendants, to wit, the sum of $8.25:" — Held, that, even on the plaintiff's own evidence, the action must fail. *Walker* v. *Town of Sydney*, 36 N. S. Reps. 48.

IV. Equalization of Assessments.

Appeal to County Court Judge—*Time for Judgment—Imperative Enactment.*]—The provision in s.-s. 7 of s. 88 of the Assessment Act, R. S. O. 1897 c. 224, that the judgment of the County Court Judge on appeal from the equalization by the county council of the assessment of the county shall not be deferred beyond the 1st day of August next after such appeal, is imperative. Proceedings for equalization of the assessment, and the rolls of what financial year are to be equalized, considered. Judgment in 3 O. L. R. 169, 22 Occ. N. 48, reversed. *In re Township of Nottawasaga and County of Simcoe*, 22 Occ. N. 172, 4 O. L. R. 1, 1 O. W. R. 278.

V. Exemptions.

Book Debts.]—Book debts are assessable in the city of St. John under s. 121 of 52 V. c. 27 (N.B.), as amended by 63 V. c. 43. Railway bonds secured by mortgage are not exempt under these Acts. *Rex* v. *Sharp, Ex p. Turnbull*, 35 N. B. Reps. 477.

Canadian Pacific Railway — *Branch Lines—Buildings—"Superstructure"—Valuation.*]—Clause 16 (relating to exemption from taxation) of the agreement between the Canadian Pacific Railway Company and the Government of Canada, as embodied in 44 V. c. 1, is not applicable to the Crow's Nest Pass Railway, but is applicable only to the main line of the Canadian Pacific Railway Company, and to such branches thereof as the company was authorized by clause 14 of the agreement to construct from points on the main line, and does not extend to other distinct lines of railway which the company may have been subsequently authorized to construct. Under the Ordinance respecting the Assessment of Railways, C. O. 1898 c. 71, s. 3, the round-houses, station, or office buildings, section houses, employees' dwellings, freight sheds, and other buildings of like nature belonging to a railway company and situated upon it, are not included in the term "superstructure," but may be assessed separately as personal property under the Municipal Ordinance. Such buildings should not be valued as part of the railway as a going concern, and as having a special value as such, but merely at what they are worth separate and distinct from other portions of the railway. When only two and a half stalls of a round-house were situated within the municipality, and the round-house was shewn to be worth $900 a stall, the assessment was fixed at $2,250. *In re Canadian Pacific R. W. Co. and Town of Macleod*, 5 Terr. L. R. 192.

Canadian Pacific Railway Lands—*Twenty Years' Exemption—Grant from the Crown—Taxation by the Dominion—School Taxes—Time of Vesting of Land Granted.*]—The words "grant from the Crown" in clause 16 of the contract between the government of Canada and the promoters of the Canadian Pacific Railway, ratified by Act of Parliament, 44 V. c. 1, mean the letters patent conveying the land, and the twenty years' exemption from taxation provided for in that clause do not begin to run, in respect of any particular parcel, till the date of the letters patent. The words "taxation by the

Dominion" in the same clause do not include taxation by school corporations created by the Government of the North-West Territories under powers of legislation conferred upon it by various Acts of Parliament prior to the statute referred to, and, consequently, the railway company are not exempted by said clause from taxation of their lands by such a school corporation until such lands shall be included in a Province hereafter to be created.—Under the contract referred to and the company's charter of incorporation and the ratifying Act, 44 V. c. 1, it was not intended that they should take any vested interest in any specific lands until actual formal conveyance from the Crown by letters patent in the usual course. *Rural Municipality of North Cypress* v. *Canadian Pacific R. W. Co.*, *Rural Municipality of Argyle* v. *Canadian Pacific R. W. Co.*, *School District of Springdale* v. *Canadian Pacific R. W. Co.*, 23 Occ. N. 159, 14 Man. L. R. 382.

Crown—*Property Bought for School—Collector's Roll.*]—An immovable bought by the government of the province to establish upon it a normal school is not, by the acquisition of it for that purpose, made exempt from municipal taxes.—2. A municipal tax does not become a charge upon immovables which it affects, until the coming into force of the collector's roll. *Corporation of Notre-Dame de Quebec* v. *The King*, Q. R. 25 S. C. 195.

Income—Exemption—Superannuated civil servant—Retiring allowance. *Bucke* v. *City of London*, 6 O. W. R. 406, 10 O. L. R. 628.

Manufacturing Company—*Act of Incorporation—Construction—Scope of Exemptions—"Law"—"County."*]—The plaintiffs were given power by their Act of incorporation (Acts of 1899, c. 84, s. 6) "to purchase, acquire, hold, use occupy, sell, and convey real estate," &c.—By s. 14 it was provided that, if the plaintiffs should locate any of their works in any part of the county of Cape Breton, all the property, income, and earnings of the plaintiffs should be exempt from taxation "under any law, ordinance, or by-law of any municipal or local authority;" provided that such exemption should not apply "to any building used as a dwelling house, or for any purpose not connected with the business of the company, nor to land on which the same is erected."—The defendant municipality sought to assess lands not purchased for the works or operations, or in connection with the operations, of the plaintiffs, and which were offered to the public for sale at a price greater than that paid for them:—Held, that the word "law," as used in s. 14, must be read in the sense of general law of the province relating to assessment, there being nothing in the context to restrict its meaning; that the word "county" must be read as meaning the whole geographical area of the county, including any city or town within its borders; and that the wording of the statute made it clear that, with the exception specifically mentioned, the exemption given to the plaintiffs was intended to apply to all taxation, whether general assessment for the county or local. *Dominion Iron and Steel Co.* v. *City of Sydney*, 37 N. S. Reps. 495.

Personal Property—Exemptions—Trustees—Non-resident beneficiaries—Income of trust estate. *Re Macpherson and City of Toronto, Re Hamilton and City of Toronto*, 1 O. W. R. 234.

Personal Property Owned out of Province — Exemptions — Cash in banks—Trustees. *Re Leadley and City of Toronto*, 1 O. W. R. 239.

Personal Property of Military Persons—*Government Building.*] — Under the provisions of the Halifax city charter, Acts of 1891, c. 58, s. 336, the following, among other property, is exempted from assessment: "All personal property of military persons residing in government buildings, or barracks," etc.:—Held, that a private house in the city, under lease to His Majesty's Principal Secretary of State for the War Department, for the purpose of being used as a place of residence by a military person, for whom there was no suitable accommodation in any barracks in Halifax, was a "government building" within the meaning of the statute, and that personal property contained in such building was exempt from taxation for civic purposes. *Smith* v. *City of Halifax*, 35 N. S. Reps. 373.

Portion of Building — *Assessment of Remainder.*]—The fact that a portion of a building assessed for taxes under the Municipal Ordinance, is occupied by the Crown under lease, and is therefore exempt under s. 121, s.-s. 1, of that Ordinance, does not prevent the remaining portion being assessed for a proportionate part of the value of the whole. *Macleod Improvement Co.* v. *Town of Macleod*, 5 Terr. L. R. 190.

Property of Companies—"*Plant and Appliances*"—*Public Streets of Municipality.*]—The words "plant and appliances" used in s.-s. 4 of the new s. 18 of the Assessment Act, substituted by 2 Edw. VII. c. 31, s. 1, are confined to any plant and appliances located upon the streets, roads, highways, and other public places in the municipality, such words taking this limited meaning because they must be referred to the words "rolling stock" which immediately precede them in the same sub-section, and because it was manifestly the intention of the Legislature in enacting a new s. 18 to deal only with the method of assessing so much of the property of the companies named in s.-s. 2 as was situate upon the public streets of the municipality. *In re City of Toronto Assessment*, 22 Occ. N. 390.

Property of Municipality Situate in Another Municipality.] — Upon the proper construction of s. 7, s.-s. 7, of the Assessment Act, R. S. O. 1897 c. 224, providing that "the property belonging to any county or local municipality" shall be exempt from taxation, property acquired by the corporation of a town, under a special Act, 62 V. c. 64 (O.), as amended by 2 Edw. VII. c. 53, situate in a neighbouring township, at a distance of 19 miles from the town, and consisting of land, buildings, machinery, and plant for the purpose of generating and transmitting electrical energy to the town for lighting, heating, manufacturing, and such other purposes and uses as might be found desirable with power to distribute, sell, and dispose of such electrical power in the town and elsewhere within a radius of 25 miles, is exempt from taxation by the township corporation. *In re Town of Orillia and Township*

of Matchedash, 24 Occ. N. 216, 7 O. L. R. 389, 3 O. W. R. 91.

Railway—*General Assessment Act—Construction—Application to Railways of Coal Company.*]—The Assessment Act, R. S. N. S. 1900 c. 73, s. 4, s.-s. (p), (as amended by Act of 1902, c. 25), exempts from taxation "the road, rolling stock, bed, track, wharves, station houses, buildings, and plant used exclusively for the purpose of any railway either in course of construction or in operation under the authority of any Act passed by the legislature of Nova Scotia:"—Held, that this exemption extended to all lines of railway built, owned, or operated by the plaintiffs, including road bed, right of way, piers, and plant and appurtenances of extensions sought to be assessed by the defendants, but not to lands which formed no part of the land used exclusively for railway purposes, or which, having been at one time so used, had been abandoned or appropriated to other purposes, or to a steamer used solely for the company's own purposes.—It could not have been the intention of the legislature, in granting exemption, to permit a general system of railways and connections to be so cut up that certain parts should be liable to taxation while other parts were exempted. Neither is it sufficient to deprive a company of the benefit of exemption that, at the time in question, only coal mined by the company is carried over one of its extensions, there being provision under the Railway Act to compel it, if necessary, to carry freight for any other person or company. *Dominion Coal Co. v. City of Sydney*, 37 N. S. Reps. 504.

Railway—Track along highway—Orders in council—Statutes—Contract. *Re Grand Trunk R. W. Co. and City of Toronto*, 2 O. W. R. 602, 4 O. W. R. 450, 6 O. W. R. 27, 852.

Railway—*Imposition of Tax—Date—Municipal Act.*]—Section 3 of R. S. N. S. 1900 c. 73 (Assessment Act) exempted from taxation "the road, rolling stock . . . . used exclusively for the purpose of any railway, either in course of construction or in operation, exempted under the authority of any Act passed by the Legislature of Nova Scotia." Prior to the passing of this Act the appellants' railway had always been exempt from taxation, but all former Assessment Acts were repealed by these Revised Statutes, so that it was not "exempted" when the latter came into force. By 2 Edw. VII. c. 25, assented to on the 27th March, 1902, the word "exempted" was struck out of the above clause, and in May, 1902, the appellants were included in the assessment roll for that year for taxation on their railway:—Held, per Taschereau, C.J., that under the above recited clause the railway was exempt from taxation:—Held, per Davies, Nesbitt, and Killam, JJ., that, if the railway could be taxed under the Assessment Act of 1900, the rate was not authorized until the amending Act of 1902, by which it was exempt, had come into force, and no valid tax was, therefore, imposed. *Dominion Iron and Steel Co. v. McDonald*, 24 Occ. N. 286, 35 S. C. R. 98.

Railway Mortgage Bonds.]—The whole of an estate of a deceased person, liable to be assessed in the city of St. John, may be rated in the names of the resident trustees under 52 V. c. 27, s. 135, though one of the three trustees in whom it invested, is resident abroad. Railway bonds, secured by a mortgage, are not mortgages within the meaning of s. 121, as amended by 63 V. c. 43, and are not exempt from taxation. *Rex v. Sharp, Ex p. Lewin*, 35 N. B. Reps. 470.

Railway Lands—*School Taxes—By-law—Validating Statute.*]—In 1881 the plaintiffs passed a by-law, No. 148, providing for a bonus to the defendants in consideration of certain works to be undertaken by the defendants, and also providing that the defendants should be forever exempt from all "municipal taxes and rates, levies and assessments, of every nature and kind." In 1883 the Legislature of Manitoba passed an Act making valid by-law No. 148 of the city of Winnipeg, describing it as a by-law for a bonus, but omitting all reference to the exemption clause:—Held, affirming the judgment in 12 Man. L. R. 581, 19 Occ. N. 287, that the statute made valid the whole by-law 148, that relating to exemption from taxes, as well as the portion recited in the Act:—Held, also, reversing the judgment, that under the by-law school taxes were included in the exemption from "all municipal taxes." *City of Winnipeg v. Canadian Pacific R. W. Co.*, 20 Occ. N. 433, 30 S. C. R. 558.

School Taxes—*Recovery of Taxes Paid by Mistake—Court of Revision.*]—Certain of the plaintiff's lots were by by-law of the defendant municipality "exempted from payment of taxes," for the year 1899 and other years. The said lots were assessed for taxes for the said year "for school purposes only." Thereafter the plaintiff received from the defendant a statement and demand for payment within 30 days of the taxes on the said lots for the said year, and "in consequence of the said demand" paid the same:—Held, that, assuming the plaintiff was entitled to exemption from taxation for school purposes, this did not amount to such an involuntary payment as would entitle the plaintiff to recover the amount so paid. Effect of decision of Court of Revision discussed. *Spring-Rice v. Town of Regina*, 5 Terr. L. R. 171.

Trustees—*Income.*]—Under s. 46 of the 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 set-off against it:—Quære, whether the amendment to the section by 63 V. c. 34, s. 3, affects the question. *In re McMaster and City of Toronto*, 21 Occ. N. 559, 2 O. L. R. 474, 1 O. W. R. 98.

Unoccupied Lands of Crown—*Land Grant of Canadian Pacific Railway Company.*]—Crown lands which have been set apart for the land grant of the Canadian Pacific Railway Company, and earned by that company as part of its land grant under the schedule to 44 V. c. 1. "An Act respecting the Canadian Pacific Railway," but which have never been sold or occupied by the company, are exempt from taxation by school districts in the Territories, by virtue of s. 16 of the schedule. Construction of statutes discussed. *Balgonie Protestant Pub-*

lic School Trustees v. *Canadian Pacific R. W. Co.*, 5 Terr. L. R. 123.

VI. Local Improvement Districts in N. W. T.

Assessment by Wrong Name—*Mistake in Acreage—Directory Statute—Time for Assessing—Notice—Order in Council—Exceptional Tax—Powers of Legislature of Territories.*]—The defendants were sued by their proper corporate name, but were assessed as "the Hudson's Bay Company:"—Held, that the assessment was not void, no injury being shewn; nor would an error in acreage avoid the assessment. The statute is merely directory on these points. 2. Under s. 17 of c. 17 of the N. W. T. Ordinances of 1899, in a district constituted under s. 14, the assessment may be made at any time of the year; and, although the district was only constituted on the 21st July, 1899, under an Ordinance which came into force on the 24th April, 1899, an assessment made on the 24th July, 1899, for the whole year 1899, was valid. 3. The formalities prescribed by s. 3 of c. 73 of the Consolidated Ordinances are unnecessary, except the publication in the Gazette of a notice of the order constituting the district; and a mistake in the number of the district in the publication in the Gazette was not fatal. 4. The district was legally constituted by order in council of the 21st July, 1899; the area was independent of municipalities and villages within its boundaries. 5. The Ordinances respecting public improvements enacted by the Legislative Assembly, under the provisions of which this district was constituted and the assessment complained of made, rendering taxable equally and without exception or discrimination all lands within its limits, do not infringe upon the condition of clause 11 of the Imperial order in council of the 23rd June, 1870, by exceptionally placing a tax upon the lands in question; and from such construction there has been no departure by the Ordinances referred to. *McGowan* v. *Governor and Company of Adventurers of England Trading into Hudson's Bay*, 21 Occ. N. 64.

Conditions Precedent—*Notice—Dominion Lands—Personal Liability.*]—On the 9th May, 1899, an order in council was passed and published in the *Gazette* ordering that a certain defined area should be formed into a local improvement district:—Held, that as the lands comprised exceeded 72 square miles, the authority for creating it was to be found in s. 14 of c. 17 of the Ordinances of 1899, amending the Local Improvement Ordinance, R. O. c. 73:—Held, that the conditions prescribed by R. O. c. 73, as to municipalities in the district, population, and notice of intention to erect a district, did not apply to districts formed under s. 14 of the Ordinance of 1899. 2. That, although the district was not constituted till May, 1899, the levy of the whole of the taxes for that year was authorized by the Ordinance. 3. That the defendants were properly assessed as occupants of Dominion lands comprised in a lease, and the fact that the lands were not enclosed and that the defendants permitted the stock of other persons to run or graze upon them did not relieve them from liability as occupants. 4. That it is the owners or occupants, and not the lands, that are to be assessed. *Crosskill* v. *Sarnia Ranching Co.*, 21 Occ. N. 577.

VII. Property Assessable.

British Columbia Assessment Act—"*Income.*]—Held, that, on the true construction of the British Columbia Assessment Act (R. S. c. 179), the word "income" includes all gains and profits derived from personal exertions, whether such gains and profits are fixed or fluctuating, certain or precarious whatever may be the principle or basis of calculation. Judgment in In re Assessment Act, 9 B. C. R. 209, reversed. *Attorney-General of British Columbia* v. *Ostrum*, [1904] A. C. 144.

Debts—*Situs—Double Domicil—School Ordinance.*] — The School Ordinance, C. O. 1898 c. 75, s. 131, s.-s. 2, interprets "personal estate" and "personal property" as including inter alia "accounts and debts contracted within the district;" and s. 132 provides that "All real and personal property situated within the limits of any school district . . . shall be liable to taxation"—subject to certain exceptions and exemptions:—Held, (against the objections, (1) that debts have no situs, and therefore cannot be situated anywhere; and (2) if they can have a situs, it is, in the case of a creditor being a person, his domicil; and of a corporation, the place of its head office); that choses in action, including debts, have a situs; that debts contracted within a school district are, for the purposes of taxation, situate within the district, and are assessable by the district notwithstanding that the creditor, if a person, has not his domicil therein, or if a corporation has not its head office situated therein. To the situs of a debt is the domicil of the creditor, a person as well as a corporation may have, if not for all, at all events, for some purposes, more than one domicil, namely: (1) at the head office of the corporation, and at the actual residence of the person; and also (2) where the business of the corporation, or person, is actually carried on; and, therefore, where the Hudson's Bay Company, whose head office is in London, England, carried on at Battleford an ordinary merchant's business, and Macdonald, whose actual residence was in Winnipeg, Manitoba, also did the same, debts contracted to them at the Battleford places of business were, for the purpose of taxation, situated in Battleford. *Hudson's Bay Co.* v. *Battleford School District*, *Macdonald* v. *Battleford School District*, *Clinkskill* v. *Battleford School District*, 4 Terr. L. R. 285.

Homestead—*Crown.*]—The plaintiff's husband, in 1882, became the holder of a homestead claim, part of the Dominion railway belt, and in October, 1897, a Crown grant was issued to the plaintiff at the instance of her husband and herself. The defendants sought to assess the land for taxes from 1892 to 1897:—Held, that where the fee still remains in the Crown, the interest of the holder of a homestead claim is not subject to taxation by a municipality, although the holder personally is. *Kier* v. *Municipality of Matsqui*, 22 Occ. N. [illegible] 289.

Income of Foreign Insurance Company—*Investments.*] — An insurance company, having its head office in Scotland, had ceased to do any new business in Canada, but invested some of its money there, and had

an agent in Toronto who collected premiums on the old business and adjusted losses, and also employed a solicitor in Toronto and maintained an advisory board to look after investments, none, however, being made without reference to the home board. Payments of interest on some investments were made to the solicitor and by him deposited to the credit of the company in a Toronto bank, and other payments were remitted by the borrowers by draft direct to the company:—Held, that the money paid into the bank was in the possession of an agent for the owner, a person non-resident within the Province, within the meaning of s. 11 of the Assessment Act, and was personal property of an incorporated company, within s. 39, and was therefore assessable, Toronto being "the usual place of business" of the company, within s. 40. City of Kingston v. Canada Life Assurance Co., 19 O. R. 453, distinguished. Phœnix Insurance Co. v. City of Kingston, 7 O. R. 343, and Re North of Scotland Mortgage Co., 31 C. P. 552, followed.—But the interest remitted direct to Scotland was not assessable as income or personal property. *In re Edinburgh Life Ins. Co.*, 21 Occ. N. 38.

Income of Government Officials.]—The income which a person receives as an employé of the Government of the North-West Territories is taxable, by virtue of the Municipal Ordinance, notwithstanding that the General Revenue Fund of the Territories, from which income is paid, is formed in part of a grant from the Dominion Government made "for schools, official assistance, printing, etc." *Robson* v. *Town of Regina*, 4 Terr. L. R. 80.

Income of Locomotive Engineers.]—The earnings of railway locomotive engineers who receive pay according to the number of miles they run their locomotives, are not "income" within the meaning of that term as used in the Assessment Act prior to the Amendment of 1901, and are therefore not liable to taxation. Decision in 9 B. C. R. 90 reversed. *In re Assessment Act*, 9 B. C. R. 209.

Interest of Lessee from Crown—*Local Improvements—Sidewalk.*]—Under an agreement of the 20th March, 1889, entered into by the Crown, as representing the University of Toronto, and the city of Toronto, confirmed by 32 V. c. 53 (O.), College street in the city of Toronto has become so far a public highway of the city as to make the interest of a lessee from the Crown of land fronting on that street liable to assessment for the due proportion of the cost of the construction, as a local improvement, of a sidewalk in front of the leased land, even though the lease has been made before the agreement. *In re Leach and City of Toronto*, 22 Occ. N. 406, 4 O. L. R. 614, 1 O. W. R. 661.

Land and Improvements Belonging to Dominion Government—*Assessment of Occupier of — Description — Municipal Clauses Act—Court of Revision—Appeal—Action.*]—The defendant was the occupier of one of several stores on the ground floor of a building belonging to the Dominion Government, and was assessed under s. 168, s.-s. 4 (*a*), of the Municipal Clauses Act, for taxes in respect of land and improvements. The assessment roll described the property as "parts of lots 1, 605, and 1, 607, block 1; measurement 23 x 66; Government street; land, $12,650; improvements, $920; total, $13,570:"—Held, that the defendant was an occupant of part of the improvements only, and not of the land. 2. The assessment was invalid because the lands and improvements were insufficiently described. 3. The Act provides no procedure for such an assessment. —4. Where an assessment is illegal, the person assessed is not bound to appeal to the Court of Revision, but may successfully raise the question of his liability in an action to recover taxes. *City of Victoria* v. *Bowes*, 22 Occ. N. 218, 8 B. C. R. 363.

Land and Plant of Companies——*2 Edw. VII. c. 31, s. 1 (O.)—Application to Oil Company.*]—The provisions of s. 18 of the Assessment Act, as amended by 2 Edw. VII. c. 31, s. 1, relating to the assessment of the land and other property to be regarded as land, of certain companies, apply only to companies of the specific description therein mentioned, and therefore do not apply to such a company as the Canadian Oil Fields, Limited, carrying on the business of procuring and transmitting crude petroleum. *In re Canadian Oil Fields, Limited, and Township of Enniskillen*, 24 Occ. N. 82, 7 O. L. R. 101, 3 O. W. R. 253.

Land and Plant of Companies—*Electric Railway Company—Cars—Res Judicata —Court of Revision—Appeal.*]—Under R. S. O. 1897 c. 224, the personal property of the appellant railway company is exempt from assessment (s. 39, s.-s. 2), while its real estate (s. 2, s.-s. 9) includes everything affixed to the land, and all machinery or other things so fixed to any building as to form in law part of the realty:—Held, that its electric cars are personal estate, inasmuch as they are not part of the railway and are not fixed in any sense to anything which is real estate:—Held, also, that a decision between the same parties by the Court of Revision, established under s. 62 of the above Act, and of the Courts in appeal therefrom, to the effect that the electric cars were assessable, is not res judicata. By s. 68 the jurisdiction of those Courts is confined to the amount of assessment, and does not extend to validate an assessment unauthorized by the statute. Judgment of the Court of Appeal (1 O. W. R. 441, 2 O. W. R. 579, 6 O. L. R. 187, 22 Occ. N. 206), reversed. Bank of Montreal v. Kirkpatrick, 2 O. L. R. 113, overruled. *Toronto R. W. Co.* v. *City of Toronto*, [1904] A. C. 809.

Personal Property—Choses in action—Property not already assessed—Court of revision. *Re Nasmith and City of Toronto*, 1 O. W. R. 238.

Personal Property of Bank—"*Diligent Inquiry*"—*Statute—Imperative or Directory—Notes and Cheques on Other Banks.*]—The failure of an assessor to make "diligent inquiry," is not fatal to the validity of the assessment; the provision in the Municipal Ordinance in that respect being merely directory. Commercial paper (such as notes and cheques on other banks) held by a branch of a chartered bank are "personal property," and a branch bank holding such paper is liable to assessment in respect thereof. *Union Bank of Canada* v. *Town of Macleod*, 22 Occ. N. 310, 4 Terr. L. R. 407.

VIII. Special Taxes.

Fire Insurance Company—"*Doing Business.*"]—Action to recover $400, being

the amount of special tax imposed by the city of Montreal upon fire insurance companies doing business within the city. The defendant company contended that it did not come within the provisions of the by-law in question, since it took no risks in the city, although its chief office was there:—Held, that the issue of a policy in Montreal was the acceptance of a risk in the city, even though the property thereby insured was situated outside the city. *City of Montreal* v. *Union Mutual Fire Ins. Co.*, 21 Occ. N. 52.

Local Improvement Rates — Owner — "Taxable person"—Petition—Two-thirds in number of owners—One-half in value of real property benefited—Charge on land—Distress—Invalid by-law—Validating statute—Effect of—Frontage tax—Special rate. *McDonnell* v. *City of Toronto*, 1 O. W. R. 433, 494, 4 O. L. R. 315.

Local Improvements—*Establishment of District—Notice—Error in Number—Wrong Name—Time for Assessing—Exceptional Tax—Construction of Taxing Statutes—Conditions Subsequent.*]—The designation of a local improvement district by an incorrect number, while its name was otherwise correctly stated in the notice in the Gazette constituting the district, did not invalidate the notice. 2. The assessment of the defendants was not invalid by reason of their being assessed under the name of "The Hudson's Bay Company"—a name by which they were commonly designated by themselves and the public. 3. That, though the district in question was not constituted until July, 1899, and the defendants not assessed till August, 1899, they were liable for the whole amount for which they were assessed, the rate of assessment being a fixed rate per acre, irrespective of time, and the assessor being expressly authorized to assess at any time during the year. 4. That the assessment of the defendants under the Ordinances in question is not an exceptional tax upon them within the meaning of the Imperial Order in Council of 23rd June, 1870, inasmuch as it was equal and uniform throughout the district. The construction of statutes generally and of the Ordinances relating to local improvements in particular discussed. The construction of taxing statutes discussed. The effect of non-fulfilment of statutory conditions subsequent discussed. *McGowan* v. *Governor and Company of Adventurers of England Trading into Hudson's Bay*, 21 Occ. N. 64, 5 Terr. L. R. 147.

Local Improvements — *Unenclosed Lands under Lease from Crown* — "*Occupant*"—*Personal Liability.*]—Where lands are held under lease from the Crown, and, though they are not enclosed or fenced, the lessee uses them as pasture for his sheep, the lessee is an "occupant" of the lands within the meaning of the Local Improvement Ordinance, C. O. 1898 c. 73, s. 15. Notwithstanding the wording of s. 16, s.-s. 2, and of s. 17, of the said Ordinance, the effect of the provisions of ss. 15, 20, and 23 is to create a personal liability to pay, upon which the occupant may be sued. *Crosskill* v. *Sarnia Ranching Co.*, 21 Occ. N. 577, 5 Terr. L. R. 181.

Local Tax — *Insurance Company* — *Agency.*]—In an action against an insurance company under the Fire Companies' Aid Amendment Act of 1871, which applies only to Victoria, for taxes due by it as a company issuing policies within the city limits, it was held at the trial, dismissing the action, that the plaintiff had failed to establish agency:—Held, by the full Court, dismissing plaintiff's appeal, that the action was misconceived; that the tax sought to be recovered was not on the company directly, but in respect of a special form of agency described in the statute; and the evidence negatived the existence of such an agency. *Dowler* v. *Union Assurance Society*, 9 B. C. R. 196.

Local Improvements—*Sidewalk—General By-law—Irregularities in Procedure.*]—The defendant corporation provided, by a by-law under s. 667 of the Municipal Act, that every petition for or against the construction of a sidewalk as a local improvement should be left with the clerk of the council, whose duty it should be to examine it, and to report at the next meeting of council whether it was sufficiently signed, what real property would be benefited, and the respective frontages, and the probable lifetime and probable cost of the sidewalk. A petition for the construction of a sidewalk as a local improvement was handed to the clerk, who examined it and came to the conclusion that it was signed by two-thirds of the owners. It was on the same day presented to the council, who resolved that the petition should be granted, and that the clerk should determine forthwith whether the petition was sufficiently signed. The clerk immediately reported that it was sufficiently signed, and his report was received and adopted, but he did not report as to the other matters. The council then proceeded under s. 672 to have the work done, and on its completion the clerk prepared, and certified to the correctness of, a schedule of the frontages and assessments, etc., and the council passed a by-law directing the assessment of the lands, and subject to appeal to the Court of Revision, adopted the particulars set out in the schedule and directed notice to be given to the owners affected:—Held, that the assessment was valid, the clerk's failure to observe the provision as to reporting at the next meeting of the council being a mere irregularity and not a fatal objection. Judgment of Falconbridge, C.J., 2 O. W. R. 732, affirmed. *Canada Co.* v. *Town of Mitchell*, 24 Occ. N. 210, 7 O. L. R. 482, 3 O. W. R. 478.

Lottery—*Permit — Date of Payment — Exorbitancy — Constitutionality.*]—The date at which a tax, under the form of a permit, imposed on every person or company carrying on the business of a lottery, ought to be paid, is sufficiently indicated when the by-law imposing it declares that such permit is a tax payable annually within the periods fixed by the city charter, that it will expire on the 1st May after it has been issued, and will be renewed every year upon demand.—2. A tax cannot be called exorbitant when it does not exceed the amount fixed by the charter of the city for the particular thing to which such tax applies.—3. The Legislature has power to authorize the imposition of taxes, under the form of permits, to persons or companies carrying on lotteries. *Société des Ecoles Gratuites* v. *City of Montreal*, Q. R. 19 S. C. 148.

Poll Tax—*Municipality—Non-resident—Civil Servant—Recovery Back.*]—The plaintiff, an employé in the library of the Provincial Legislature in the city of Quebec, sued the city corporation to recover back $26 paid by him at the rate of $2 a year for thirteen years in respect of a capitation tax imposed by virtue of 40 V. c. 52, s. 3. The plaintiff did not live in the city, but performed his daily duties there:—Held, that he was not liable to the tax, and was entitled to recover back the amount paid. *Desjardins* v. *City of Quebec*, Q. R. 18 S. C. 434.

Special Assessment Roll—*Contestation—Prescription — Interruption — Injunction—Rescission.*]—Under the former charter of the city of Montreal (52 V. c. 79), the contestation of a special assessment roll, by a person assessed therein, had not the effect of interrupting prescription as regards other persons subject to such assessment.—2. The fact that the person contesting the roll obtained a temporary order enjoining the city against making any collection under the roll attacked, did not constitute an interruption of prescription as regards other persons assessed by the same roll, where such order was made without objection on the part of the city, and no steps were subsequently taken by the city to obtain the rescission of the order. Judgment in Q. R. 23 S. C. 461 affirmed. *City of Montreal* v. *Land and Loan Co.*, Q. R. 13 K. B. 74.

IX. Statute Labour.

Assessment Act—*Imperative Provision—Separate Assessment of Distinct Lots.*]—Section 109 of the Assessment Act, which in effect provides that if the assessment is for more than 200 acres the statute labour shall be rated and charged against every separate lot or parcel according to its assessed value, is imperative and not merely directory. Where, therefore, on an assessment of 600 acres, instead of the amount chargeable against the several lots owned by the plaintiff being rated and charged against each lot, a bulk sum was assessed for statute labour and charged against the whole of them, the assessment was held invalid. Love v. Webster, 26 O. R. 453, followed. *Waechter* v. *Pinkerton*, 6 O. L. R. 241, 2 O. W. R. 645.

X. Tax Sale.

Action to Set Aside—Arrears—Notice—Assessment roll—Distress—Evidence—Onus—Parties—Costs—Locatee—Status as plaintiff. *Fisher* v. *Parry Sound Lumber Co.*, 6 O. W. R. 381.

Action to Set Aside — Parties — Municipal corporation—Non-compliance with provisions of Assessment Act—Fatal objections—Proof of plaintiff's title — Redemption — Costs—Judgment — Death of plaintiff. *Ruttan* v. *Township of Shuniah*, 6 O. W. R. 356.

Action to Set Aside—Prior Tax Sale—Purchase by municipality — Lien—Redemption—Costs—Interest. *Hime* v. *Town of Toronto Junction*, 1 O. W. R. 740.

Description in Deed—Uncertainty—Invalid assessment roll—Assessment Act, s. 211—No arrears of taxes—Conveyance of right of re-entry — Effect of repeal of section — Champerty and maintenance—Improvements—Set-off—Rents and profits. *Eede* v. *Pulford*, 3 O. W. R. 179.

Description of Land — Assessment roll—Arrears. *Quinlan* v. *City of Brantford*, 2 O. W. R. 730.

Description of Land—Sufficiency of—Possession—Rights of entry. *McLellan* v. *Hooey*, 1 O. W. R. 215, 707.

Description of Lots—*Block Assessment—Plan — Owner — Defects — Curative provisions.*]—An assessment of lots as "water lots 436 x 660" is invalid as not identifying them. An assessment of lots en bloc after they have been sub-divided by registered plan, and without shewing the known owner against whom particular parcels are assessable, is invalid as disregarding the essential requirements of R. S. O. c. 224, s. 13. The requirements of ss. 147, 152-5, inclusive, as to the duties of the collector, treasurer, clerk, and assessor, with reference to the list of lands liable to be sold, were not complied with; and the defects were not cured by s. 208, which makes the tax deed binding if the land is not redeemed in one year, nor by s. 209, by which the deed is valid if not questioned within two years. The judgment of MacMahon, J., 32 O. R. 274, 21 Occ. N. 30, affirmed for the reasons therein stated, as regards the invalidity of the tax sale in question:—Held, however, that the language of s. 218 of the Assessment Act, R. S. O. c. 224, has no application to cases where the taxes have not been lawfully imposed, or where the taxes for which the land was sold were not in arrear. The grantee of the tax purchaser was, therefore, not entitled to the lien which he claimed in respect of the sums alleged to be due for taxes for the years 1890 and 1891, for there was in these years no valid assessment, and therefore no taxes in arrear as to them; but the case as to 1892 and 1893 was on a different footing; for the assessment for those years was a valid one and not affected by the error in the statement as to the depth of the lots, which might be rejected as falsa demonstratio, and the taxes for 1892 and 1893 were, therefore, validly imposed and in arrear at the time of the sale. Judgment below varied. *Wildman* v. *Tait*, 21 Occ. N. 465, 2 O. L. R. 307.

Highway Included in Land Sold — Void sale—Deviation road—Sale subject to right of way—Misconduct of plaintiff—Costs. *McCabe* v. *Armstrong*, 3 O. W. R. 808.

Invalidity — *Onus — Proof of Taxes in Arrear — Assessor's Return — Irregularity — Limitation of Actions.*]—In action brought on the 23rd April, 1902, to set aside a sale of land made on the 7th October, 1898, for arrears of taxes for 1895, 1896, and 1897, and a deed made in November, 1899:—Held, that the onus of proof of the invalidity of the tax title rested on the plaintiffs. Taxes for the whole period of three years next preceding the 1st January, 1898, being due and in arrear and unpaid, and those for the year 1895 having been in arrear for three years next preceding that day, the lot was, by s. 152 of

the Assessment Act, R. S. O. 1897 c. 224, liable to be sold in 1898 for such arrears. The proceedings leading up to the sale were substantially regular, with one exception, the omission of the clerk of the municipality to furnish the treasurer, as he is required to do by the last clause of s. 153, with a true copy of the list furnished by the latter under s. 152, with the assessor's return, certified to by the clerk under the seal of the corporation.—Quære, whether this requirement of s. 153 was of so essential a character as, conceding that taxes were in arrear, to render a sale invalid if attacked before any statutory limitation upon an action came into operation. Love v. Webster, 26 O. R. 453, distinguished:—Held, however, that as in this case the omission worked no injury to the plaintiffs, who had all the notices and delays to which they were entitled, and in respect to whose land all the other conditions essential to a valid tax sale existed, and as the action was brought more than three years after the sale and more than two years after the deed, it should be dismissed. *Kennan* v. *Turner*, 23 Occ. N. 195, 5 O. L. R. 560, 2 O. W. R. 239.

Land Titles Act, 1894—*Confirmation of Tax Sale—Transfer—Treasurer.*]—Though a purchaser at a municipal tax sale does not, within one month after the expiration of the time for redemption, make a demand upon the treasurer for a transfer, nor pay to him the $2 for such transfer, and it is not until long after the expiration of the said month that such demand and payment are made and such transfer executed, the treasurer has authority to execute the transfer to the purchaser. *In re Prince Albert Tax Sales*, 4 Terr. L. R. 198.

Non-compliance with Statute — *Invalidity—Curative Provisions.*]—In a sale of land for taxes there was a failure to distrain, although sufficient goods were on the premises to have paid the taxes; the account furnished by the collector did not, as required by s. 140 of R. S. O. 1887 c. 193, shew the reason why the taxes had not been collected; there was no delivery to the collector by the clerk of the list furnished him by the treasurer, as required by s. 141; no notification, as also required by that section, by the collector to the occupants or owners of the lands of their liability to be sold for taxes; no certificate verified by oath as required by s. 142; nor any list furnished by the clerk to the treasurer of the lands which had become occupied or were incorrectly described, as required by s. 143:—Held, that the sale was invalid; and the invalidity was not cured by ss. 189, 190, which validate a sale on the expiration of two years from the making of the tax deed. *Boland* v. *Jenkins*, 21 Occ. N. 125, 32 O. R. 358.

Omission to Furnish List of Lands to be Sold — *Limitation Sections of Assessment Act—Port Arthur Special Act—Conveyance by Owner after Sale—Repeal of Act after Action Brought.*]—The omission of the treasurer of the municipality to furnish to the clerk a list of the lands liable to be sold for taxes is a fatal objection to the validity of a sale for taxes, and neither the limitation sections of the Assessment Act, nor the provision of the special Act relating to sales for taxes in Port Arthur, 63 V. c. 86 (O.), are a protection to the tax purchaser. The owners of land sold for taxes conveyed it after the tax sale to the plaintiff, who then brought an action against the tax purchaser to set aside the sale. The statute 32 Hen. VIII, c. 9 was in force when the conveyance was made, and when the action was brought, but was repealed before the trial of the action:—Held, that the prohibition of the statute applied, and that the action could not be maintained. Judgment of Ferguson, J., 1 O. W. R. 560, affirmed. *Ruttan* v. *Burk*, 24 Occ. N. 85, 7 O. L. R. 56, 3 O. W. R. 167.

Order Confirming—*Notice.*]—An order, under s. 151 of the Municipal Clauses Act Amendment Act of 1898 and amendments of 1899 and 1900, confirming a tax sale, will not be made without notice of the petition for the order being given to the persons whose property is being sold. *Re South Vancouver Tax Sale*, 9 B. C. R. 572.

Purchaser at — *Liability for Taxes of Year of Sale—Statutes—Amendment.*]—Certain lots in the city of Calgary were on the 27th June, 1896, sold for arrears of taxes due thereon for certain years prior to 1896; the sales were duly confirmed by the Court, and on the 10th July, 1897, and 27th June, 1898, the purchaser received certificates of title in due form from the Registrar of Land Titles, and entered into and remained in possession of the lots as owner. The lots were duly assessed for taxes for the year 1896, but no rate was struck until after the sale. The said taxes for 1896 remained unpaid for two years. Section 81 of the Ordinance Incorporating the city of Calgary provides that the transfer from the treasurer to the purchaser shall vest in the purchaser all the rights of property of the original holder of the land, and purge and disincumber it from all incumbrances of whatever nature other than existing liens of the city and the Crown:—Held, that the lots in question were liable to be sold for taxes for the year 1896, and that, under s. 51 of the same Ordinance, the purchaser was personally liable to the city for the amount of the taxes. Section 81 was amended by Ordinance 1900 c. 39, s. 4, by the addition after the word "Crown" of the words "including all taxes unpaid upon such land at the day of the date of such transfer, and whether imposed before or after the day of the date of the tax sale at which said lands were sold":—Held, that this amendment did not raise the presumption that the section as it originally stood had not the same meaning; that the amendment was probably made to remove doubts that may have existed. *In re Lougheed and City of Calgary*, 5 Terr. L. R. 200.

Refusal to Confirm — Land vested in Crown — Recommendation of patent for homesteader — Costs — Witnesses. *Re Cann* (N.W.T.), 1 W. L. R. 206.

School Taxes — Confirmation of sale — Time for redemption—Extension—Terms. *Re Lewis and Phalen* (N.WT.), 1 W. L. R. 36.

Sale by Provincial Assessor—*Property of Municipality—Purchaser—Agent — Fiduciary Relationship.*]— The city of Nelson was incorporated in March, 1897, and in September, 1898, land situated therein was sold by the provincial assessor for taxes for the years 1896 and 1897, levied under the provisions of the Assessment Act:—Held, setting aside the tax deed, that there was no authority to hold the tax sale, as the Assessment Act does not apply to municipalities. In July, 1897, a

real estate agent on behalf of the owner, negotiated with a prospective purchaser, but the attempted sale fell through, and after that the agent and the owner ceased to have any dealings with each other. In September, 1898, the agent bought the property at a tax sale at a very low figure:—Held, that at the time of the sale the agent was not in a fiduciary relation to the owner. *McLeod* v. *Waterman*, 10 B. C. R. 42.

Sale of Wrong Lot — *Reconveyance by Purchaser—Recognition of Validity of Sale—Third Parties.*]—The sale of anything belonging to another person is radically void; thus the sale of an immovable made in error, for municipal taxes due upon the adjoining immovable, is void, and does not purge the hypothecs by which the immovable sold is affected. 2. In this case the reconveyance which the true owner obtains from the purchaser or his assigns is not to be interpreted as a recognition of validity of such a sale; and, even where a sale is recognized as valid by the true owner, such recognition can only be considered as a new sale made by the true owner and not affecting the rights of third parties. *Humphreys* v. *Desjardins*, Q. R. 24 S. C. 250.

Time for Redemption —*Statute—Retroactivity—Constitutional Law.*[—Section 80 of the charter of the city of Calgary (Ordinance 33 of 1893) provides that if land sold for taxes be not redeemed within one year after the date of the sale, the purchaser shall be entitled to a transfer, which shall have the effect of vesting the land in him in fee simple or otherwise, according to the nature of the estate sold; and s. 81 provides that the transfer shall not only vest in the purchaser all rights of property which the original owner had therein, but shall purge and disincumber such land from all payments, lien charges, mortgages, and incumbrances whatever, other than existing liens of the city and the Crown. Certain lots in the city of Calgary were sold for taxes on 16th April, 1900, and a transfer was given to the purchaser on 8th May, 1901, the owners not having offered to redeem within the year:—Held, that s. 2 of Ordinance 12 of 1901, "an ordinance respecting the Confirmation of Sales of Land for Taxes," passed 12th June, 1901, giving a right to redeem at any time before the hearing of the application for confirmation, is not retrospective, and that the original owners could not take advantage of its provisions. Held, futher, that ss. 80 and 81 of the charter of the city of Calgary are not ultra vires as being in conflict with ss. 54 and 57 of the Land Titles Act, 1894. Wilkie v. Jellett, 2 N. W. T. Reps. No. 1, p. 125, 26 S. C. R 282, applied. *In re Kerr*, 5 Terr. L. R. 297.

XI. Valuation of Property.

Appeal from Assessment — *Value of Lands and Buildings—Burden of Proof.*] — Under ordinary circumstances, it is incumbent upon an appellant who complains that he is assessed too high to shew that the property is not worth the amount for which he is assessed, but where, although this is not shewn, it appears that, under the general scheme of assessment, lands of a particular description are assessed generally at a certain fixed sum per acre, and that the appellant's lands of that description, which are of no greater value either by reason of their situation or otherwise, are assessed at a larger amount, the assessment should be reduced to accord with the general scheme of assessment. A school district assessor assessed certain of the appellants' lands at $800, and the dwelling houses thereon at $2,000:—Held, that the assessment should stand, although the more correct course would have been to assess the whole as "land" and place a single value upon both soil and buildings as "land." *In re Canadian Pacific R. W. Co. and MacLeod Public School District*, 5 Terr. L. R. 187.

Appeal—*Onus.*] — In assessment appeals the onus is upon the appellants who assert that their property is assessed at too high a figure, to prove it affirmatively. *Re McDougall and Town of Edmonton, Re Carruthers and Town of Edmonton*, 5 Terr. L. R. 465.

Appeal against Whole Assessment — *Notice.*] — The provisions of the Municipal Ordinance respecting appeals against the assessment of third parties do not authorize a ratepayer to appeal generally against the assessment of very person on the assessment roll, without designating the names of all the ratepayers in a written request to the secretary-treasurer to notify them of the appeal. *Re Heiminck (P.) and Town of Edmonton*, 5 Terr. L. R. 459.

Companies Ordinance—*Gas and Water Company — Mains and Pipes — Real Estate — Land — Fixtures — Exemptions — Double Taxation.*] — Where a waterworks company were assessed for certain lots, and opposite the entry under the heading on the assessment roll, "Value of lot in parcel without improvements," was placed "$315," and under the heading "value of buildings or other improvements," was placed "$100,000," and in this latter sum it was intended to include the company's water mains and pipes laid on the streets of the city:—Held, following Consumers' Gas Co. of Toronto v. City of Toronto, 27 S. C. R. 453, that the company's water mains and pipes were assessable as "land." (2) That, however, the form of the assessment did not include the mains and pipes, and that the attempted assessment of them was ineffective, and that the roll could not be amended, in view of the fact that the value of the mains and pipes had not been made a question in the proceedings. (3) That the fact that the city charter gave power to assess the shares of the company did not prevent the city from exercising the power also given thereby to assess any part of the company's real or personal property. (4) That the fact that the mains and pipes were laid under the authority of an agreement with the city in that behalf did not exempt them from assessment. *Calgary Gas and Waterworks Co.* v. *City of Calgary*, 2 Terr. L. R. 447.

Contestation of Roll — *Limitation of Actions—Interruption—Statute.*] — The prescription of three years in respect of taxes provided by the Montreal city charter, 52 V. c. 79 (Q.), runs from the date of the deposit of the assessment roll, as finally revised, in the treasurer's office, when the taxes became due and exigible, and the prescription is not suspended or interrupted by a contestation of the assessment roll, even although the con-

testation may have been filed by the proprietor of the lands assessed. Judgment appealed from reversed. Girouard and Nesbitt, JJ., dissenting. *City of Montreal* v. *Cantin*, 25 Occ. N. 3, 35 S. C. R. 223.

Discrimination against Non-residents — *Petition to County Court Judge — Authority of Agent of Ratepayer—Time for Petition—Objection Made to Assessors—Notice—Waiver—Payment of School Tax—Certiorari—Grounds.*]—In a petition for relief by a non-resident ratepayer under 44 V. c. 9 (N.B.), it is sufficient evidence of authority to warrant the County Court Judge in acting, that the person petitioning describes himself as the agent of the person aggrieved in the matter of the assessment, and swears to the truth of the statements in the petition. The time within which the petition must be presented under the Act does not begin to run until after the assessment complained of has been made up from the corrected list and filed with the county secretary, and then within one month, either from notice of the assessment from the county officer charged with the duty of giving notice, or from the time the person assessed first heard or knew of such assessment. It is no objection to an application under the Act that objection to the valuation of the property was made to the assessors under C. S. c. 100, s. 59, and that the objection might have been further prosecuted before the valuators under s. 68. Where one of the objections under the Act is that the property of residents had been greatly undervalued, the effect of which was to increase the rate of non-residents, it is not necessary that the residents, the valuation of whose property is attacked, should have notice of the application. The right to apply for relief from general county taxes is not waived by payment of the school tax. The petition under the Act must contain facts from which it can be collected that the petitioner is aggrieved, or must state the fact. The specific grounds upon which a certiorari is granted must, under Rule 7, Mich., 1899, be stated, and a general statement, i.e., "also all other grounds taken at the hearing in the Court below," is objectionable. *Rex* v. *Wilkinson*, 35 N. B. Reps. 538.

Gas Pipes — Natural gas company. *Re United Gas and Oil Co. of Ontario and Township of Colchester South*, 1 O. W. R. 642.

Improvements — *Selling Value.*] — The measure of value of improvements for purposes of taxation prescribed by s. 38 of the Vancouver Incorporation Act, 1900, is the actual cash selling value, and not the cost. In re Municipal Clauses Act and J. O. Dunsmuir, 8 B. C. R. 361, followed. In re Vancouver Incorporation Act, 1900, and B. T. Rogers, 9 B. C. R. 373, not followed. *In re Vancouver Incorporation Act, 1900, and B. T. Rogers*, 9 B. C. R. 495.

Income — *Basis of Assessment — Exemption.*]—Although a person assessed for income tax under the Municipal Ordinance was not during the previous year a resident of the municipality, the previous year's income, wherever earned, may be taken as a basis for determining the amount for which he should be assessed. Income to the extent of $600 is exempt. *Lamontaigne* v. *Town of Macleod*, 5 Terr. L. R. 199.

International Bridge — *Assessable Value.*]—In assessing for the purpose of taxation that part of a bridge, crossing the Niagara river, lying within a township in Canada, regard cannot be had to its value in proportion to the value of the franchise or of the whole bridge, or to the cost of construction, but only to the actual cash price obtainable for the land and materials situate within the township. In re Bell Telephone Company Assessment, 25 A. R. 351, and In re London Street Railway Company Assessment, 27 A. R. 83, applied. *In re Queenston Heights Bridge Company Assessment*, 21 Occ. N. 112, 1 O. L. R. 114.

Lands Acquired for Railway — *Real Value — Farm Purposes — Village Lots.*] — The railway company had acquired a parcel of land of more than 200 arpents for the purposes of their railway, but, changing their intention, they leased it as a farm, by a lease for a year, renewable from year to year, with the condition that it should not be used except for the purposes of pasturage, for which it was quite unfit. The company had prepared a plan of subdivision of the land into lots, and had made application to the corporation and the government to have it adopted and registered. They had also advertised the sale of the property in lots:— Held, that the land should be valued for assessment purposes according to its real value, and not according to the value which it might have for agricultural purposes only. *In re Canadian Pacific R. W. Co. and Village of Verdun*, Q. R. 20 S. C. 194.

Measure of Value—*Municipal Clauses Act, B.C.*]—The measure of value for purposes of taxation prescribed by s. 113 of the Municipal Clauses Act is the actual cash selling value, and not the costs. *In re Dunsmuir*, 8 B. C. R. 361.

Modification by Judge—*Error in Principle.*] — The Judge ought not to vary the valuation of a property made upon oath by the assessors of a municipality, unless it has been made in consequence of an erroneous principle, or is so evidently erroneous that a competent and honest man could not arrive at the same result. *Bagg* v. *Town of St. Louis*, Q. R. 20 S. C. 149.

Railway Lands—*Right of Way.*]—Held, following Rouse v. Great Western R. W. Co., 15 U. C. R. 168, that the grading of a railway could not be assessed, and that in order to ascertain the value of the railway property, consisting of the right of way and station houses and yards, a fair test was to take the average value per acre of the tier of lots through which the railway ran, and, after making a deduction from that for the value of buildings and improvements on the farm, to value the railway lands at the same value per acre as the lots through which they passed. Applying this rule, and taking the value of each lot adjoining, it was found that (including the buildings upon them) the lots were assessed at an average value of $45 per acre. The railway company's lands, valued at this figure, were found to be worth $5,175, from which a deduction of $387, being 7½ per cent., was made on account of the average difference in the value of buildings on the adjoining farms. Subtracting this amount from $5,175 left a balance of $4,788, at which the assessment of the railway company's lands

was fixed. *In re Township of Chatham and Canadian Pacific R. W. Co.*, 21 Occ. N. 534.

Vacant Land — *Municipal Ordinance — Construction—Appeal—Onus.*]—The onus is on the appellant to shew that vacant land in towns comes within the exceptions mentioned in s.-s. 1 of s. 127 of the Municipal Ordinance (C. O. 1898, c. 70); otherwise it is properly assessed under s.-s. 2. Where vacant land is shewn to be "bona fide enclosed," as mentioned in s.-s. 1, and used in connection with a residence as a garden, "position and local advantage" are to be considered in addition to an annual rental in fixing the value for assessment purposes, and persons making use of valuable lands for the purposes of a garden, park, etc., sould be assessed for it in the same proportion of value as other lands in the vicinity. *Re Heiminck (Isabella) and Town of Edmonton*, 5 Terr. L. R. 462.

Valuation Roll—*Petition to Set Aside—Parties—Interest.*]—Valuators must proceed strictly according to law, and it cannot be said, in answer to a petition to set aside a valuation roll, that they have acted in the exercise of their discretion or according to an established practice. 2. It cannot be alleged that the party who contests a valuation roll is acting in the interest of other persons, unless it is also alleged that the petitioner himself is without any interest whatever. *Leitch v. Town of Westmount*, 5 Q. P. R. 225.

Valuation Roll—*Revision — Time—Statute—Directory Provisions.*] — The terms of art. 746a, M. C., so far as regards the revision of the valuation roll "in the months of June or July," are directory only, and the municipal council charged by law with the duty of revision, is not divested of authority to make such revision where the time specified in the article has expired before the duty has been performed. *Canadian Pacific R. W. Co. v. Allan*, Q. R. 19 S. C. 57.

Valuation Roll—*Illegality—Quashing — Jurisdiction of Judge—Names Improperly Inserted—Notice—Overvaluation.*] — By virtue of s. 4376, R. S. Q., a Judge in Chambers has jurisdiction on petition to quash a valuation roll for illegality. 2. The facts that the names of persons who are not owners are inscribed upon a roll as such, or that the properties are valued above or below their real value, constitutes an illegality. 3. In such case notice should be given to the persons whose names it is sought to strike off. *Truchon v. Town of Chicoutimi*, Q. R. 25 S. C. 55.

Vancouver Incorporation Act, 1900, ss. 38, 56 — *Valuation of Improvements — Mode of—Decision of Judge on Appeal from Court of Revision—Appeal from.*]—No appeal lies from the decision of a Judge on an appeal from the Court of Revision, had under s. 56 of the Vancouver Incorporation Act. An objection to an appeal on the ground that the Court has no jurisdiction to hear it is not a preliminary objection within s. 83 of the Supreme Court Act. Although the full Court has no jurisdiction to hear an appeal, it has jurisdiction to award costs in dismissing it. Under s. 38 of the Vancouver Incorporation Act, 1900, all ratable property for assessment purposes shall be estimated at its actual cash value, as it would be appraised in payment of a just debt from a solvent debtor.—In estimating the value of an expensive residence built by its owner, it is fair to assume that the owner will not permit his property to be sacrificed, and therefore a valuation approaching to nearly the actual cost is not excessive. *In re Vancouver Incorporation Act and Rogers*, 23 Occ. N. 72, 9 B. C. R. 373.

Waterworks Company—*Valuing Plant — 1 Edw. VII. c. 29, s. 2 — Retroactivity — Construction.*]—Held, that the statute 1 Edw. VII. c. 9, s. 2, amending the Assessment Act by inserting ss. 18a and 18b, is not retroactive, and therefore does not affect the assessment in question, which was made by the assessor and confirmed on appeal to the Court of Revision for the city, before the Act came into force; but doubted, even if the Act is retroactive, whether in any way it affects or changes the principle of assessment governing corporations like the appellants. All that it enacts is, that the property shall be valued as a whole, or as an integral part of a whole, instead, as formerly, by wards separately. Thus it leaves untouched and unaltered the law laid down in In re Bell Telephone Company Assessment, 25 A. R. 351, In re London Street Railway Company Assessment, 27 A. R. 83, and In re Queenston Heights Bridge Assessment, 1 O. L. R. 114, that as real property it shall be estimated at its actual cash value, as it would be appraised in payment of a just debt from a solvent debtor. This standard by the Act of last session is now applied to the property in its larger area as extended by the statute, but the standard remains the same:—Held, also, that the evidence of witnesses fixing value by wards (when one of the elements of such value is the possibility of a franchise in such ward, distinct from other wards, being obtained at some future time), is too remote to prevent the application of the law as settled by the cases, as also is the chance at some future time of getting a franchise to connect the wards with one another. *In re Stratford Waterworks Co. and City of Stratford*, 21 Occ. N. 479.

Wild Lands—*Valuation—Assessor Acting on Instructions from Superior Officers — Exemption—Jurisdiction of Court of Revision.*]—In assessing 500,000 acres of wild land, consisting largely of inaccessible mountains and valleys, the assessor acted on instructions received from his superior officers and fixed the value at $1 per acre for the whole tract. On appeal to the Court of Revision and Appeal, evidence was taken, and an average value of 45 cents per acre was fixed. An appeal was taken to the full Court, on the grounds that the valuation was too high, and that, so far as some of the lands were concerned, they were exempt from taxation under the company's Subsidy Act, and on the argument counsel for the company asked the Court to fix the assessable value of the lands at the specific sum of $47,986.23:—Held, per Drake, J., that, as some of the land was of some value and some of it of no value, the fixing of a flat rate was not a compliance with s. 51 of the Assessment Act, 1903, and that the assessment should be set aside with costs. Per Irving, J., that the evidence did not enable the Court to form any opinion as to the value of the land within the meaning

of s. 51, and, as the assessment was improperly levied at the outset, the Court should simply declare that there was no proper assessment in respect of which an appeal will lie:—Held, per Drake and Irving, JJ. (Duff, J., dissenting), that by the operation of s. 3 of the amending Act, with respect to all the lands granted to the company, the exemption from taxation conferred by s. 4 of the Subsidy Act expired with the expiration of the period of ten years, beginning with the 8th April, 1885, and that therefore the lands claimed to be exempt were assessable. *In re Nelson and Fort Sheppard R. W. Co.*, 24 Occ. N. 385, 10 B. C. R. 519.

XII. Other Cases.

Payment of Taxes under Protest — *Appeal from Assessment — Judgment Confirming—Res Judicata — Estoppel — Money Had and Received.*]—J., having been assessed in 1896 on personal property as a resident of St. John, N.B., appealed without success to the appeals committee of the common council, and then applied to the Supreme Court of New Brunswick for a writ of certiorari to quash the assessment, which was refused. An execution having been threatened, he then paid the taxes under protest. In 1897 he was gain assessed under the same circumstances, and took the same course, with the exception of appealing to the Supreme Court of Canada from the judgment refusing a certiorari, and that Court held the assessment void and ordered the writ to issue for quashing: 30 S. C. R. 122, 20 Occ. N. 11. J. then brought an action for repayment of the amount paid for the assessment in 1896:—Held, affirming the judgment of the Supreme Court of New Brunswick, 21 Occ. N. 52, that the judgment refusing a certiorari to quash the assessment in 1896 was res judicata against J., and he could not recover the amount so paid. *Jones* v. *City of St. John*, 21 Occ. S. 401, 31 S. C. R. 320.

Validity of Assessment—*Special Tribunal—Failure to Appeal—Proof of Assessment—Pleading—Evidence.*]—In an action to recover the amount claimed to be due for rates and taxes, the defendant pleaded among other things that, at the time of the assessments, defendant was not the owner of more than a one-quarter interest in the ship assessed:—Held, following Town of Westville v. Munro, 32 N. S. Reps. 311, that the defendant having received notice of the assessment, if he was dissatisfied therewith, should have brought the matter before the assessment appeal Court, established for that purpose by s. 341 of the Halifax City Charter, 1891, and, having failed to do so, that the assessment was conclusive, and could not be attacked in an action to recover the amount assessed. The only evidence before the Court of the assessment and the rate due thereon was the city collector's certificate of taxes unpaid, and s. 362 of the city charter, which provides that all rates and taxes shall become due on the 31st May in each year, and that it shall be the duty of the city collector, immediately thereafter, to take proceedings, &c. There was no evidence to prove the collector's signature to the certificate, or that he was collector:—Held, that the evidence was wrongly received:—Held, nevertheless, that, as the defendant in his defence admitted that he was assessed for the amount claimed, and that the rate alleged to be due on such assessment was correct, it was not necessary for the plaintiffs to prove the assessment or the rate due thereon. *City of Halifax* v. *Farquhar*, 33 N. S. Reps. 209.

ASSESSMENT OF DAMAGES.

See Damages.

ASSIGNEE FOR CREDITORS.

See Bankruptcy and Insolvency.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See Bankruptcy and Insolvency.

ASSIGNMENT OF CHOSE IN ACTION.

See Chose in Action.

ASSIGNMENT OF DAMAGES.

See Damages.

ATTACHMENT OF DEBTS.

I. Generally—What Debts Attachable, 114.

II. Practice and Procedure in Garnishment, 120.

III. Other Cases, 130.

I. Generally—What Debts Attachable.

Alimentary Allowance — *Claim for Maintenance of Natural Child—Ancestors.*]—The obligation resulting from a natural relationship does not extend to the ancestors of the father and mother of the natural child. 2. Alimentary debts, for the payment of which an income bequeathed for alimentary purposes may be attached, are such as are due to a creditor who has furnished aliments to the person entitled to the allowance and his family, and not those which such person may be under an obligation to furnish for his natural child. *McAulay* v. *McLennan*, Q. R. 23 S. C. 419.

Alimentary Allowance—*Pension.*] — A pension granted by the Montreal Harbour Commissioners to a sick pilot, from the "Decayed Pilots' Fund," is an alimentary allowance, and is exempt from seizure, under art. 599, s. 9, C. C. P., except for an alimentary debt. 2. An alimentary pension can only be

seized for an alimentary debt incurred while the pension is in force, and not for a debt incurred before the pension began to run. *Hamelin* v. *Perrault*, Q. R. 21 S. C. 51.

Assignment of Fund — Contingency — Ascertainment. *Evans* v. *Clancy*, 2 O. W. R. 522.

Bank Deposit—*Attachment for Debt of Depositor—Claim of True Owner—Intervention.*]—The fact of a person depositing sums of money in his own name in a bank does not take away from the true owner of such sums the right of recovering such sums. The true owner, as a third party, may assert his rights of recovering such sums. The true owner, as a third party, may assert his rights by intervention in a garnishing cause, and have annulled the saisie-arrêt of such sums by the garnishing creditor. *Stephens* v. *Higgins*, 5 Q. P. R. 1.

Costs Due to Solicitor—Agreement with client to throw off — Fraud upon creditors. *Waller* v. *Malone*, 3 O. R. 774.

Damages for Personal Injuries—*Alimentary Claim — Limited Attachment.*] — Damages awarded as compensation for personal wrongs, bodily injuries, and medical attendance rendered necessary thereby, are in the nature of an alimentary claim, and are not attachable for a debt other than one which has been created for the purpose of assuring the payment of such damages or the prosecution of the plaintiff's right thereto. *Lafond* v. *Marsan*, Q. R. 24 S. C. 22, 5 Q. P. R. 326.

Damages for Personal Injuries — *Judgment—Alimentary Provision — Attachment before Judgment.*]—The right of a person injured in an accident to recover from the person who caused the accident the damages suffered, is a purely personal right, and cannot be exercised by the ordinary creditors of the person injured. But when the person injured exercises the right the amount of damages or indemnity recovered is not in the nature of an alimentary provision, but becomes part of the property or means of the injured one; and therefore such a sum may be seized or attached by his creditors, and they may proceed by way of attachment even before judgment in the action brought by the person injured. Molsons Bank v. Lionais, 8 D. C. A. 176, followed. Judgment in Q. R. 25 S. C. 188 reversed, and judgment in Q. R. 24 S. C. 282 restored. *Cochrane* v. *McShane*, Q. R. 13 K. B. 505, 6 Q. P. R. 465.

Equitable Assignment—Disputed facts —Issue. *Wilkinson Plough Co.* v. *Perrin*, 2 O. W. R. 541.

Fees of Bailiffs—*Exemptions—Liability of Solicitors.*]—The fees of bailiffs are attachable in their entirety, and are not included in the exemptions which are enumerated in art. 599, C. P. C. In spite of stipulations previously made to the contrary, solicitors are personally liable to the bailiffs they employ for payment of their fees, and that although they have not received payment from their clients. *Lachance* v. *Casault*, Q. R. 26 S. C. 90.

Income from Trust Fund—*Assignment of Fund and Income.*]—An attaching order under 45 V. c. 17 will not lie against the income of a trust fund, unless there are trust moneys actually in the hands of the trustees at the time the order is served; nor will an attaching order operate upon debts of which the judgment debtor has divested himself by assignment, even though the assignment may be void as against creditors under 13 Eliz. c. 5. *Ex p. Black*, 34 N. B. Reps. 638.

Insurance Money — *Foreign Corporation Garnishee—"Within the Province."*] — The judgment debtor was insured under an accident policy in a company incorporated under a Dominion statute, having its head office at Toronto, represented in the province of Prince Edward Island by a local agent, who had authority to solicit applications and forward them to the head office of the company for approval. The insured, having met with an accident, gave the required notice, and furnished the necessary proofs of claim to the company according to the conditions in the policy. After the proofs of claim had been received at the head office, a copy of an attaching order was served upon the local agent in Prince Edward Island:—Held, that the insurance company was a foreign corporation within the meaning of s. 30 of 44 V. c. 4, s. 4 (P.E.I.). 2. That the company was within the province and doing business therein by an authorized agent. 3. That there was an attachable debt due by the company to the judgment debtor within 48 V. c. 4, s. 1. *Seaman* v. *Seaman*, 25 Occ. N. 109.

Insurance Moneys—*Hypothecary Creditor—Contingent Debt.*]—The indemnity due by an insurance company, in case of fire, is a simple debt resulting from a contingent contract, and, except in the case of an assignment of the anticipated indemnity, an hypothecary creditor has no preferential claim upon such indemnity, and therefore the indemnity cannot be attached in the hands of the insurance company. *Leroux* v. *Cholette*, 4 Q. P. R. 193.

Insurance Moneys — Judgment against married woman, payable out of separate estate—Proceeds of insurance on life of husband—Trust for wife. *Doull* v. *Doelle*, 4 O. W. R. 525, 5 O. W. R. 238, 253, 413, 6 O. W. R. 39.

Insurance Moneys—*Quebec Law—Creditors of Former Owner—Impeached Transfer—Fraud—Insurable Interest.*]—The lessor of real estate (in Quebec) insured the leased property "in trust," and notified the insurers that the lessee, his son, was the real beneficiary. The lessee paid all the premiums, and, the property having been seized in execution of a judgment against the lessor, the lessee purchased at the sheriff's sale and became owner in fee. He afterwards increased the insurance, the insurers acknowledging, in the second policy, the existence of the first in his favour. The property having been destroyed by fire, payment of the amount of the first policy to the lessee was opposed by a judgment creditor of the lessor, and the money attached in the hands of the insurers:—Held, that the lessee, having had an insurable interest when the first policy issued, and being when the loss occurred the only person having such interest, was entitled to payment. Even

if the lessor knew that his father was embarrassed at the time he took the lease and when he purchased the property at the sheriff's sale, that would not make the transaction fraudulent as against the father's creditors. A creditor who was a party to the action against the lessor in which the property was sold in execution subject to the lease, and who did not oppose such sale, could not afterwards contest payment of the amount of the policy on the ground of fraud. *Langelier v. Charlebois*, 24 Occ. N. 74, 34 S. C. R. 1.

Interest of Debtor under Will — *Residuary Legatee.*]—A primary creditor in a Division Court, by garnishee summons served on the executors, attached the interest of the primary debtor, as residuary legatee, in the estate of a testator who had died within a year of the attachment. A receiver was subsequently in a High Court action appointed to receive his interest. The Judge in the Division Court gave judgment against the garnishee, and an application for a new trial by the garnishee, on the ground that such interest was not attachable, was dismissed, but on an appeal to a Divisional Court: — Held, that the residuary legatee's interest was not such a debt as could be attached; and the garnishees were discharged. *Hunsberry v. Kratz*, 23 Occ. N. 185, 5 O. L. R. 635, 2 O. W. R. 448.

Juror's Indemnity.]—Money due to a petit juror for his indemnity, as such, is not garnishable. *Brouillard v. Shawl*, 4 Q. P. R. 181.

Legacy—*Alimentary Allowance—Previous Alimentary Debt.*]—Sums bequeathed by will as aliments, with a proviso that they are to be insaisissable, cannot be garnished for an alimentary debt arising prior to the will. *Kelly v. Masson*, Q. R. 23 S. C. 97.

Life Rent—*Reservation by Donor of Immovables.*]—A life rent reserved by the donor of immovable property, in his own favour, and secured by hypothec, does not fall under the provisions of art. 599 (4), C. P.; and is not exempt from seizure by creditors of the donor. *Bradford v. Lasnier*, Q. R. 24 S. C. 53.

Moneys Due by Crown.] — A sum of money due to a school teacher, as a subsidy payable out of the fund appropriated by the legislature as allowance to institutions and superior schools, being money due by the government of the province, and not money due as to the salary of a public officer, is not seizable in the hands of the government under a writ of attachment by garnishment. *Beauchemin v. Fournier*, Q. R. 20 S. C. 272.

Moneys Due under Mortgage—Instalments falling due after service of garnishee summons — Priorities—Judgment creditors—Transferee of mortgage—Assignee of mortgage for benefit of creditors. *Macpherson Fruit Co. v. Hayden* (N.W.T.), 2 W. L. R. 427.

Money of Union — *Judgment against Members of Unincorporated Association in Representative Action — Trust.*] — Action against an association. Certain members were authorized by the Court to defend the action on behalf of themselves and all other members:—Held, 1. that the association was not a corporation, individual, partnership, nor a quasi-corporate body. 2. That its members could not be sued by their adopted name. Certain costs were ordered to be paid by defendant members. The plaintiffs sought to garnishee a certain account at the Dominion Bank, headed "Amalgamated Sheet Metal Workers' Union, No. 30":—Held, could not be garnished, as order that the defendants shall pay money, without more, cannot be enforced against the property of any one except the defendants themselves. *Metallic Roofing Co. of Canada v. Local Union, No. 30, Amalgamated Sheet Metal Workers' International Association*, 1 O. W. R. 573, 644, 2 O. W. R. 183, 266, 819, 844, 5 O. W. R. 95, 709, 6 O. W. R. 41, 283, 5 O. L. R. 424, 9 O. L. R. 171, 10 O. L. R. 108.

Proceeds of Exempted Chattels.] — The proceeds of chattels exempt from seizure and sale under execution, but voluntarily sold by a debtor, are attachable. *Slater v. Rodgers*, 2 Terr. L. R. 310.

Purchase Money of Land — *Issue between Judgment Creditor and Claimant — Scope of—Fraudulent Conveyance—Husband and Wife.*]—An issue was directed to try the question whether certain moneys in the hands of a garnishee were, at the time of the service of the garnishee summons, the moneys of the plaintiff in the issue, as a creditor of the judgment debtor, as against the defendant in the issue, the wife of the debtor.—The moneys were the balance of the purchase price of land sold by the judgment debtor's wife to the garnishee:—Held, per Rouleau, J., the trial Judge, 13 Occ. N. 472, that the Court on such an issue could not inquire into the question whether the land, having formerly been that of the judgment debtor, had been fraudulently conveyed to his wife. On appeal to the Court in banc:—Held, reversing the judgment of Rouleau, J., who adhered to his former opinion, that the Court could so inquire. Hull v. Donohoe, 2 Terr. L. R. 52. Reversed and judgment of Rouleau, J., restored, 24 S. C. R. 683, 15 Occ. N. 356.

Rent—*To Whom Due—Heirs of Deceased Landlord—Executors — Devolution of Estates Act.*]—Five plaintiffs, claiming as heirs-at-law of their father to be owners of a lot of land, brought an action for specific performance, which was dismissed with costs, subsequently taxed at $209.49. After the trial one of the plaintiffs, G. R., died, and probate of his will was granted to a sister and co-plaintiff, M. S., and the action was revived in the names of the remaining plaintiffs and M. S. as his executrix, and an appeal against the judgment was also dismissed with costs. It appeared that G. R. owned one-half of the lot, and the father the other half, and that the lot had been leased to a tenant by M. O'R., one of the plaintiffs, as administratrix of the estate of the father, who died in or before 1896, and M. S., as administratrix of the estate of G. R. No caution was registered under the Devolution of Estates Act:—Held, that the rent due from the tenant was garnishable for the costs payable by the plaintiffs. Macaulay v. Rumball, 19 C. P. 284, commented on. *McDonald v. Sullivan*, 23 Occ. N. 45, 5 O. L. R. 87, 1 O. W. R. 721, 723, 784, 840, 849; *Reilly v. McDonald*, 1 O. W. R. 196, 721, 723, 784, 849.

Salary—*Civil Servant—Insolvency—Notification to Other Creditors.*]—If an employee

of the province is insolvent, a creditor garnishing the employee's salary will be allowed to have the other creditors called in and notified to file their claims. *Gagnon* v. *Rowan*, 7 Q. P. R. 52.

Salary—*Deposit of Portion Attachable—Further Attachments.*]—The deposit of the portion of salary attachable under 3 Edw. VII. c. 57, s. 1, has the effect of preventing further attachments, and this without the debtor requiring to give notice of such deposit to his creditors. *Godin* v. *Flanagan*, 7 Q. P. R. 6.

Salary — "*Due or Accruing Due.*"] — Where the salary of an employee was a fixed amount per month payable at the end of the month:—Held, that a garnishee summons served on the last day of the month did not bind the current month's salary, inasmuch as no part of the amount was due, that is, recoverable by the employee, till the last day of the month had expired, nor was any part accruing due, inasmuch as the liability of the employer to pay was contingent upon the completion of the month's service by the employee. *Main* v. *McInnis*, 4 Terr. L. R. 517.

Salary of Court Stenographer—*Fees for Depositions.*] — Amounts due to official stenographers for depositions taken in Court are regarded as salary, and are attachable to the extent of one-fifth. *Létourneau* v. *Collin*, 4 Q. P. R. 122.

Salary of Harbour Master — *Public Officer.*] — The harbour master of Montreal, having by virtue of his office to administer a part of the public domain of the Crown, and acting in the general interest of commerce and navigation, must be considered as a public functionary, and his salary is not seizable under execution or attachable. *Cochrane* v. *McShane*, Q. R. 24 S. C. 283.

Salary of Municipal Officer—*Payment in Advance—Set-off—Equitable Assignment—Service — Costs.*] — Upon an application to garnish the salary of an officer of a municipal corporation, it appeared that by virtue of a by-law his salary was payable monthly, and that the practice of the corporation was to pay all salaries on the first day of the month. The attaching order was served on the 30th April, between ten o'clock in the morning and one o'clock in the afternoon. The judgment debtor, before the service of the order, had been paid in full all his salary for the month of April, under an arrangement between him and the treasurer of the corporation that advances should be made on account of salary and stopped from the debtor's cheque at the end of the month:—Held, that nothing was due to the debtor by the corporation at the time of the service of the attaching order, for there had been actual payment of the salary by the corporation; or, if not payment, an advance by the corporation which they could set off against a claim for salary; or, if the moneys advanced were to be regarded as misappropriated by the treasurer or the clerk and advanced personally by him to the debtor, there was a good (though verbal) equitable assignment of the salary by the debtor to the treasurer or clerk; and, per the Master in Chambers, a debt in respect of the salary, in any event, would not have accrued due until after the service of the attaching order: — Held, also per Meredith, C.J., in Chambers, that the judgment debtor and the corporation, by its responsible officers, had so misconducted themselves that they should be deprived of costs, although the order of the Master in their favour was in other respects affirmed. *Wilson* v. *Fleming*, 21 Occ. N. 334, 1 O. L. R. 599.

Salary of Partner.]—Where a garnishee partnership declares that the defendant is a member of the partnership and draws from it a weekly salary, the partnership will not be ordered to deposit any sum in Court, to its prejudice, but the attachment will be declared effective. *De Claude* v. *Hemond*, 4 Q. P. R. 71.

Salary of Sheriff—*Judgment by Default—Opposition.*]—The salary of a sheriff is insaisissable; and even where the Government has paid several instalments of salary to a garnishing creditor, the sheriff, even when the attachment has been made absolute upon default of his appearance, may, by way of opposition to the judgment, have it set aside. *Mongeau* v. *Arpin*, Q. R. 18 S. C. 395.

Salary of Teacher—*Exemption—Application after Death—Crown—Provincial Government — Public Officer.*] — The salary of a teacher (instituteur) being by law exempt from attachment, the exemption subsists in favour of his children in respect of arrears due him at the time of his decease. 2. Money in the hands of the Government of the Province of Quebec cannot be attached unless in the case of salaries of public officers. *Beauchemin* v. *Fournier*, 4 Q. P. R. 138.

Wages—Exemption—Board money — Deductions—Construction of statute. *Gordon* v. *Seabrooke* (Y.T.), 2 W. L. R. 105.

Wages — Exemption — Construction of Rule 395 (Y.T.). *Meacham* v. *Nugent* (Y. T.), 2 W. L. R. 301.

Wages of Mariner—Exemption—Master of boat plying on inland waters. *N. A. T. and T. Co.* v. *Seaton* (Y.T.), 2 W. L. R. 559.

Wages—*Set-off.*]—Upon a declaration of the garnishees that the judgment debtor is employed by them as a driver; that he has the use of a waggon and two horses every day, "the understanding being that he gives us every evening the half of the daily profit;" that since the service of the attaching order they have paid him $11.54, half of the receipts since made, while he still owes them $43:—Held, that the half of such receipts represents daily wages, and the part of such wages which can be seized may be garnished, and the attachment of it should be declared valid. 2. That a set-off cannot be made to the prejudice of the garnishors, between the wages of the debtor and arrears of receipts due by him to the garnishees before the attachment. *Payfer* v. *Beauchamp*, 3 Q. P. R. 347.

II. Practice and Procedure in Garnishment.

Action by Judgment Debtor against Garnishee—*Special Pleading.*]—In a suit to recover moneys which have been attached, brought by the defendant in the attachment

against the garnishee, the latter may, instead of proceeding regularly, file a declaration that he submits his rights to the Court, at the same time stating, with documents in support of his statements, the previous proceedings which prevent him from paying what he owes to the plaintiff, namely, the garnishing proceedings pending, a judgment already given requiring him to pay one-fifth to a creditor, and the fact that another creditor has made a motion for a declaration that the whole salary of the plaintiff is exigible. *Noel* v. *Corporation of Pilots for the Harbour of Quebec*, 5 Q. P. R. 90.

Affidavit — *Information and Belief — Grounds.*]—The affidavit for attachment en mains tierces, when founded upon information or belief, must state the grounds of such belief and the sources of such information, and in the absence of such statement the seizure will be quashed on petition. *Duclos* v. *Beaumier*, Q. R. 20 S. C. 237.

Affidavit—*Irregularity—Claimant—Judge by Consent Trying Issue Summarily—Appeal—County Court.*]—The plaintiffs in County Court proceedings issued several garnishee summonses, and subsequently in Supreme Court actions judgment creditors of the defendants in the County Court actions issued attaching orders, against the same garnishees. The judgment creditors in the Supreme Court actions contended that the County Court garnishee summonses were nullities, as they were issued on an affidavit which did not comply with the statute, and all the interested parties agreed that the County Judge might decide the matter in a summary way. He held that the County Court plaintiffs were entitled to the moneys garnished:—Held, on appeal, following Eade v. Winser, 47 L. J. C. P. 584, that the County Judge was in effect an arbitrator; and no appeal lay from his decision. Per Drake, J.—(1) The affidavit leading to a garnishee summons must verify the plaintiff's cause of action, and a garnishee is entitled to question the validity of the proceedings at the hearing. (2) The defect in the affidavit was an irregularity only, and payment into Court by the garnishees was a waiver by them of their right to object. (3) The plaintiff may specify in one affidavit several debts proposed to be garnished. *Harris* v. *Harris*, 22 Occ. N. 73, 8 B. C. R. 307.

Ante-judgment Summons — *County Court—Debt or Liquidated Demand—Affidavit Verifying Debt.*]—An application by the defendant to set aside a garnishee summons (and service) issued before judgment, and for payment out of Court of moneys paid in by the garnishee, was granted. Section 102 of the County Courts Act, R. S. B. C. 1897 c. 52, provides that "a plaintiff, at the time of issuing a summons for a debt or liquidated demand, or at any time thereafter previous to judgment, upon filing . . . an affidavit verifying the debt . . . may obtain a summons" (i.e., garnishee summons), etc. The summons was issued claiming $2.50 for hire of horse and sleigh, together with $60 damages for the destruction of the sleigh through the defendant's negligence. The affidavit verifying the debt ran: "My claim against the defendant is for the sum of $2.50 for hire or rig hired by the defendant from me on the 14th day of February last, and for the sum of $60 damages for the destruction of the said rig or vehicle." *Lindburg* v. *McPherson*, 21 Occ. N. 425.

Attachment before Judgment — *Affidavit—Requisites of.*]—The allegation, "the plaintiff verily believes that unless a writ of attachment before judgment be served upon the garnishees he will lose the amount owing him," in an affidavit for the issue of a writ of attachment before judgment, is sufficient and equivalent to the form of art. 895, C.C., which says "that the plaintiff will thus be deprived of his recourse against the defendant." The affidavit need not give the reasons of belief and the sources of information of the deponent, unless these relate to withdrawal or concealment by the defendant. *Bois* v. *Fels*, 6 Q. P. R. 447, Q. R. 27 S. C. 34.

Attachment before Judgment — *Petition to Quash—Irregularities—Quality of Deponent.*]—The defendant's remedy by petition to quash an attachment before judgment is collateral to the regular methods of defence, and must be strictly confined to the grounds permitted by art. 919, C. P. 2. The petition to quash cannot allege irregularities in the writ and indorsement, default to leave copy of affidavit and declaration or the quality of the deponent, which are properly matters for exception to the form. *Canadian Pacific R. W. Co.* v. *Frappier*, 6 Q. P. R. 186.

Bailiff—*Offer of Security—Refusal.*] —A bailiff who makes a seizure under a saisie-arrêt before judgment, cannot refuse to restore the goods seized to the defendant, if the latter offers good and sufficient sureties in accordance with art. 938, C. P., under the pretence that he has no power to appraise the security. *Schwartz* v. *Ramch*, 6 Q. P. R. 396.

Contestation—*Insolvency of Defendant—Pleading—Amendment—Costs—Distraction—Scale of Costs.*]—In a contestation of an attachment by the defendant, it is immaterial to the issue whether the original debtor whose heirs have been condemned by judgment on the principal action, was solvent or not. 2. A paragraph struck out from a pleading upon an inscription in law, will not be reinstated by amendment at the trial. 3. A writ of attachment after judgment cannot be issued for costs without the consent of the attorneys in whose favour distraction of costs was granted. 4. The costs awarded upon a contestation of attachment, maintained as far as costs are concerned, will be governed by the amount of the costs for which attachment was improperly issued. *Montreal Land and Mortgage Co.* v. *Heirs of Mathieu*, 6 Q. P. R. 329.

Contestation—*Undue Delay.*]—The garnishing creditor will not be allowed to contest, after the delays, the declaration of a garnishee, if he has shewn no diligence in the matter. *Mcloche* v. *Lalonde*, 7 Q. P. R. 161.

Corporation Garnishee—*Declaration by Attorney—Art. 686, C. P.*]—When in answer to an attachment in the hands of a corporation, such corporation makes its declaration by an attorney under a general authorization, no question under art. 686, C. P., can be put to such attorney. *Brodeur* v. *MacTavish*, 7 Q. P. R. 235.

Debtor Suing Garnishee—*Discharge of Garnishee.*] — The fact that the judgment debtor has, since the declaration of the garnishee, brought an action against him, does not interrupt the latter's right to be discharged from the attachment if he owes nothing. *In re Banque Ville-Marie*, 7 Q. P. R. 169.

Declaration of Garnishee—*Conditional Debt—Discharge.*] — If a garnishee declares that he owes nothing to the judgment debtor, but that there is a contract between them under which the judgment debtor is allowed to take insurance risks for the company of which the garnishee is an agent, the judgment debtor and the garnishee are not entitled upon such declaration to have the attachment proceedings dismissed, as they would be if the garnishee had declared simply that he owed nothing. Quære, is there ground, in the case of a conditional debt, to claim dismissal of the proceedings on the ground that the garnishing creditor has not had it declared that the attachment is binding. *Lamothe* v. *Piche*, 5 Q. P. R. 180.

Declaration of Garnishee — *Contestation by Debtor—Status.*]—A debtor has no interest to support a motion for the rejection of the declaration of a garnishee, on the ground that the necessary stamps have not been affixed to it, or that the garnishee has not the status to make such declaration. *Montreal Loan and Mortgage Co.* v. *Mathieu*, 7 Q. P. R. 84.

Declaration of Garnishee—*Contestation of—Claim for Damages.*]—A garnishee is not obliged to declare hypothetical and possible debts; his declaration is sufficient if it admits debts of which he knows the cause and the amount. 2. Facts which may serve as the basis of an action for damages by a defendant against the garnishee do not justify a contestation of the declaration of the garnishee, when the additional claim of the defendant against the garnishee is not liquidated nor established nor stated in any manner, and when the garnishee cannot be presumed to have known it at the time of his declaration. 3. In this case, the garnishee, being indebted to the defendant in the sum of $100 by virtue of a judgment, was not obliged to declare that, besides such sum, he owed $200 as damages caused to the defendant by the allegations of a certain plea which he alleged to be false; and a contestation of the declaration of the garnishee based upon default of declaring something else besides an ascertained debt, was dismissed upon inscription in law. *Germain* v. *Dussault*, 5 Q. P. R. 96.

Declaration of Garnishee — *Contestation of—Requirements.*]—When a tiers-saisi has declared that he owes nothing, it is not sufficient to allege, in contestation thereof, that it is false: a contestation of a declaration of a tiers-saisi has for its object a different basis of facts whereon to determine the liability of the garnishee from that furnished by his declaration; it must, if for less than the amount of the judgment, set forth the exact amount of the alleged indebtedness; it must be as sepcific as, and proved like, the contents of the declaration in an ordinary suit, and it creates a real cause, in which the tiers-saisi is a defendant. *Canadian Congregational Missionary Society* v. *Larivière*, 4 Q. P. R. 290.

Declaration of Garnishee—*Default of — Judgment — Appeal — Relief on Terms.*]—A garnishee who has appealed from a judgment against him by default, and whose appeal has been dismissed, may still be relieved from his default to make a declaration upon paying all the costs incurred, including those of the appeal. *Saunders* v. *Boeckh*, 5 Q. P. R. 416.

Declaration of Garnishee — *Judgment — Moneys accruing due — New declaration.*] —In order that an attachment after judgment in the hands of a third party be binding, it must be so declared by judgment; in the absence of a contestation of the garnishee's declaration within the legal delays, and of a demand within the same delay to have the seizure declared binding, a writ of attachment is without effect against the garnishee as regards the sums which may eventually become due; and a motion then made to make him declare de novo will be rejected. *Decelles* v. *Lafleur*, 5 Q. P. R. 439.

Declaration of Garnishee — *Judgment — Reduction on Appeal — Payment of Solicitor's Costs — Set-off.*]—A garnishee, who has declared that he was adjudged to pay to the defendant $100 damages by a judgment from which he has appealed, cannot afterwards, after the amount of the judgment has been reduced by the Court in review to $50, with costs of the hearing and review against the defendant, allege by a subsequent declaration that he has paid his solicitor the $50 allowed to him by the later judgment, which has been garnished before the decision. *Pieffer* v. *Campeau*, 5 Q. P. R. 135.

Declaration of Garnishee — *Place of Making.*]—The declaration of a garnishee made in a district other than that where the writ of saisie-arrêt was issued, without notice to the garnishing creditor, will on motion therefor be rejected. *Duchesne* v. *Quintal*, 7 Q. P. R. 163.

Declaration of Garnishee — *Place of Making — Taxation of Costs.*]—When a garnishee lives in a district other than the one in which the attaching process has been issued, he may come to make his declaration before the clerk of the Court from which the writ has issued, and then he has the right to tax all his travelling and hotel expenses, and, besides, $1 per day for each day he is absent from home in making his declaration —and this although the expense of making his declaration before the prothonotary of his domicil would not have been so great. *Blouin* v. *Perrault*, Q. R. 25 S. C. 439.

Declaration of Garnishee — *Time for Contesting — Dismissal of Attachment Proceedings — Separate Orders in Favour of Judgment Debtor and Garnishee — Inscription in Review—Deposit—Desistment.*]—In a summary cause the time for contesting the declaration of a garnishee is two days. 2. A plaintiff who complains of judgments dismissing his proceedings against the defendant and the garnishee, upon two separate motions, must make separate inscriptions in review in respect of each judgment and make a deposit in each case, in default of which his inscription will be set aside. 3. Where an inscription in review has been set aside, the Court of Review has no jurisdiction to

adjudicate upon the validity of the desistment; that must be dealt with by the Court of first instance. *Lamothe* v. *Piche*, 5 Q. P. R. 164.

Declaration of Garnishee — *Uncertainty as to Amount Owing — Motion for Judgment.*]—Although a seizure may have been declared tenante, the plaintiff is not entitled to inscribe for judgment on the garnishee's declaration when the garnishee states that he owes the defendant nothing, and is not ready to say what portion of certain moneys in his first declaration stated to have been received from the defendant's attorneys, is returnable to them. *Baumar* v. *Carbonneau*, 7 Q. P. R. 213.

Default of Service on Debtor — *Motion to Dismiss.*]—A debtor who has been served with attachment process after judgment cannot appear and demand dismissal of the attachment. *Fafard* v. *Marsan*, 5 Q. P. R. 438.

Denial by Garnishees of Liability to Judgment Debtor — Cross examination of affidavits—Refusal to answer to liability of third person—Allegation of identity of third person with debtor. *Smith* v. *O'Dell*, 6 O. W. R. 47, 179.

Deposit by Garnishee — *Amount — Costs.*]—The garnishee who fails to deposit a certain sum of money, in accordance with an order served upon him, cannot be condemned, in the absence of any mention in the record of other creditors of the judgment debtor, to pay any greater sum than the amount he should have deposited, and the costs of order and of the inscription for judgment against him. *Laforce* v. *Grant*, 6 Q. P. R. 370.

Desistment — *Notice — Practice.*] — A garnishee, who receives a notice of desistment from a saisie-arrêt before the day of its return, cannot by motion demand an act of desistment and dismissal of the proceeding; if he believes the desistment to be insufficient, he must apear at the process office and so declare. *Montreal Land and Mortgage Co.* v. *Heirs of Mathieu*, 6 Q. P. R. 274.

Desistment — *Notice — Withdrawal — Costs.*]—Where a garnishing creditor desists from the attachment proceedings without mentioning that the attachment was made with costs, and without giving notice of such desistment to the attorneys of the garnishee, a motion by the latter for withdrawal of the attachment will be granted with costs. *Levy* v. *Arkbulatoff*, 5 Q. P. R. 338.

Issue in Course of Action—*Service on Defendant—Absence from Jurisdiction.*]—An attachment of debts issued in the course of an action is itself an action separate and distinct from the original action, and if, since the commencement of the action, the defendant has left the Province, service of the attachment should be made upon him as it would be in an action. Service made upon him at the record office, in accordance with the provisions of Art. 85, C. P. C., is a nullity. *Wasby* v. *Brown*, Q. R. 19 S. C. 424.

Judgment against Garnishee—*Setting Aside—Declaration—Time for—Judgment in Default—Prothonotary Entering—Long Vacation.*]—A garnishee against whom judgment by default has been improperly entered, may apply to have it set aside.—When called upon to make its declaration by a writ which does not state either the day or hour when it should be made, he must be considered as not properly before the Court; no default can be charged against him, and no judgment can be pronounced against him for default of a declaration.—The prothonotary has no jurisdiction to sign judgment against a garnishee who has made default, and the Court itself cannot pronounce such judgment against him during the long vacation. *Crapeau* v. *Tremblay*, Q. R. 27 S. C. 99, 156.

Judgment Debt — *Execution — Stay — Payment into Court.*]—The fact that the debt of the plaintiff for which he has recovered judgment against the defendant has been attached does not hinder him from proceeding to execution of his judgment, and if the defendant desires to escape such execution, he has only to pay the amount into Court. *Lamb* v. *Keilan*, 4 Q. P. R. 42.

Judgment by Default against Garnishee — *Irregularity in Service — Right of Appeal — Return — Consent.*]—A garnishee against whom a judgment has gone by default, without service of process personally or at his domicil, has the right to move against such judgment by way of appeal. 2. A party who garnishees after judgment cannot return his writ of saisie-arrêt after the three days following the day for such return without the consent of all the parties to the cause, and the consent of one of the defendants alone is insufficient. *Perrin* v. *Tate*, 5 Q. P. R. 116.

Judgment by Default against Garnishee — *Opening Up—Terms—Costs.*]—A garnishee against whom judgment has been given by default, and who wishes to open up the judgment, must pay the costs of the motion and of the proof of the disbursements incurred upon his default, and a supplementary fee, if that was necessary. *St. Denis* v. *Goulet*, 4 Q. P. R. 318.

Judgment in Action for Debt or Liquidated Demand—Claim for proceeds of sales by agent — Goods sold — Rule 384. *Stimson* v. *Hamilton* (N.W.T.) 1 W. L. R. 20.

Nature of Creditor's Claim—*Notice to Debtor—Alimentary Debt.*]—A creditor desiring to garnish moneys declared *insaisissables*, by proving that his claim is of an alimentary nature, cannot so prove without notice to the debtor as well of the proof to which he intends to make as of the inscription for judgment. *Gratton* v. *McCready*, 4 Q. P. R. 155.

Petition to Quash Saisie-arret Before Judgment—*Judgment Debtor—Parties — Conclusions.*] — A creditor cannot, by means of a saisie-arrêt before judgment restrain the tiers-saisi from paying certain sums to his debtor, made a party to the preceeding as mis-en-cause but against whom no conclusions are taken. 2. A petition to quash the saisie-arrêt on the part of the mis-en-cause is the proper proceeding in such a case. *Duckett* v. *Bayard*, 5 Q. P. R. 218.

Priority of Attaching Creditor—*Allegation of Insolvency by Other Creditors—Salary of Municipal Employee.*]—A creditor who has obtained judgment on an attachment after judgment, has the right to make in preference to all other creditors of the debtor, the amount awarded him by this judgment, which operates as an assignment or subrogation in his favour.—An allegation of insolvency ought to be made by such other creditors before such judgment on attachment has been recovered, if they wish to obtain the benefit of art, 694, and that although the subject matter of the attachment is the salary of the municipal employee mentioned in paragraphs 10 and 11 of art. 599, C. P. *Mailloux* v. *Blackburn*, Q. R. 27 S. C. 91.

Remedy of Crown.]—Order 45 of the English Rules respecting garnishee process is not applicable to a proceeding by information by the Crown. The Crown's remedy is by writ of extent. *Regina* v. *Connolly*, 21 Occ. N. 279, 7 Ex. C. R. 32.

Requisites of Saisie-arret After Judgment — *Salary — Declaration of Garnishee—Costs.*]—If a writ of attachment after judgment does not state the nature and place of the debtor's occupation, it does not constitute a seizure of salary which can be declared tenante, and a motion to that effect will be dismissed. — 2. However, if the garnishee by his declaration has set forth the fact that the defendant was in his employ on salary, a motion to have seizure declared binding will be dismissed without costs, as the seizing creditor had some reason to believe that the seizure was recognized as one of salary. *Drouin* v. *Brunelle*, 5 Q. P. R. 371.

Saisie-arret— *Affidavit for—Information and Belief.*]—An affidavit in support of a saisie-arrêt before judgment which is simply based upon the belief of the deponent as to the loss of recourse by the plaintiff, in place of positively affirming such loss as a fact, is insufficient, and the saisie-arrêt will be set aside on petition. *Michaud* v. *Clement*, 5 Q. P. R. 25.

Saisie-arret— *Non-service — Motion to Discharge.*]—A motion by the defendant for the discharge of a saisie-arrêt because it has not been served nor returned, will be dismissed with costs, because the defendant cannot apply for the discharge of a writ which has no existence. *Devlin* v. *Charlebois*, 4 Q. P. R. 281.

Saisie-arret — *Notice of Desistment — Costs.*]—If a plaintiff desists from a saisie-arrêt and gives notice of his desistment, without mentioning the costs to the defendant and the garnishee the defendant has a right to demand the dismissal of the saisie-arrêt by motion, and with costs. *Bank of British North America* v. *Laporte*, 5 Q. P. R. 67.

Saisie-arret—*Second Writ—Exception de Litispendance.*]—To afford ground for an exception de litispendance against a second saisie-arrêt after judgment, while the first is pending, it must apear that the second writ attached the same debt as the first writ. *Leith* v. *Hall*, 4 Q. P. R. 398.

Saisie-arret—*Time for Plea to—Inscription.*]—In summary causes a defendant has two days to plead to the saisie-arrêt; if he does not plead within this time, the plaintiff has two days to contest the declaration of the garnishee; after this time, he may, if he does not contest it, inscribe the case for judgment in terms of the declaration. *Goldberg* v. *Griffin*, 4 Q. P. R. 376.

Saisie-arret—*Wages—Occupation of Defendant—Neglect to State.*]—Where in an attempt to garnish wages alleged to be due to a judgment debtor, the writ of saisie-arrêt did not state the occupation of the defendant, as required by art. 678, C. C. P., the service of such writ was held to be of no effect. *De Sièyes* v. *Painchaud*. Q. R. 20 S. C. 230.

Salary of Civil Servant—*Motion to Declare Attachment Valid.*]—The attachment of the salary of a civil servant is regulated by s. 9 of Art, 599, C. P.; and Art. 697 does not apply thereto. A motion to declare the attachment of a salary binding will be dismissed as useless. *Garaud* v. *Boileau*, 4 Q. P. R. 158.

Salary—*Writ of Attachment — Requirements of.*]—A creditor cannot attach his debtor's salary, wages, or commissions without stating in the writ of attachment the nature and place of the debtor's occupation, and consequently he cannot contest the garnishee's declaration, alleging that commissions have become due to his debtor, if the writ of attachment does not meet the requirements of law regarding seizures of salaries and wages. *Sièyes* v. *Painchaud*, 3 Q. P. R. 552.

Service—*Officers of Bank—Priorities.*]—Interpleader proceedings were taken by the Bank of Nova Scotia to determine the priority of attaching process served on it by two creditors of an absconding debtor. Order IX., Rule 8, of the Judicature Act provides that process may be served on a corporation by serving the same on the principal officer thereof or on the clerk or secretary. One of the creditors served the president and secretary of the bank at its head office. The other creditor, before making any service in the same manner, and before the service of the first mentioned creditor, served the process on the manager of the branch of the bank in which the absconding debtor's money was deposited, and he contended that he thereby acquired priority:—Held that priority must be given to the first service on the president at the head office. *Kinsman* v. *Onderdonk*, 22 Occ. N. 262.

Service of Saisie-arret — *Domicil of Judgment Debtor—Death—Garnishable Debt—Proceeds of Sheriff's Sale—Subsequent resale.*]—Article 135 of the Code of Procedure which authorizes service upon the heirs of a person deceased within the previous six months, at the former domicil of deceased, applies to proceedings against the heirs, and not to the service of a saisie-arrêt issued against the deceased himself, on a judgment obtained against him, the fact of his death, at the time of the service of the saisie-arrêt, being known to the plaintiff.—2. A collocation founded on the first sale of an immovable by the sheriff ceases to have effect

when the same immovable is resold at folle-enchére, and a saisie-arrêt in the hands of the sheriff for the amount of such first collocation cannot be maintained. *Demers* v. *Gaudet*, Q. R. 23 S. C. 276.

Service of Saisie-arret — *Effect of—Payment to Debtor After Service—Payment again to Creditor — Declaration—Contestation.*]—It is the service of the writ of saisie-arrêt which establishes the claim of the garnishor against the garnishee. 2. From the moment of the regular service of the saisie-arrêt, the garnishee is prevented from paying to the judgment debtor, and, if he does so, will be obliged to pay a second time, whether he knew or not of the service being made; that is the consequence of the change made by Art. 679 of the new Code of Procedure in Art. 615 of the old. 3. When a garnishee commences his declaration by denying that he owes anything to the judgment debtor, and afterwards it is clearly established that he did owe him and had paid him after the service of the saisie-arrêt, it is not necessary to contest his declaration; the Court will order the garnishee to pay again. *Montambault* v. *Lapointe*, Q. R. 23 S. C. 413.

Set-off Between Defendant and Garnishee.]—A debt due by the defendant to the garnishee which did not become due until after an attachment, cannot be set off against the debt of the garnishee to the defendant, being the debt attached. *Hogue* v. *Ogilvie*, 4 Q. P. R. 317.

Suit by Another Claimant—*Interpleader.*]—The person who owes a sum of money which has been attached in his hands cannot be ordered to pay it to another claimant, so long as the attachment subsists; therefore, such debtor may plead to an action by the other claimant the fact of the attachment, and ask the Court to decide to whom it should pay the sum claimed and to order the claimant to pay the costs of the action. *Shannon* v. *North American Life Assurance Co.*, Q. R. 19 S. C. 321.

Writ of Saisie-arret — *Mis-en-cause — Transferee of Debtor—Petition to Set Aside Writ.*]—The plaintiff, a creditor of the defendant, having judgment against him, issued a saisie-arrêt in respect of moneys in the hands of M. et al, also making C. F. B. et al, parties (mis-en-cause). By this writ of saisie-arrêt the garnishees and the mis-en-cause were ordered to appear and declare what property they had in their hands belonging to the defendant and what sum of money they owed him. In a declaration annexed to the writ, but to which the writ did not refer, the plaintiff alleged that C. P. B. had acted collusively with the defendant and as his prête-nom in certain transactions with some of the garnishees, by virtue of which a sum of money was deposited in the hands of a firm of solicitors, the other garnishees. The claim in the declaration was that the garnishees should be ordered to declare what sum they had paid or were to pay by virtue of certain acts of sale really entered into with the defendant but nominally with his son, C. F. B., and that the mis-en-cause should be ordered to appear and declare whether the debt was really due to the defendant or to C. F. B. The latter petitioned for the quashing as to him of the writ of saisie-arrêt:—Held, that the plaintiff could not, by means of a writ of saisie-arrêt, prevent the payment to the mis-en-cause of the sum which appeared to be due to him on the facts of the acts, but that the plaintiff should have proceeded against the mis-en-cause by way of a direct action to set aside the transaction, or by contesting the declaration of the garnishee.—2. That the mis-en-cause had the right by petition to demand the quashing of the writ. *Duckett* v. *Bayard*, Q. R. 25 S. C. 150.

III. Other Cases.

Division Court — *Cheque — Payment Stopped—Payment into Court—Sale of Goods.*]—A vendor of goods, after receiving payment therefor, fraudulently sold them to another purchaser, who bought in good faith, giving in payment his cheque drawn on a bank at T. but cashed at a bank in O. on payment being guaranteed by an indorser. The second purchaser on being served by the first with a garnishee summons issued out of a Division Court, stopped payment of the cheque, and paid the amount into Court. The indorser, meanwhile, paid the bank at O.:—Held, that he was entitled to the money paid into Court. *Wilder* v. *Wolf*. 22 Occ. N. 293, 4 O. L. R. 451, 1 O. W. R. 481.

County Court—*Garnishee Summons Before Judgment—Partnership Action.*]— An application by the defendant to set aside a garnishee summons issued under s. 102 of R. S. B. C. c. 52, which enables a plaintiff at the time of issuing a summons for a debt or liquidated demand, or at any time previous to judgment, upon filing an affidavit, &c., to obtain a garnishee summons. The action was brought to have a partnership dissolved and for an account and payment:—Held, that the action was not for a debt or liquidated demand; and the garnishee summons was set aside. Walter v. Rooke, 50 L. J. Q. 470, Howell v. Metropolitan District R. W. Co., 51 L. J. Ch. 158, and Randall v. Lithgow, 53 L. J. Q. B. 518, referred to. *Cicognia* v. *McHeather*, 22 Occ. N. 309.

Fraudulent Collusion — *Setting Aside Judgment.*]—Although a judgment validating a garnishment constitutes a judicial transfer of the sum garnished, the garnishee (in this case the wife of the defendant) who after service of such judgment, has settled with the attaching creditor by means of an exchange of properties and a dation en paiement, will be ordered—at the suit of a creditor prior to the attaching creditor, and upon proof that the attachment and the judgment were the result of a fraudulent agreement to defraud the creditors of the defendant, with the knowledge of the garnishee and attaching creditor—to deposit in the record office for distribution the sum which she owes to the defendant, and the exchange of properties and the dation en paiement will be set aside. *Leroux* v. *Préfontaine*, Q. R. 19 S. C. 315.

Insolvency of Debtor—*Judgment Making Garnishment Absolute—Attack Upon by*

Another Creditor.]—After the creditor who has issued a writ of saisie-arrêt has obtained, without fraud, a judgment ordering the garnishee to pay him the amount which the garnishee acknowledges he owes the debtor, another creditor of the latter cannot, by tierce-opposition, cause such judgment to be annulled on the ground of the insolvency of the debtor; the allegation of insolvency must be made before the judgment making absolute the saisie-arrêt. *Manseau* v. *Bruyère*, Q. R. 11 K. B. 16.

Insolvency of Debtor — *Opposition by Other Creditors—Knowledge of Attaching Creditor.*]—In order that there may be ground for an opposition à fin de conserver, based upon the insolvency of the debtor, after judgment has been given upon a writ of saisie-arrêt, it is necessary that the attaching creditor should have known of the insolvency of the debtor. *Dansereau* v. *Bradshaw*, 4 Q. P. R. 198.

Purchase Money of Land — *Deed — Acknowledgment — Estoppel — Burden of Proof.*]—Where there is an acknowledgment under seal in a transfer of land that the consideration or purchase money has been paid, the vendor cannot, in the absence of fraud, maintain an action at law against the purchaser for such purchase money; he is estopped by his deed. Baker v. Davey, 1 B. & C. 704, and Donohoe v. Hull, 24 S. C. R. at p. 689, followed. The vendor may proceed in equity, but in rem. by asserting a lien on the land sold for the purchase money (and as incidental to that relief may have a personal order against the deficiency, it any, as in Sanderson v. Burdette, 16 Gr. 119, 18 Gr. 419, and in Shelly v. Shelly, 18 Gr. 495). But the Court has no power in garnishee proceedings to give effect to such lien, or to order the purchaser to pay over the purchase money to the creditor of the vendor:—Held, also, in an issue arising out of a garnishing application, that the onus of proving the indebtedness of the garnishee to the judgment debtor was upon the judgment creditor, and he failed to satisfy it. *Genge* v. *Wachter*, 20 Occ. N. 158, 4 Terr. L. R. 122.

Solicitor's Lien — *Costs in Court not Having Jurisdiction—Distribution of Moneys Attached—Insolvency — Opposition — Third Party—Prescription.*] — There is no lien for costs incurred by an advocate before a Court which has been declared to have no jurisdiction, notwithstanding the contentions of the parties to the contrary. 2. Article 673 applies, in the case of the alleged insolvency of the debtor, to all distributions of money which do not represent immovable property and for which he is not accountable by law. 3. When a garnishment has been declared binding there is no occasion for a subsequent judgment ordering the garnishee to pay over the moneys attached, the amount, unless there is an allegation of bankruptcy, being distributable according to art. 697, C. P., and especially so if there is a seizure after a prior judgment. 4. An opposition by a third party is not prescribed, whatever be the date of the judgment attacked, if the third party has had knowledge of it only within a year. *Royal Electric Co.* v. *Pallister*, 3 Q. P. R. 340.

ATTACHMENT OF GOODS.

Affidavit for Writ—*Wife of Plaintiff.*] —A writ of attachment had been issued upon the filing, with the fiat, of an affidavit of the wife (commune) of the plaintiff. Upon motion of the defendant to set aside the attachment, upon the ground that a wife in such position cannot testify on behalf of her husband:—Held, that the affidavit required to obtain the issue of a writ of attachment is not evidence in the action, and may be made by such wife. *Roberge* v. *Roberge*, 3 Q. P. R. 403.

Affidavit—*Person to Make.*]—An affidavit leading the issue of a conservatory attachment ought to be subscribed by one of the persons authorized to subscribe such an affidavit in case of an attachment before judgment. *Marchand* v. *Globensky*, 7 Q. P. R. 94.

Attachment before Judgment — *Affidavit—Sufficiency.*]—The following statement in an affidavit: "That the said (defendant) said and declared to this deponent that he was going to sell everything and decamp from the country in order not to pay him (deponent); and the said deponent is, besides, credibly informed and believes that the said (defendant) is concealing and selling and is about to conceal and sell his property with the intention of defrauding his creditors, and particularly the said deponent, and the sources of my information are that one B., a milkman, affirms that the said (defendant) said and declared to him that he would sell all his property in order not to pay the deponent his said debt:"—Held, sufficient; and that a saisie-arrêt before judgment containing this allegation should not be quashed upon petition. *Lefebvre* v. *Rochon*, 5 Q. P. R. 443.

Conservatory Attachment — *Contestation—Assignment for Creditors.*]—The plaintiff issued a writ of conservatory attachment against the defendant. After the execution of the writ, the defendant made an abandonment of her property, and a provisional guardian was appointed to her estate. The defendant contested the conservatory attachment by an exception to the form:—Held, that after the abandonment the defendant ceased to have any interest in prosecuting the exception to the form. *Ledoux* v. *Simpson*, 4 Q. P. R. 57.

Conservatory Attachment — *Ordinary Creditor—Lien—Master and Servant—Claim for Wrongful Dismissal — Clerk in Store — Affidavit.*]—A saisie-conservatoire can issue only at the suit of one who claims a right of property in or a special lien upon movable effects, and not at the suit of an ordinary creditor who has only the general lien resulting from arts. 1980 and 1981. 2. A clerk has not, under arts. 1994 and 2006, a lien upon the merchandise in the shop where he serves to secure the payment of damages for wrongful dismissal. 3. Such a claim being one for unliquidated damages, the affidavit made in order to obtain the writ of saisie-conservatoire should state the nature and the amount of damages claimed and the facts giving rise to the claim, and should be submitted to the Judge, without whose order the writ cannot be issued. *Poirier* v. *Ornstein*, Q. R. 19 S. C. 182, 3 Q. P. R. 487.

Conservatory Attachment — *Sale of Goods—Refusal to Deliver.*]—The purchaser who has not yet received the goods sold to him, and on account of which he paid certain sums, cannot seize, by way of conservatory attachment, goods of the same nature and quality, owned by the defendant, and which the plaintiff alleges to be the defendant's only asset. 2. Conservatory attachment can only issue in virtue of an express provision of law. *Papin* v. *Long*, 4 Q. P. R. 140.

Defendant Out of the Country — *Goods Claimed by Wife and Offered for Sale by Her.*]—A right of conservatory attachment arises when the defendant insolvent has left the country, and his wife has offered his goods for sale and claims a title thereupon. *Lefebvre* v. *Picard*, 7 Q. P. R. 233.

Interest of Partner in Grain—Possession. *Clemens* v. *Bartlett*, 1 O. W. R. 342.

Seizure before Judgment—*Defendants about to leave Province — Amount of Claim only Disputed.*]—An attachment before judgment may be issued when the defendant, a foreigner, intends to depart with all his effects without paying the plaintiff's claim, of which he disputes the amount only. *Lemieux* v. *Le Cirque Sells and Downs*, 7 Q. P. R. 273.

Setting Aside—*Fraudulent Intent—Non-disclosure—New Evidence.*] — The plaintiff's affidavit, upon which an order for attachment of goods was granted, stated that he had good reason to believe and did believe that the defendant had disposed of her real estate with intent to defraud her creditors, and that she was about to dispose of her personal property with the same intent, and was about to leave Manitoba as soon as the goods should be disposed of (giving the source of his information). The defendant, on motion to set aside the order, by affidavit denied having had the intention to leave Manitoba permanently, and gave reasons for leaving temporarily. In reply the plaintiff swore to a chattel mortgage on the defendant's property, and a seizure thereunder: — Held, that the bare fact that the defendant had disposed of her real estate raised no inference of fraud; the affidavit of the plaintiff in reply disclosed facts on which his belief of intent to defraud was properly grounded; but these facts, being within the plaintiff's knowledge at the time of the original application, should then have been disclosed. The fact of the plaintiff's holding security should also have been stated. *Newton* v. *Bergman*, 21 Occ. N. 485, 13 Man. L. R. 563.

Setting Aside—*Procedure—Grounds.*]—A defendant cannot set aside, upon petition, a saisie-conservatoire, except by attacking it on affidavit or establishing that the goods seized are exempt from seizure; other grounds should be taken by pleading to the merits. *Lefleur* v. *Beaudin*, 3 Q. P. R. 442.

Usufruct of Fund — *Withdrawal from Bank.*]—The fact that a person having the usufruct of a fund has withdrawn from the bank a sum of money part of the usufruct does not give occasion for a conservatory attachment against him. *Marchand* v. *Globensky*, 7 Q. P. R. 208.

See HUSBAND AND WIFE — INSURANCE — JUDGMENT—MECHANICS' LIENS — PARTNERSHIP.

ATTACHMENT OF PERSON.

See ARREST.

ATTAINDER.

See CRIMINAL LAW.

ATTORNEY.

See SOLICITOR.

ATTORNEY-GENERAL.

See CONSTITUTIONAL LAW.

AUCTION.

See VENDOR AND PURCHASER.

AUCTIONEER.

See PRINCIPAL AND AGENT.

AUDIT.

See COMPANY.

AWARD.

See ARBITRATION AND AWARD.

BAIL.

See ARREST—CRIMINAL LAW.

BAILIFF.

Costs of Judicial Sale — *Right to Retain.*]—Whether there is or is not opposition à fin de conserver, the bailiff who has made a judicial sale has the right to keep his costs out of the moneys which he returns, provided such costs have been taxed. *Turgeon* v. *Shannon*, 4 Q. P. R. 274.

Fees of—*Responsibility of Advocates for —Partnership—Registration—Profits.*] — Advocates are personally responsible for the fees of bailiffs employed by them in connection

with the cases which they are conducting before the Courts. Such liability, where a partnership of advocates exists, is joint and not joint and several. 2. A partnership of bailiffs does not fall under arts. 1834 and 1835, C. C., and registration of such partnership, not being required or authorized by law, is without effect. Therefore the provisions of art. 1835, as to disproof of the allegations of the declaration of partnership, do not apply to a declaration of partnership made by a firm of bailiffs so far as their business as bailiffs is concerned. 3. Although bailiffs cannot act, in the performance of their duties, under a partnership name, they are not precluded from forming a partnership as regards the financial returns from their individual work, nor from contracting, as a partnership, for the payment of individual services rendered by one or several of them. *Decelles* v. *Bazin*, Q. R. 19 S. C. 399, 4 Q. P. R. 92.

Incorporated Society — *Trial of Members — Domestic Tribunal — Appeal.*]—It is only the board of examiners of the corporation of bailiffs of the district of Montreal who have the right to try in the first instance members of that corporation accused of breaches of the rules, and the Superior Court has no jurisdiction except upon appeal. *Montreal District Bailiffs' Corporation* v. *Proulx*, Q. R. 24 S. C. 244.

Removal—*Interest of Party Seeking.*]—One who petitions to have a bailiff removed from office must have a special interest. *Normand* v. *Aumais*, 7 Q. P. R. 59.

Service of Papers — *Report — Amendment.*]—A bailiff effecting service of a proceeding commits a grave irregularity if he corrects his report after it has been filed in Court. *Hall* v. *Kenton*, 4 Q. P. R. 375.

See DIVISION COURTS.

BAILIFFS' CORPORATION.

Admission of Member—*Examination—Refusal—Appeal.*]—There is no appeal by petition to the Superior Court from the decision of the board of examiners of the Corporation des Huissiers of the District of Montreal, refusing a certificate of qualification to a candidate who has failed to pass the examination of the board. *Lalonde* v. *Corporation des Huissiers du District de Montreal*, Q. R. 26 S. C. 426.

BAILMENT.

Agistment of Cattle — *Contract — Liability for Loss—Exception as to Disease—Death from Disease by Mismanagement.*] — The plaintiff, who owned 47 head of cattle, made an agreement with the defendant to feed, salt, and winter them for $4.50 per head; the defendant to feed the cattle sufficient good feed to bring them through the winter in good condition, and to deliver them to the plaintiff in the spring of 1904 as soon as there was green pasture sufficient to feed the cattle. The defendant agreed that he would be responsible for the loss of any of the cattle through getting lost or killed or any other way, except dying from ordinary disease. While in the defendant's charge 29 of the cattle died; he housed them in a building so low and small that there was not sufficient ventilation. They were so crowded at night that they became overheated; as a result they were chilled when turned out and contracted colds resulting in catarrh, which caused their deaths. The defendant was warned by a veterinary surgeon that the building was not large enough:—Held, that the exception from liability provided by the agreement, in case of death from ordinary diseases, could not be held to apply to disease resulting directly, as was the case here, from the defendant's own mismanagement. *McLenaghan* v. *Hood*, 25 Occ. N. 19, 1 W. L. R. 422.

Agistment of Cattle—*Loss of—Reasonable Care—Price Paid—Custom of Locality—Negligence.*] — Although one who takes animals to pasture them should give them the care of a "bon père de famille," the extent of this obligation is, nevertheless, dependent on the price paid for such pasturage, and the custom of the locality. Therefore, it is unreasonable to expect that for a moderate price a man should watch the animals constantly; and if one of them disappears, it is the owner who should bear the loss, at least, unless he can prove negligence on the part of the owner of the land. *Nadon* v. *Pesant*, Q. R. 26 S. C. 384.

Destruction of Goods Stored, by Fire — *Liability of Bailee.*] — The respondents, butchers, had caused to be slaughtered by the appellants, as they were bound to be by the by-laws of the city of Montreal, eighteen hogs, which they had the right to leave in the ice-houses of the appellants during the following night and for at least twelve hours without paying for storage. During such night and while the meat was in the ice-houses, a fire consumed the abattoirs, and the respondents' meat was destroyed:—Held, that the storing of such meat was not a necessary storing. 2. That the appellants having proved that they had used in the care of such meat the diligence of a bon père de famille, and that the fire had occurred by reason of no fault of theirs, they were not responsible for the loss suffered by the respondents. 3. That the appellants were not obliged to prove the origin of the fire. *La Compagnie de L'Union des Abattoirs de Montreal* v. *Leaue*, Q. R. 10 K. B. 289.

Fire—*Damages—Sale of Goods.*]—The defendants agreed to make for the plaintiff certain tools used in making hubs of a special kind, and, in consideration of being allowed to use the tools, to make also a number of the hubs:—Held, that the use of the tools was an unconditional appropriation thereof to the contract, so that the property in them had passed to the plaintiff; that while using them the defendants were bailees thereof for hire, and after ceasing to use them, gratuitous bailees; that the defendants, having neglected to send the tools to the plaintiff after repeated requests, were liable to him in damages; but that these damages were nominal only, and that the plaintiff could not, upon the destruction of the tools by an accidental fire while retained by the defendants, recover from them their value, that destruction not being damage

such as might fairly and reasonably be considered as arising from the breach, or in contemplation of the parties. *Leggo* v. *Welland Vale Manufacturing Co.*, 21 Occ. N. 374, 2 O. L. R. 45.

Hire of Horses — Negligence of bailee — Loss — Contributory negligence. *Klassen* v. *Wright* (N.W.T.), 1 W. L. R. 158.

Hire of Machinery—Contract for work —Loss of part of outfit—Damages for breach of contract — Rental of machinery — Notice terminating—Agreement to return—Condition —Impossibility of performance. *Oke* v. *Great Northern Oil and Gas Co.*, 5 O. W. R. 429.

Negligence—*Storage—Duty of Periodical Examination.*]—The defendants were keepers of an elevator, and on the 24th April, 1897, received from the plaintiff a quantity of corn for storage, and stored it in several large bins. On the 22nd May, 1897, desiring to use one of these bins (No. 49) for another purpose, the defendants removed the corn over into another bin, and in so doing discovered that it had become heated, whereupon, by exposing it to the air, they stayed the process of heating, and the corn recovered. They also notified the plaintiff by telegram of the discovery in the bin No. 49, but they did not themselves examine the remainder of the corn to see whether it also was becoming heated, nor did the plaintiff ask them to do so. When, on the 3rd June, the corn was run out to be shipped, a quantity of it was found to be in an advanced condition of fermentation: — Held, that the defendants had been guilty of negligence, under the above circumstances, and were liable to the plaintiff for the loss sustained by him. *Dunn* v. *Prescott Elevator Co.*, 22 Occ. N. 257, 4 O. L. R. 103, 1 O. W. R. 75, 404.

Stable-keeper—*Injury to Horse—Negligence—Contract—Estoppel.*] — The plaintiff's mare, kept for him in an open stall in the defendant's stable, was kicked by a horse, kept in the adjoining open stall, which had broken his halter shank during the night and got loose. This horse had got loose in the stable on several previous occasions, and on one of such occasions, the plaintiff's mare had received a slight injury to one of her legs, which defendant supposed had been caused by the same horse. In the opinion of the majority of the Court, it was not proved that the horse was a vicious one, or that he had ever broken a halter shank before, or that the shank he broke on that night was not as strong as halter shanks usually are. The plaintiff's mare shortly afterwards died as the result of the kicking:—Held, that the defendant was not liable for the loss; Perdue, J., dissenting. After the first injury, the plaintiff's son, in the absence of his father, asked the defendant to put his father's mare in a box stall, saying that his father on his return would pay the extra charge. The defendant did so, but, a day or two before the injury, put the mare back into the same open stall without the knowledge of the plaintiff or his son:—Held, that there was no contract binding on the defendant to keep the mare in the box stall; Perdue, J., dissenting. *Templeton* v. *Waddington*, 24 Occ. N. 151, 14 Man. L. R. 495.

Storage of Wheat—Conversion—Dispute as to quality redelivered—Evidence—Certificate of weighmaster. *Sceley* v. *Imperial Elevator Co.* (N.W.T.), 2 W. L. R. 273.

Storage of Wheat—Increase of bailor's wheat by leaking from neighbouring bins—Damage to bailor's wheat by reducing grade —Claim and counterclaim—Costs. *Welwyn Farmers' Elevator Co.* v. *Byrne* (N.W.T.), 2 W. L. R. 333.

See COMPANY — MASTER AND SERVANT — NEW TRIAL—WAREHOUSMEN.

BALLOTS.

See MUNICIPAL ELECTIONS—PARLIAMENTARY ELECTIONS.

BANKRUPTCY AND INSOLVENCY.

I. ABANDONMENT OF INSOLVENT, 138.
II. ACT OF INSOLVENCY, 140.
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I. ABANDONMENT BY INSOLVENT.

Contestation of Schedule — *Fraud — Pleading.*]—Where an insolvent's schedule is contested for fraud, and the insolvent in his reply to the contestation explains his acts in order to justify them, the contestant will be allowed to rejoin to this reply alleged facts connected with the allegations of his contestation in order to explain and justify them, and these allegations will not be struck out on the ground that they should have formed part of the contestation itself. *Bessette* v. *Ball*, 5 Q. P. R. 233.

Contestation of Schedule — *Summary Procedure—Inscription—Notice—Filing—Service—Time.*]—The rules and times for taking the different steps in the matter of the contestation of a schedule are those applicable to summary procedure. 2. An inscription on the merits in every case must first be filed at the office of the Court, and notice must afterwards be given to the opposite party. 3. In a summary matter an inscription upon the merits filed less than three clear days before that fixed for the hearing is illegal and will be set aside upon motion, even when the notice of inscription has been given to the opposite party three days before that fixed for the hearing, such notice being irregular because the inscription had not been filed at the office of the Court at the time that it was served. *Dufour* v. *Ames-Holden Co.*, 6 Q. P. R. 38.

Creditors' Claims—*Contestation—Filing—Subrogation—Exception to Form — Tierce-opposition.*]—The original of a contestation of claim must be filed with the curator, and it is not enough to file a copy. 2. An allegation in such a contestation that the contestant has been subrogated to different creditors of the insolvent cannot be attacked by exception to the form upon the allegation that it is not supported by documents justifying it. 3. The fact that certain grounds of contestation of a claim really amount to a tierce-opposition, while the contestant is not in a position to claim as a tiers-opposant, is also a ground of substance which cannot be discussed upon an exception to the form. *Beaudoin* v. *Lamothe*, 5 Q. P. R. 356.

Creditors' Claims—*Filing with Prothonotary—Fee.*]—By virtue of art. 44 of the tariff of prothonotaries, a prothonotary has a right to charge a fee upon a claim sworn to and filed with him, for the purpose of authorizing the creditor filing it to vote at a meeting held for the nomination of a curator, etc., pursuant to art. 867, C. P. *In re Beaudoin*, Q. R. 23 S. C. 179, 5 Q. P. R. 291.

Declaration of Insolvent — *Place of Filing—Domicil—Nullity.*] — To constitute a valid abandonment of property, the declaration and statement of the debtor must be filed in the office of the Superior Court for the district in which the debtor has his principal place of business or his domicil. 2. If the declaration and statement are filed in any other district than the above, the abandonment is illegal, and all proceedings therein are null and void. *In re Rivard*, Q. R. 22 S. C. 190.

Demand of Abandonment — *Contestation—Petition — Deposit — Practice — Hearing.*]—The contestation of a demand of abandonment is not governed by the rules governing pleadings, but is made by summary petition, which need not be accompanied by a deposit, even if it questions the jurisdiction of the Court in the office of which the demand is filed. 2. If a debtor, by his petition, urges that a delay was granted to him by the creditor demanding abandonment, the adjudication on his petition, and on a motion to reject the same, will be deferred until after proof is made by both parties of their respective allegations. *Mussen* v. *Filion*, 5 O. P. R. 170.

Demand — *Retired Trader — Refusal to Assign—Arrest—Capias.*]—It is not necessary that a person be actually engaged in trade when a demand of abandonment is made upon him. Even where he has ceased for several years to carry on trade, he is nevertheless subject to a demand of abandonment based on a commercial debt contracted by himself or his firm while he was enaged in trade; and consequently, in such case, under art. 895, C. C. P., he is liable to arrest under capias for refusal to make an abandonment. Carter v. McCarthy, Q. R. 6 Q. B. 499, followed, and Roy v. Ellis, Q. R. 7 Q. B. 222, distinguished. *Perkins* v. *Perkins*, Q. R. 22 S. C. 72.

Landlord's Claim for Rent—*Distribution of Insolvent's Estate—Effect of 61 V. c. 46—Retrospective Legislation.*]—Where insolvent tenants judicially abandoned their property for the benefit of their creditors, and statute law (61 V. c. 46) at the date of the abandonment restricted the lessor's preference to two years' rent, ranking them as ordinary creditors for the balance, while no such restriction was enacted by the law as it stood at the date of the leases:—Held, that the existing statute applied to all liquidations which arose after its enactment, and governed the lessor's privilege unless expressly excepted therefrom. Judgment in *In re Bulmer, Beaudry* v. *Ross*, Q. R. 12 K. B. 334, reversed. *Ross* v. *Beaudry*, [1905] A. C. 570.

Pretended Abandonment—*Fraudulent Conduct—Judgment—Estoppel.*]—A pretended abandonment, whereby the defendant states that he has no assets whatever, cannot avail against a judgment of the Court declaring that the defendant has fraudulently done away with his property, and absconded from the Province, especially where the said pretended abandonment has been intituled and filed in another cause, where the plaintiff was not a party, and has not been followed by the appointment of a curator or any other proceeding. *Roumilhac* v. *Vianez*, 3 Q. P. R. 362.

Provisional Guardian—*Change of.*] — The fact that a provisional guardian, appointed by the prothonotary, is a creditor for a sum less than the claim of another creditor is not a sufficient cause for the Court to substitute the other creditor for him. 2. The Court will not order a change of provisional guardian except upon proof of incompetence or dishonesty. *In re Bonhomme*, Q. R. 22 S. C. 22.

Purchase of Estate by Wife of Insolvent—*Agreement with Creditor.*]—An agreement by the wife, separated as to property, of an insolvent trader, to pay one of his creditors $100, and also to compensate any loss he might sustain by the insolvency, in consideration of his assistance in financing the purchase by her of her husband's bankrupt estate, does not come within the prohibition contained in art. 1301, C. C., where such purchase was carried out, and the wife continued the business in her own name. *Carter* v. *Walker*, Q. R. 23 S. C. 123.

Trader—*Compulsory Abandonment.*] —A trader who neglects to pay at maturity the claims of two of his creditors, which compose more than half of his debts, will be ordered to make an abandonment of his property. *Lemay* v. *Parizeau*, 6 Q. P. R. 40.

II. Act of Insolvency.

Second Hypothec — *Vente à réméré — Impairment of First Security.*] — A debtor having on the 8th May, 1901, executed an instrument hypothecating his immovables for an advance payable at the end of three years, subsequently, in order to defray the costs of an action, the existence of which his creditor knew at the time of the loan, and which was afterwards decided against him, borrowed from another person the amount necessary to pay these costs, and gave to this new creditor a vente à réméré upon the immovables already hypothecated. He was sued by his first creditor upon the hypothec not yet due, and for a declaration that he was insolvent and had impaired the security which he had given:—Held, that, in executing the vente à réméré, he had not made himself insolvent,

that he had done no injury to the security which he had given to his first creditor, and that what he did did not come within the provisions of art. 1092, C. C. *Danjou* v. *Vaillancourt*, Q. R. 22 S. C. 316.

III. ASSIGNMENT FOR BENEFIT OF CREDITORS.

Action by Assignee for Creditors to Set Aside Conveyance by Insolvent — Fraudulent conveyance — Statutory presumption—Rebuttal—Onus—Knowledge of grantee —Parties—Fraudulent grantor. *Crawford* v. *Magee*, 6 O. W. R. 44.

Action by Creditors against Assignee —Lien—Distribution—Costs. *Lucas* v. *Tegart*, 2 O. W. R. 548.

Claim to Rank on Estate—Declaration —Costs. *Smith* v. *Harkness*, 2 O. W. R. 171.

Conveyance by Insolvent to Creditor —Action by assignee to set aside—Grantee's ignorance of solvency—Secured for debt— Wages — Interest — Redemption — Costs. *Casserley* v. *Hughes*, 5 O. W. R. 599, 6 O. W. R. 70.

Declaration of Right to Rank—*Division Court.*]—An action for a declaration of the right to rank against an insolvent estate vested in an assignee under the Assignments Act, R. S. O. 1897 c. 147, is not within the jurisdiction of a Division Court. *In re Bergman* v. *Armstrong*, 23 Occ. N. 14, 4 O. L. R. 717, 1 O. W. R. 799.

Demand—*Cessation of Payments—Costs.*] —The cessation of payments is an essential condition of a demand for an assignment of property for the benefit of creditors. However, if the defendant, by his default, has occasioned the demand for an assignment, and has not since discharged his obligation, but, on the contrary, has caused considerable expense to the creditor requiring the assignment, the demand for an assignment will be dismissed without costs. *Hetu* v. *Poirier*, 4 Q. P. R. 242.

Demand — *Contestation — Discovery by Debtor.*]—There is no provision of the Code of Civil Procedure whereby a debtor, contesting a demand of assignment made upon him, can be ordered to exhibit and give communication, to a creditor of his books of account, letterheads, or any documents or books of whatsoever nature. *Wistar* v. *Dunham*, 5 Q. P. R. 79.

Demand—*Contestation — Time — Order Extending.*]—The plaintiff having made a demand upon the defendant for an assignment of his property, the latter did not contest the demand within the time fixed by art. 857, C. P. C. Afterwards, by leave obtained ex parte from a Judge of the Superior Court, he filed a contestation, and the plaintiff asked to have the contestation dismissed as having been filed too late:—Held, that art. 205, C. P. C., applies to proceedings for the assignment of property, as well as to all other causes, and that the plaintiff, not having appealed from the order allowing the filing of the contestation, could not, by reason of its filing after the time allowed, demand the dismissal of it. *Mussen* v. *Filion*, Q. R. 24 S. C. 308.

Demand — *Petition to Set Aside — Affidavit—Notice of Presentation.*]—There is no need of an affidavit in support of a petition to set aside a demand for an assignment of property, even if the facts relied upon do not appear upon the record. 2. It is not necessary to give notice of the presentation of such petition for a day fixed, a notice of filing it as part of the record being sufficient. *Dufresne* v. *Superior*, 5 Q. P. R. 28.

Demand—*Service of—Irregularity — Demand Based on Debt Assigned—Proof of.*]— A demand for assignment of property served at the residence of the manager of the debtor, will not be dismissed on an exception to the form, if it is shewn that it was sent to the debtor, and that he has not been prejudiced by the irregularity of the service. A demand for assignment based on a debt transferred to the creditor in writing under seal, will be dismissed if the creditor does not prove the writings containing the assignment, which, by themselves, are not evidence against the debtor. *Smith* v. *Timbers*, 7 Q. P. R. 29.

Execution after Time Provided in Deed—*Originating Summons — Costs.*] — A proceeding by originating summons to determine the rights of certain creditors who executed a deed of assignment for the benefit of creditors after the expiration of the time provided in the deed, but before any dividend was paid. Some of the creditors had not learned of the assignment until after the time had elapsed; others had sent instructions and power of attorney to execute within the time, but the same miscarried, and the execution did not take place until after the time had elapsed. The assignment contained no release:—Held, on the authority of Whitmore v. Turquand, 3 D. F. & J. 107, Haliburton v. DeWolfe, 1 N. S. D. 12, and Douglas v. Samson, 1 N. B. Eq. 137, that the creditors who executed after the expiration of the time limited in the assignment, but before payment of a dividend, were entitled to participate pari passu with the creditors who executed within the period. Held, also, following Gunn v. Adams, 8 C. L. J. 211, that the costs of all parties should be paid out of the estate. *Capstick* v. *Hendry*, 22 Occ. N. 35.

Exemptions — *Alien—Costs.*] — An alien is entitled to the statutory exemption of a part of his property from seizure and sale under execution. He is not barred therefrom by s. 3, s.-s. 1, of the Naturalization Act. Where an alien made an assignment for the benefit of his creditors of all his property not exempt by law, an order for payment of the costs of certain proceedings by the creditors out of a fund representing the value of his exemptions, was reversed. *In re Demaurez*, 21 Occ. N. 457, 5 Terr. L. R. 84.

Form of Assignment—*Acceptance—Action by Assignee.*] — A debtor, by indenture dated the 10th July, 1900, mortgaged all his real estate to the defendant; at and before the giving of the mortgage the debtor was, and knew himself to be insolvent; he had borrowed heavily and was largely in debt. On the 26th July the debtor made an assignment for the benefit of his creditors generally, to the plaintiff, who was a member of a

firm who were creditors of the debtor. There was no evidence of acceptance of the benefits of the assignment by any creditor except the plaintiff, or even of communication of it to any other:—Held, that it was not necessary for the purpose that the assignment should be in the language of s. [illegible] of the Assignments Act, R. S. M. c. 7; the assignee was the proper person to bring an action to set aside the mortgage; he was a creditor and entitled to the benefit of the assignment; this circumstance rendered it irrevocable. *Schwartz* v. *Winkler*, 21 Occ. N. 574.

Further Directions.]—*Law Society of Upper Canada* v. *Hutchison*, 1 O. W. R. 558.

Incomplete Assignment — *Seizure of Immovables—Stay of Execution—Art. 772, C. C. P. (old text.)*]—Judgment in Q. R. 8 Q. B. 517 affirmed. *Birks* v. *Lewis*, 30 S. C. R. 618.

Interest of Debtor in Estate — Receivership order—Costs—Lien. *Reinhardt* v. *Hunter*, 6 O. W. R. 421.

Judgment—*Execution—Sheriff — Sale of Land.*]—Under a writ of fieri facias a sheriff seized the interest of a judgment debtor in certain lands, and advertised the interest for sale. Three days prior to the time fixed for the sale the judgment debtor made an assignment for the benefit of his creditors pursuant to the provisions of R. S. O. 1897 c. 147. The assignee gave notice to the sheriff of the assignment and asked for a statement of the costs incurred to that time. No tender of the costs was made or undertaking given to pay them, and the sheriff proceeded with the sale, and sold the land to the plaintiff. The assignee, notwithstanding the sheriff's sale, assumed to sell the land to, and executed a conveyance in favour of, the defendant's son, who allowed the defendant to remain in possession as his agent:—Held, that the assignment for the benefit of creditors did not stand in the way of the sheriff proceeding to sell under the writ of execution, and that the sale by the assignee was nugatory and void, and the sheriff's vendee entitled to possession of the land. Gillard v. Milligan, 28 O. R. 645, followed. *Elliott* v. *Hamilton*, 22 Occ. N. 412, 4 O. L. R. 585, 1 O. W. R. 705, 2 O. W. R. 141.

Mortgage by Insolvent — *Purchase of Mortgaged Land by Assignee—Ignorance of Existence of Mortgage—Subsequent Action to Set Aside—Statutory Presumption.*]—Plaintiff was assignee in law of the Vandecar estate, and sued in that character to vacate a mortgage to the defendants for $250 made by the insolvent, a few days before the assignment, upon a farm already mortgaged to the Huron and Erie Loan Co. for $3,600. The defence was that the farm was sold by the assignee and purchased on his behalf for $4,200 in March, 1897, and is now vested in him as owner. The learned Judge ruled that such was his legal position, and declined to regard his status as sufficient to justify the maintenance of this action. No doubt, qua owner, he could not attack the prior registered mortgage—qua assignee for creditors he can impeach the mortgage under the statute then in force, 54 Vict. c. 20, s. 2, s.-s. 2 (b). The mortgage for $250 was to secure a bill of costs of the mortgagees; it was made on 15th October, 1896, but it was not registered until 10th February, 1897. The assignment for creditors was executed on 21st October, 1896. The assets were all realized and distributed on a dividend of 7 per cent. about 12th July, 1897. The farm was sold, subject to the first mortgage, on 13th March, 1897, and the conveyance taken, through a nominal purchaser, to plaintiff in August, 1897. After providing for the first mortgage, there came out of the purchase money a balance of $600, which was paid by plaintiff and distributed among the creditors. Defendants filed their claim as creditors (but without disclosing the mortgage), in December, 1896, and received their share of the dividend in June, 1897. It was proved the plaintiff had no notice nor knowledge of the $250 mortgage till October, 1897, after the estate had been wound up and distributed. Plaintiff took possession of the farm with knowledge of the creditors of the purchase by him, and so remained until disturbed by notice of the exercise of the power of sale in defendant's mortgage on 10th May, 1903, and then this action was begun to invalidate the instrument or to stay proceedings thereon. At trial before Judge (without jury), the action was dismissed without hearing evidence for the defence, holding that plaintiff could not maintain the action:—Held, on appeal (evidence for the defence being heard), that neither Vandecar nor the defendants entered into the transaction with the knowledge or intent which would bring it within the mischief of the statute, 54 Vict. c. 20, s. 2, s.-s. 2 (b), and that it was extremely doubtful whether Vandecar was at the time insolvent, the appearance of anything extraordinary in the defendants' dealings with their security being accounted for by the proverbial carelessness of lawyers in the conduct of their own affairs. *Craig* v. *McKay*, 4 O. W. R. 274, 6 O. W. R. 160, 25 Occ. N. 10, 8 O. L. R. 651.

Partnership Assets Only — *Creditors' Trust Deeds Act.*]—An assignment by a firm for the benefit of creditors which is construed by the Court to be an assignment of partnership assets only, may be a good and valid assignment within the meaning of the Creditors' Trust Deeds Act. *Eastman* v. *Pemberton*, 7 B. C. R. 459.

Preferential Claim—*Wages of Assignor —Creditors' Trust Deeds Act—Contractor.*]—The plaintiff contracted with cannery proprietors (a) to supply labour and pack salmon at a stated price per case, i.e., by piece work; and (b) to act as foreman of the labourers supplied by him, at a salary of $50 per month. The proprietors having assigned for the benefit of creditors, the plaintiff sought to enforce the preference given by s. 36 of the Creditors' Trust Deeds Act in respect to both the salary and the piece work:—Held, that the preference must be restricted to the salary. *Ah Tam* v. *Robertson*, 23 Occ. N. 238, 9 B. C. R. 505.

Preferential Claim — *Wages — One Month — Computation — Statutes.*]—By the Creditors' Trust Deeds Act, 1901, an assignee is required to pay in priority to the claims of ordinary creditors the wages of persons in the employ of the assignor at the time of the assignment, or "within one month before." The assignment was made on the 27th November, 1901:—Held, that a workman who

was in the employ of the assignor previous to and including the 26th October, 1901, was not entitled to a preference. Interpretation Amendment Act, 1902, applied. *In re Clayoquot Fishing and Trading Co.*, 9 B. C. R. 80.

Property of Third Person in Hands of Insolvent—*Recovery—Petition.*]—Property not belonging to the debtor which is in the creditors' possession by virtue of an abandonment, can only be recovered by the person entitled thereto on a petition by himself, and the curators will not be allowed to obtain an order authorizing them to transfer the same to the person who pretends to be the owner thereof, in a matter where such owner is not a party and where the ownership is disputed by other creditors. *In re Simpson and Gagnon*, 6 Q. P. R. 419.

Provisional Guardian — *Change of—Creditors.*]—The fact that the provisional guardian named by the prothonotary in the case of an assignment for creditors is a creditor for less sum than that claimed by another creditor is not a sufficient ground for an order of the court to replace the provisional guardian by the other creditor.—2. The court will not order a change of provisional guardian except upon proof of incompetence or dishonesty. *In re Bonhomme and Burnett*, 5 Q. P. R. 40.

Removal of Assignee—Solicitor for preferred creditors—Appointment — Approval—Injunction—Solicitor for estate—Partner of assignee—Debtor of estate. *Orillia Export Lumber Co.* v. *Burson*, 2 O. W. R. 1110.

Rights of Assignee—*Recovery of Portions of Estate—Garnishment—Creditors.*]—The curator to an assignment of property may recover from the insolvent property which the insolvent has not given up or which he has secreted, but the curator cannot exercise against the debtor rights of action which belong individually to each one of his creditors (Art. 931, C. P.) for the balance of the claims of such creditors against the debtor, by way of garnishment of the party paid out of the proceeds of the property given up by the debtor. *Desmarteau* v. *Viau*, 4 Q. P. R. 282.

Right to Rank on Estate—*Annuitant—Attachment of Debts—Assignments Act.*]—An insolvent made an assignment to the defendant for the benefit of creditors, pursuant to R. S. O. 1897 c. 147. Previous to the assignment the defendant had covenanted with the plaintiffs to pay to J. R. $100 per quarter on the first day of each quarter during her natural life:—Held, that the growing payments were in the nature of contingent debts; and that the plaintiffs were not entitled under R. S. O. c. 147 to rank upon the estate of the insolvent for the present value of such payments. Grant v. West, 23 A. R. 533, and Mail Printing Co. v. Clarkson, 25 A. R. 1, followed. Semble, that such claims are not subject to attachment under the garnishee provisions of the English Judicature Act and Rules, as accruing debts. In re Cowan's Trust, 14 Ch. D. 638, has been disapproved in Webb v. Stenton, 11 Q. B. D. 518. *Carswell* v. *Langley*, 22 Occ. N. 97, 3 O. L. R. 261, 1 O. W. R. 107.

Right to Rank on Estate—*Claim for Inchoate Dower—Competition with Creditors—Registration of Hypothec — Radiation — Rights of Curator.*]—Where by the marriage contract a prefixed or conventional dower payable in one sum, has been stipulated in favour of the wife, she is not entitled to rank for that sum as a conditional obligation, in competition with the creditors of her insolvent husband, before the opening of the dower by the death of the husband.—2. A prefixed dower, or any other right derived from the husband, does not come under the terms of Art. 2029, C. C. The only way in which such rights can be protected is by special conventional hypothec, which must describe the property affected.—3. The curator in an insolvent estate is entitled to bring action for the radiation of the registration of a hypothec affecting the insolvent's immovable property, where such registration is illegal, without waiting to see whether the estate is sufficient to pay all the creditors in full. *Bilodeau* v. *Benoit*, Q. R. 20 S. C. 241.

Sale of Land Under Execution.]—After an assignment of his property by a debtor for the benefit of his creditors, and the nomination of a curator, a creditor of such debtor cannot cause his lands to be seized and sold, but such lands must be sold by the curator or upon his authority. *Guimond* v. *Gravel*, Q. R. 19 S. C. 568, 4 Q. P. R. 17.

Sheriff of Another District—*Validity—Setting Aside—Costs of Action to Set Aside Deed.*]—An assignment to the sheriff of the Superior Court for the district of Quebec by a merchant who lives and carries on business in the district of Three Rivers is absolutely void; and so are the appointment of a trustee and inspectors and all other proceedings thereunder. Any one concerned can on an application to the Superior Court at Quebec, on producing such assignment, have it declared void; and it is sufficient to give notice to the trustees and inspectors, without giving notice to the insolvent.—Such application was allowed with costs to the applicant without saying against whom. The costs of such application are costs incurred in the common interest, and the applicant can claim them "par privilege" from the proceeds of a sale by the sheriff of the lands of the debtor, although such sale was made by virtue of a writ of fi. fa. issued by another creditor after the cancellation of this assignment—The prothonotary, in preparing his scheme of distribution, ought to consider whether hypothecs reported by the registrar are legal; and if it appears by his certificate that a hypothec mentioned in it cannot be a legal charge on the land sold, he should not take it into account.—The plaintiff in an "action paulienne," who has set aside, as a fraud upon creditors, a deed of sale of land made by the debtor, has a good privilege for his costs on the proceeds of the sale of the land; but the prothonotary can only rank him for it, if he claims it by a protest in order to preserve it. The procedure to be followed in a dispute as to the order or ranking of claims is different from that of a dispute of a claim on the merits. *Rousseau* v. *Rivard*, Q. R. 26 S. C. 176.

Voluntary Assignment—*Property Passing.*]—Quære, whether the general rule that property in which a bankrupt has no beneficial interest does not pass to his trustee

applies, so far as the legal title is concerned, in the case of a voluntary non-statutory assignment for the benefit of creditors. *MacArthur* v. *MacDowall*, 1 Terr. L. R. 345.

Voluntary Assignment for Creditors—Action by assignee to set aside mortgage made by assignor — Cause of action. *Dichl* v. *Wallace* (N.W.T.), 2 W. L. R. 24.

IV. Composition.

Collateral Securities — *Reservation—Effect of.*]—The respondent having assigned to the appellants, as collateral security for advances, a sum of $5,000 owing to him by the Merchants Telephone Co. (the "mise-en-cause"), became financially embarrassed and compromised with his creditors at 75 cents on the dollar. The appellants executed the deed of composition, but added these words, "special reserve being made as to the securities which we hold." They then accepted from the respondent 6 notes for 75 per cent. of their claim, and returned to him all the negotiable securities they had received from him as security for their claim. The first three notes were paid at maturity, and, as the appellants had received from the "mise-en-cause," under the assignment mentioned, an amount equal to the amount of the last three notes, the respondent called upon the appellants to give up these notes and retransfer the debt assigned to them. The appellants refused, contending that the reservation in the composition deed was, according to commercial custom, to be considered as made in respect of their total claim, and that the agreement to accept 75 cents in the dollar did not extend to collateral securities:—Held, that the reservation did not imply the obligation on the part of the respondent to pay even out of the collateral security which he had given the 25 cents which the appellants had abandoned by executing the deed of compoosition; that its effect was only to assure to the appellants, even as to such security, payment of their original claim, in case the respondent should fail to pay the composition notes at maturity; and that commercial usage, urged by the appellants, could not be admitted, in face of the express terms of the reservation, which was the contract between the parties. *Banque d'Hochelaga* v. *Beauchamp*, Q. R. 13 K. B. 417.

Composition Deed—Acceptance by creditor of dividend under—Subsequent action for balance of claim—Proviso as to acceptance by "all the creditors." *Shepherd* v. *Murray*, 3 O. W. R. 733.

Composition—*Payment to Creditors as Inducement to Consent — Recovery Back — Set-off.*]—Under our law deductions voluntarily made by creditors to their debtors do not leave a natural debt existing, and in this regard there is no difference between deductions agreed to between traders and the like between other persons. 2.—A payment made by a debtor to his creditor to induce him to sign a composition is contrary to public policy, and therefore is void as the contract itself, and may be recovered back; and such recovery may be by way of set-off. 3.—It is too late for the plaintiffs to oppose set-off when the cause has been submitted to the Court on the merits, when the parties have proceeded to trial upon the whole cause, and the Court is in a position to adjudicate at the same time upon the existence of the two debts and to liquidate them by its judgment. There is then nothing in the way of a set-off, and the Judge should order it. *Kirouac* v. *Maltais*, Q. R. 18 S. C. 158.

Compromise—*Secret Agreement—Bribery—Inspector.*]—A commercial firm having made an abandonment of its property for the benefit of its creditors, a secret arrangement was made whereby a particular creditor, without any legal right to preference or priority, was secured an advantage over the other creditors, through the assistance of one of the inspectors of the insolvent estate, to whom was promised a sum of money for his personal use, upon his advising the acceptance of a proposal for the purchase of the estate upon a composition at a rate on the dollar to be paid to the creditors of the estate generally. The preferred creditor was, under the concealed arrangement, to receive an amount greater than the rate of the composition proposed, such additional sum to be paid by a third person who took no direct interest in the estate purchased:—Held, that the agreement was fraudulent and void; that the proposed payment by the third person was as much a fraud upon the general body of the creditors as if it had been promised by the insolvent firm itself; and that the additional sum could not be recovered by the creditor so preferred:—Held, also, that the promise of the payment to the inspector was a bribe, and, for that reason alone, the transaction to induce which it was given should be adjudged corrupt, fraudulent, and void. *Brigham* v. *Banque Jacques Cartier*, 20 Occ. N. 371, 30 S. C. R. 429.

Construction of Deed—*Novation—Reservation of Collateral Security—Delivering up Evidence of Debt.*]—By deed of composition and discharge, the defendants agreed to accept composition notes in discharge of their claim against the plaintiff, at a rate in the dollar, a special reservation being made as to the securities held for the debt due by the plaintiff. The original debt was to revive in full, on default in payment of any of the composition notes. Upon receiving the composition notes, the defendants surrendered the notes representing the full amount of the claim:—Held, reversing the judgment appealed from, that the effect of the agreement, coupled with the reservation made, was that the debtor was to be discharged merely from personal liability on payment of the composition notes, but that the securities were to be still held by the defendants for the purpose of reimbursing themselves, if possible, to the extent of the balance of the original debt:—Held, also, that the surrender of the original notes by the defendants did not extinguish the debts they represented, and, in the circumstances, there was no novation. *Beauchamp* v. *La Banque d'Hochelaga*, 25 Occ. N. 96; *La Banque d'Hochelaga* v. *Beauchamp*, 36 S. C. R. 19.

Setting Aside—*Misstatement.*]—A composition arrangement made with a creditor induced by a misstatement by the debtor to the creditor of the amount of assets and

liabilities, will be set aside if repudiated on the discovery of the falsity of the statement, and before any benefit has been taken under the arrangement, even though the misstatement is not shewn to have been fraudulently made. Derry v. Peck, 14 App. Cas. 337, applied. *Indian Head Wine and Liquor Co.* v. *Skinner*, 23 Occ. N. 73; *Plisson* v. *Skinner*, 5 Terr. L. R. 391.

V. Curator of Insolvent Estate.

Appeal by Curator — *Leave—Costs—Creditor — Divident Sheet—Dispute.*]—The trustee of an insolvent estate has no right without the leave of the Court, on notice to the inspectors, to appeal from a judgment against him; the Court of Review may reject an appeal for this reason, although not invoked by the opposite party; the trustee who inscribes such an appeal, without the authority of a Judge, must bear the costs thereof, which he is ordered to pay personally; and a creditor, not of the insolvent, but of the trustee as such, has no right to dispute a dividend sheet prepared by the latter. *Slater Shoe Co.* v. *Marchand*, Q. R. 7 S. C. 123.

Appointment — *Vacant Succession—Notice to Persons Interested—Intervention.*]—The appointment of a curator to a vacant succession may be demanded by any "person interested," and that expression includes, besides creditors of the estate and specific or universal legatees, debtors who may have an interest in discharging their debts, and even persons who wish to bring actions against the estate.—2. It is not necessary, in making such an appointment, to notify any person as opposed in interest, but it is necessary to notify every person interested for any reason, who may have the right to intervene for the purpose of seeing that the curator is regularly appointed and that he gives the necessary security. *In re Watson and Trudeau*, 6 Q. P. R. 247.

Appointment of Curator—*Vote to Creditors—Wife of Insolvent—Claim for Dower.*]—A stipulation for a fixed sum for dower does not render the wife a creditor of her husband, but she becomes a conditional creditor of her husband's estate. Therefore, a wife cannot, on the ground of her dower, be allowed to vote as a creditor upon the appointment of a curator, to property assigned by the husband. *In re Couture and Gaudreau*, 6 Q. P. R. 438.

Authorization to Defend Petition for Property of Estate.]—The curator of an insolvent estate cannot, without the consent of the creditors or the inspectors, and the authorization of a Judge, reply in writing to a summary petition to recover possession of goods which are in his hands by reason of the assignment. *Rowe* v. *Hyde*, 5 Q. P. R. 64.

Creditors' Claims — *Communication to Other Creditors.*]—The curator to an abandonment of property is bound to communicate to creditors information concerning the claims filed by other creditors, and documents accompanying these claims. *Williamson* v. *Stevenson*, 5 Q. P. R. 407.

Creditors' Claims — *Contestation by Curator—Defect in Service—Curing by letter —Subsequent Order.*]—A letter written by the advocate of the curator to a creditor whose claim is contested, upon whom the contestation has not been served, informing him that such a contestation has been filed, and that he must attend to it or otherwise judgment will be given against him, cannot cure a defect in service of the contestation, especially when there is no proof that the letter reached the creditor. 2. The service upon a creditor whose claim is contested, who has not appeared and who is not represented by an advocate, of an order to answer sur faits et articles, to which order he does not appear, cannot cure a defect in service of the contestation. *In re Moisan*, Q. R. 22 S. C. 423.

Creditors' Claims—*Contestation by Curator—Order Pour Faits et Articles—Default of Appearance—Signature of Advocate.*]—An order pour faits et articles was returned on 6th May. The creditor whose claim was contested made default. He did not appear by attorney. Indorsed on the order were these words: "By consent, continued to 7th instant. 6th May 1901, F. P. T. R. & Co., attorneys for contestant. P. Cantin." The Court takes judical notice of the signature of advocates; therefore, it is informed that "P. Cantin" is the signature of an advocate. But that advocate not having appeared for the creditor whose claim was contested, there was nothing to shew that he had signed for the creditor or as being authorized by him: —Held, therefore, that the curator could not infer from the fact that the signature "P. Cantin" was there, as acquiescence by the creditor in the proceedings of the curator, or an act curing the default of service of the contestation. *In re Moisan*, Q. R. 22 S. C. 423.

Creditors' Claims—*Contestation by Curator—Second Dividend Sheet—Contestation—Petition to Set Aside Judgment—Lis pendens.*]—The curator prepared a second dividend sheet collocating the creditors for 17 per cent. In consequence of a judgment of default against a creditor, V., setting aside the collocation which the first dividend sheet had awarded, the curator completely omitted to collocate this creditor in his second sheet. At that time the creditor was not aware of the judgment upon his collocation on the first sheet. He thereupon contested the second sheet, demanding to be collocated upon it. Afterwards he became aware of the judgment upon the first sheet, and he thereupon presented a petition against that judgment: Held, that there was no lis pendens by the contestation of the second dividend sheet; that the petition and the contestation of the second sheet were two distinct proceedings. *In re Moisan*, Q. R. 22 S. C. 423.

Creditors' Claims—*Contestation by Curator—Service — Judgment by Default—Void Service—Petition to Set Aside.*]—The curator to an abandonment, having made and issued a first dividend sheet in which a creditor, V., was, with other creditors, collocated for 15 per cent., and having afterwards, with the necessary authorization, contested the collocation and the claim of V., must transmit the contestation to the prothonotary at once, and the contestation must be served on the creditors. 2. Such contestation not having

been served, a judgment by default against the creditor maintaining the contestation will be rescinded upon petition. 3. The petition, although intituled "petition for review," if it contains all the material necessary for an ordinary petition, will be considered as such. 4. The enumeration in Art. 1177, C. P., of the cases in which a petition may be presented, is not limitative. 5. If, in place of serving upon the creditor collocated a copy of the contestation, the bailiff, by mistake, serves upon him a copy of the contestation of collocation of another creditor, it is the same as if he had not been served at all. 6. Upon motion for leave to contest the report of service by the bailiff, a Judge will order preuve avant faire droit; and upon proof of the falsity of such report, it will be set aside. *In re Moisan*, Q. R. 22 S. C. 423.

Creditors' Claims—*Delay in Filling—Distribution.*]—A creditor who has not filed a claim with the curator to an abandonment of property, is not on that ground deprived of the right of resorting to the proceeds of the sale of the insolvent's goods for payment, but, if there still remain moneys to be distributed, he may demand payment of his claim in preference to other creditors to an amount in proportion to that which has been paid to them, and to be collocated at so much on the dollar with the other creditors for what remains due. *In re Brais*, Q. R. 22 S. C. 470.

Curator of Insolvent Estate — *Payments to Privileged Creditors—Collocation—Formalities.*]—The curator of an insolvent estate ought not to pay money received from the proceeds of the property of the insolvent, even to a privileged creditor, before all the formalities required by Art. 880, C. P., for the preparation of the memorandum of collocation have been observed. 2. The Court or a Judge should not as a general rule order the curator, although he is subject to the Court's summary jurisdiction, to depart from this Art. 880, C. P. *In re Smith and Gagnon*, Q. R. 22 S. C. 372.

Curator ad hoc—*Conseil—Judiciaire — Wish of Person Intereste'*]—The Court will not appoint a curator ad hoc to a person under conseil judiciaire, to permit him to litigate interests opposed to those of the conseil judiciaire, when it does not appear that the person has himself expressed a desire to litigate. *Meunier* v. *Meunier*, 6 Q. P. R. 201.

Disputing Landlord's Lien.] — The curator to an insolvent estate has a right to attack a privilege claim by shewing that part of what is supposed to be rental goes to the repayment of a loan, and therefore does not constitute a privileged claim. *In re Mercier and Pauzé*, 3 Q. P. R. 483.

Execution Against Lands of Insolvent—*Sale—Curator.*]—After an abandonment of property of a debtor for the benefit of his creditors, one of the creditors cannot, in the execution of a judgment obtained against the debtor, cause to be seized and sold, without the consent of the curator, of the other creditors, or of the Court, the immovable property of the debtor, but the seizure and sale of the immovables must be made at the instance of the curator. *Birks* v. *Lewis*, Q. R. 8 Q. B. 517, discussed. *Demers* v. *Gagnon*, Q. R. 11 K. B. 498.

Goods in Hands of Curator—*Seizure by Creditor — Saisie-gagerie.*] — Goods belonging to an insolvent estate and which are legally in possession of the curator to the estate, cannot be seized by a creditor of the insolvent. 2. Nor can such goods be seized by a creditor of the insolvent, by a writ of saisie-gagerie, even after they have been legally sold by the curator.—*Forrest* v. *Letellier*, Q. R. 24 S. C. 215.

Insolvent Estate — *Claim—Contestation —Proof.*]—When a creditor files a sworn claim, which is contested by the curator of the insolvent estate, it is for the creditor to prove his claim at the hearing, and the affidavit which he filed with his claim is not sufficient for that purpose. *In re Tessier dit Lavigne*, 6 Q. P. R. 179.

Insolvent Estate — *Action by Curator —Authorization—Inspectors.*]—A curator to an insolvent estate, who has taken the advice of the inspectors upon the advisability of a suit, and obtained the approval of a minority of them, may, with the approval of a Judge, institute suit on behalf of the estate. *Desmarteau* v. *Steel*, 6 Q. P. R. 149.

Insolvent Party to Action—*Substitution of Curator—Application for—Wherein made.*]—An authorization to litigate an action in the name of a party who has become insolvent since the institution of the action must be obtained upon petition made in the matter of the insolvent estate, and not in the action in which the curator proposes to litigate in the place of the insolvent. *Clark* v. *Wilder*, 5 Q. P. R. 24

Opposition to Seizure—*Leave.*]—The curator to an insolvent estate has a right to oppose the seizure and sale of the insolvent's property seized in execution of a judgment obtained against another person, and may do so without leave of the Judge. *Paquette* v. *Dish*, 3 Q. P. R. 480.

Transfer of Debt—*Attack by Another Creditor—Purchase of Claims by—Litigious Rights.*]—A creditor of an insolvent debtor has no status to maintain that the assignee of another creditor of the same debtor has not given valuable consideration, and that notice of the transfer has not been given to the debtor. 2.—Nothing in the law prevents the curator of an insolvent estate from purchasing from creditors of such estate the claims which they have against it. 3.—The plea of "litigious rights" can only prevail where the debtor making it offers to reimburse the purchaser the amount he has disbursed. *Johnson* v. *Sharswood*, 3 Q. P. R. 473.

VI. Examination of Insolvent or Third Party.

Advocate — *Cross-examination — Discovery.*]—By virtue of Arts. 882 and 883, C. P. C., a creditor of the insolvent, or the curator, with the authorization of the inspectors, may subpœna the debtor to appear before the Judge or the prothonotary, and

interrogate him on oath with regard to his schedule and the state of his affairs. The insolvent is not entitled to be represented or assisted by an advocate upon such examination, and at any rate the advocate of the insolvent has no right to cross-examine him; the examination authorized by these Articles being only preliminary information to the creditors or to the curator. *In re Riopelle and Kent*, 4 Q. P. R. 180.

Insolvent a Party—*Right to be Present —Cross-Examination.*]—Under Art. 883, C. P. C., the insolvent has the right to be represented by counsel at the examination of persons whom the curator deems capable of furnishing information regarding the insolvency; moreover, such person may be cross-examined on behalf of the insolvent in the manner and form prescribed by Art. 340, C. P., the insolvent being considered a party to the proceedings. *Cohen* v. *Kent*, 7 Q. P. R. 26.

Refusal to Answer — *Contempt of Court.*]—An insolvent cannot be imprisoned for contempt of Court because he refuses to answer one question put to him by the curator while under examination. *Saxe* v. *Kent*, 5 Q. P. R. 94.

Third Party—*Examination by Creditor—Scope of—Order for by Prothonotary—Review.*]—Under Art. 883, C. P., the Judge cannot order a third party to appear before him, or before the prothonotary, to be interrogated under oath in regard to the liquidation of the property of an insolvent, but such third party can be subpœnaed and examined pursuant to Art. 882, C. P., only as to the schedule and the state of the affairs of the insolvent. 2. An order to subpœna such a third person, made by the prothonotary in the absence of a Judge, by virtue of Art. 33, C. P., upon a petition which does not follow the terms of Art. 882, C. P., is subject to review. *In re Smith and Larivière*, 4 Q. P. R. 385.

VII. Preference.

Bill of Sale—*Levy by Sheriff—Action or Proceeding"—Pressure—Presumption.*]— In an action against a sheriff for the conversion of goods levied upon by him under executions issued on judgments recovered against R., the plaintiff's title to the goods depended upon a bill of sale from R.—The evidence shewing that R. was an insolvent, and the effect of the giving of the bill of sale being to give the plaintiffs a preference over the other creditors of R., and the levy made by the defendant having been made within sixty days from the giving of the bill of sale:—Held, that the levy was "action for the transfer, within the meaning of R. S. N. S. 1900 c. 145, s. 4, and that, under the provisions of s.-s. (2), the bill of sale must be presumed to have been made with intent to give an unjust preference, and to be such preference, whether made voluntarily or under pressure, and that, as against the creditors represented by the defendant, it was utterly void. *Shediac Boot and Shoe Co.* v. *Buchanan*, 35 N. S. Reps. 511.

Bill of Sale—*Pressure — Authority of Partner.*]—A firm composed of three members being insolvent and being indebted to the plaintiffs and also to the defendants, one of the members of the firm, under a threat of an action by the defendants, executed a bill of sale of all the firm's assets under which the defendants immediately took possession: Held, that the bill of sale was not a fraudulent preference, but was given bona fide under pressure, and that the member of the firm who executed it had implied authority to do so, or his partners had ratified his act or were estopped from denying his authority. *McClary Mfg. Co.* v. *Howland*, 9 B. C. R. 479.

Chattel Mortgage—Attack on—Time—Presumption — Satisfaction of Onus — Good Faith — Notice — Knowledge. *Keenan* v. *Richardson*, 1 O. W. R. 333.

Chattel Mortgage by Insolvent Debtor—Registration—Bills of Sale Ordinance—Preferential Assignments Ordinance—Absence of intent to defeat creditors — Pressure—"Which has such effect." *Ross Brothers Limited* v. *Pearson* (N. W. T.), 1 W. L. R. 338, 575, 2 W. L. R. 259.

Confession of Judgment—*Pressure — Absence of Collusion — Presumption.*]—The defendant in consideration of a promise by a trader to pay to the defendant a sum of money on account of indebtedness within a given time or to give security, and believing the trader to be solvent, gave him on credit a further supply of goods. Subsequently the trader, becoming insolvent, announced the fact to his creditors. The defendant thereupon reminded the trader of his promise to him, and urged and induced him to give a confession of judgment for the amount of his indebtedness to the defendant, and to execute an assignment of his book debts to him:—Held, that the confession of judgment, having been obtained by pressure and without collusion, was not within s. 1 of 58 V. c. 6, and that the assignment of book debts, having been obtained by pressure, was not within s. 2. The presumption created by s. 2 (a) of the Act does not arise where the sixty days therein mentioned have expired at the date the writ of summons in the suit is sent to the sheriff for service, though the sixty days had not expired at the date of the teste of the writ. *Amherst Boot and Shoe Co.* v. *Sheyn*, 21 Occ. N. 415, 2 N. B. Eq. Reps. 236.

Debt not Due—*Set-off.*]—The state of insolvency of a debtor fixes the position of his creditors, and on account of such insolvency no one of them can obtain a preference over the others. 2. One of such creditors, who is at the same time a debtor of his debtor, but whose debt is not yet exigible, cannot, by renouncing the benefit of the term by which the debt to him is not yet due, and by asserting a set-off, acquire such a preference. *Ville-Marie Bank* v. *Vannier*, 1 Q. R. 20 S. C. 545.

Equitable Mortgage or Assignment of Insurance Moneys—*Suit by Creditors of Assignor to Set aside.*]—On and previous to the 4th August, 1903, C. was indebted to the defendant for money lent; on that date he demanded security and C. handed to the defendant two interim receipts for insurance on the hotel owned by C., and pledged them to the defendant as security, and he was the holder thereof at the time the hotel was burned. Shortly after the fire C. arranged with one

S. to rebuild the hotel, and he authorized S. to collect the insurance moneys. C. then (26th August) agreed with the defendant that if he would hand over the insurance documents he held to S., the latter would pay the defendant out of the insurance $600 and guarantee payment of the balance due the defendant; pursuant to this agreement the defendant handed over the documents. About the 5th September C. decided not to rebuild the hotel, and on that date gave to the defendant an assignment of the insurance moneys in S.'s hands, to the extent of $2,200, to secure the defendant, and, as C. stated, to take the place of the original arrangement. This assignment was attacked by C.'s creditors:—Held, that by the dealings that took place between the parties on the 4th August the intention was that C. should pledge to the defendant the insurance on the hotel to secure the claim of the latter. The papers handed over were believed by both parties to represent actual insurance, and the transaction was intended to operate as a security in favour of the defendant. It might be regarded either as an equitable mortgage or an equitable assignment. The three transactions of 4th August, 26th August, and 5th September were all connected together; the transaction of the 4th August could not be successfully attacked, and the plaintiffs could not confine their attack to one detail out of several. S. became a trustee of the proceeds in favour of the defendant; that trusteeship arose when the insurance papers were delivered to S. *Ferguson* v. *Bryans*, 24 Occ. N. 194.

Extension Agreement — *Secret Advantage — Voluntary Payment — Action by Assignee—Status.*]—S., a trader, in August, 1899, procured the consent in writing of his creditors to payment of his debts then due and maturing, by notes at different dates extending to the following March. V., one of the creditors, insisted on more prompt payment of part of his claim, and took from S. notes, aggregating in amount $708, all payable in September, which S. agreed in writing to pay at maturity, and did pay. In November, 1899, S. assigned for the benefit of his creditors, when the arrangement between him and V. first became known, and the assignee and other creditors brought an action to recover $708 from V. as part of the insolvent estate:—Held, affirming the judgment of the Court of Appeal, 3 O. L. R. 5, 21 Occ. N. 551, and that at the trial, 32 O. R. 216, 20 Occ. N. 437, that S. having paid the notes voluntarily without oppression or coercion, could not himself have recovered back the amount, and his assignee was in no better position. *Langley* v. *Van Allen*, 22 Occ. N. 222, 32 S. C. R. 174.

Imprisonment of Insolvent.] — A debtor who arranges with one of his creditors, his relative, to make an assignment for the benefit of creditors, after having handed over to his relative goods in payment of part of what he owes him, and moreover does not give the names of all his creditors, will, upon proof of these facts, be committed to gaol as provided by art. 888, C. P. *In re Thibault and Gardner*, 4 Q. P. R. 259.

Knowledge of Insolvency—*Pressure.*] —Where there is good consideration a mortgage comprising the whole of a debtor's property will not be set aside, notwithstanding that the mortgagor is in insolvent circumstances, to the knowledge of the mortgagee, and that the effect of the mortgage is to defeat, delay, and prejudice the creditors, if there is pressure. *Adams* v. *Bank of Montreal*, 8 B. C. R. 314, 32 S. C. R. 719.

Mortgage by Insolvent Wife to Husband —Preference—Presumption —Rebuttal. *McNeil* v. *Dawson*, 1 O. W. R. 24.

Payment in Ordinary Course of Business — Power of attorney. *Goulet* v. *Greening*, 1 O. W. R. 550.

Payment of Salary—*Fraud on Creditors — Attachment of Salary.*] — A contract by which the wife of an insolvent is to receive from a third person for services to be rendered by her husband a certain salary and a part of the profits of the business of the third person, is void as being made in fraud of creditors. Accordingly, the creditors of the husband can seize in execution or attach the salary due under such contract. *Orsali* v. *Aubry*, Q. R. 24 S. C. 320.

Pressure—*Intent.*]—In giving the chattel mortgage impeached in this action it appeared that the dominant motive of the debtor was to make an arrangement for continuing his business, the defendant having induced him to give it by promises of assistance in carrying him along and in arranging with other creditors, although not in any definite way enforceable in a Court of law:—Held, that, under s. 33 of the Assignments Act, R. S. M. c. 7, as amended by 63 & 64 V. c. 3, s. 1, there must still be the intent on the part of the debtor to prefer the particular creditor, in order to set aside the impeached conveyance; and, while the effect of it may be to place that creditor in a more advantageous position than other creditors, and the debtor may recognize at the time that such will be the effect, yet if he gave it for some other purpose or in the hope that he might thus be enabled to avoid insolvency, it cannot be considered that he gave it with intent to give a preference, and the security should stand. Stephens v. McArthur, 19 S. C. R. 446, New Prance and Garrard's Trustee v. Hunting, [1897] 2 Q. B. 19, *S. C.*, sub nom. Sharp v. Jackson, [1899] A. C. 419, Lawson v. McGeoch, 20 A. R. 464, and Armstrong v. Johnson, 32 O. R. 15, followed. Although the amending Act declares that a prima facie presumption of an intent to prefer is to arise from the effect of such a transaction, this does not justify the Court in looking only to the effect and refusing to attach any weight to the proved facts as to the actual intent. The presumption being only prima facie may be rebutted by evidence:—Held, also, that the Court need not determine whether the preferred creditor was acting bona fide or really anticipated that the other creditors could be arranged with and the business continued, it being only the debtor's mental attitude that should be considered. *Codville* v. *Fraser*, 22 Occ. N. 123, 14 Man. L. R. 12.

Pressure — *Intent—Notice.*] — A debtor mortgaged all his real estate to the defendant, and shortly afterwards made an assignment to the plaintiff for the benefit of his creditors generally. Before the giving of the mortgage he was and knew himself to be insolvent. On the day the mortgage was given the defendant went to the debtor and asked for payment, and the debtor informed him he could

make none, and then gave the mortgage. The evidence was contradictory as to whether there was a request for security:—Held, that when the debtor gave the mortgage he was in insolvent circumstances; the execution of it had the effect of giving the defendant a preference over the unsecured creditors; it must be presumed that the mortgage was executed with intent to prefer and that it constituted a preference. Stephens v. McArthur, 19 S. C. R. 446, followed. 2. At and before the execution of the mortgage, the defendant had notice of the insolvency and of the mortgage being made with intent to give him a preference over other creditors and having such effect. *Schwartz* v. *Winkler*, 21 Occ. N. 574, 13 Man. L. R. 493.

Pressure — *Knowledge of Insolvency — Yukon Ordinance.*]—The effect of s. 2 of the Yukon Ordinance, c. 38, Consolidated Ordinances, 1902, is to remove the doctrine of pressure in respect to preferential assignments, and, consequently, all assignments made by persons in insolvent circumstances come within the terms of the Ordinance. In order to render such an assignment void, there must be knowledge of the insolvency on the part of both parties and concurrence of intention to obtain an unlawful preference over the other creditors. Molsons Bank v. Halter, 18 S. C. R. 88, Stephens v. McArthur, 19 S. C. R. 446, and Gibbons v. McDonald, 20 S. C. R. 587, referred to. *Benallack* v. *Bank of British North America*, 36 S. C. R. 120.

Promissory Notes—*Composition—Costs of Action.*]—1. Where a creditor, who was also one of the inspectors of the insolvent estate, exacted promissory notes from the insolvent as a condition of his assent to a compromise, such notes were illegal, null and void, as made in fraud of the other creditors, and against public order, and no action could be maintained on the notes by the creditor, or by a prête-nom. Brigham v. Banque Jacques-Cartier, 30 S. C. R. 429, followed. 2. The Judge at the trial dismissed the action "with costs." The Court of Review declined, under the circumstances, to interfere with the discretion thus exercised. *Cartier* v. *Genser*, Q. R. 21 S. C. 139.

Transfer by Insolvent Debtor — *Attacking—Time—Division Court Proceeding—Collateral Inquiry—Pressure—Evidence of.*] —A garnishee summons was issued from a Division Court on the 22nd January, 1900, wherein the primary creditor claimed from the primary debtor $200 upon a due bill, and whereby all debts due from an insurance company to the primary debtor were attached. The primary debtor had recovered a judgment against the insurance company on the 7th December, 1899, and had assigned the judgment on the same day to the claimant. No formal notice of the proceedings in the Division Court or of any contest as to his rights was ever given to the claimant, but he appeared in the proceedings on the 6th July, 1900, and consented to an adjournment of them, and afterwards appeared again before the Judge, when his rights under the assignment were tried, and judgment was given against him setting aside the assignment as an unjust preference:—Held, on appeal, that the transfer to the claimant was not attacked when the summons was issued, nor until the claimant appeared in the proceedings, and, therefore, it was not attacked within sixty days, and its validity could be supported by proof of pressure in procuring it:—Held, also, Falconbridge, C.J., dissenting, that, as it appeared from the evidence both of the primary debtor and the claimant, that the latter had asked the former for security shortly before the security was given, and that the security given was that which was promised, there was pressure inducing the giving of the security, and it should be upheld, notwithstanding that the claimant was merely liable for a debt of the primary debtor which it was expected he should pay, as he did, and notwithstanding that he was not present at the time the assignment was made to him, it having been drawn by his solicitor. Molsons Bank v. Halter, 18 S. C. R. 88, and Stephens v. McArthur, 19 S. C. R. 446, followed. *Murphy* v. *Colwell*, 22 Occ. N. 111, 3 O. L. R. 314, 1 O. W. R. 146.

Transfer of Goods — *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. *Dana* v. *McLean*, 21 Occ. N. 555, 2 O. L. R. 466.

VIII. Other Cases.

Action for Debt — *Defence—Discharge in Bankruptcy in England.*]—A plea that the defendants were adjudged bankrupt, and a certificate of discharge granted, in England, under the Bankruptcy Act, 1883, is a good answer to an action for a debt provable against the defendants in bankruptcy, brought in New Brunswick by the subject of a foreign state who had never resided or been domiciled within British Dominions. Nicholson v. Baird, N. B. Eq. Cas. 195, considered. *Ford* v. *Stewart*, 35 N. B. Reps. 568.

Assignments Act, Manitoba — *Action by Assignee—Preference — Novation—Executed Contract — Non-rescission.*] — M. & Co. were indebted to the defendant G., amongst other creditors, and were pressed by G. for payment. The defendant L. offered to buy M. & Co.'s stock, and approached G. to find out whether, if he did so buy, G. would accept him as debtor in the place of M. & Co. G. agreed to do so, and L. bought the stock, and bound himself to M. & Co. to pay their debt to G., and to procure the latter to release them, M. & Co., from that debt. He paid M. & Co. in cash the difference between the purchase price of the stock (82½ cents on the dollar) and the amount of their debt to G.; he also bound himself to G. to pay to M. & Co.'s debt to them, and procured from G. and delivered to M. & Co., a release in full of their debt to G. There was thus a complete novation as to the debt due to G. A few days later, and within 60 days after the novation, M. & Co. assigned under the provisions of the Assignments Act, for the benefit of their creditors, to the plaintiff. G. did not know M. & Co. to be insolvent, and entered into the arrangement with L. in good faith:—Held, that it was doubtful whether such a novation could be attacked under the Assignments Act. The contract had been partly performed on L.'s part, and wholly on that of G. The latter had released M. & Co. absolutely, and

in so doing had also released one B. from his covenant which G. held, to pay the liability to G. of a former firm, which M. & Co. had assumed, and $1,200 of which was still unpaid, at the time of the assumption of M. & Co.'s debt by L. and was included in that debt. G. had lost recourse against M. & Co. and the members of that firm. Even if the plaintiff could by this action consent that G., if the novation were set aside, should be at liberty to rank on the estate and receive dividends, the Court could not restore to G. his rights as against the members of the firm of M. & Co., as those had been released in good faith, and it could not restore the claim against B. *Newton* v. *Lilly*, 24 Occ. N. 250.

Assignments Act, Manitoba—*Action by Creditors—Time — Amendment — Statute of Limitations—Preference — Assignment of Insurance Moneys.*]—The plaintiffs brought action on the 2nd November, 1903, on "behalf of themselves and all other creditors of C. . . . who are willing to join in and contribute towards the payment of the expenses thereof," to set aside, as a fraudulent preference, an assignment by C. to the defendant, dated the 5th September, 1903, of certain moneys payable under fire insurance policies to secure the defendant's claim against C. C. had not assigned under the Assignments Act, R. S. M. 1902 c. 8. On the 4th December, 1903, the plaintiffs amended by adding after the words quoted, "and the same is brought for the benefit of the creditors generally of the said debtor:"—Held, that there was no suit brought for the benefit of the creditors generally, or of such as had been injured, delayed, or prejudiced, to impeach the transaction in question, until the amendment of the 4th December was made, which was more than 60 days after the date of the impeached transaction; and that this objection was fatal, notwithstanding the provision in s. 48 (*b*) that "in case any amendment of the statement of claim be made, the same shall relate back to the commencement of the action for the purpose of the time limited by the 40th section hereof."—The right to sue and the relief to be given are created by the statute and must be construed strictly. The amendments referred to in that provision must, in strict construction, be confined to allegations of law or fact upon which the relief is to be founded, and that provision presupposes an action to have been commenced in the form provided within 60 days.—On the merits, also, the findings of fact were that the impeached assignment was not a fraudulent preference within the meaning of the Act, as it was only the last of a series of transactions all connected together which should be treated as a whole, and so treated, were not open to attack. *Ferguson* v. *Bryans*, 24 Occ. N. 194, 15 Man. L. R. 170.

Assignments Act, Ontario—*Assignee for Creditors—Removal — Notice of Motion — Grounds—Evidence — Proposed Examination of Assignee—Judicature Act and Rules.*]—Where a summary motion is made under s. 8 (1) of the Assignments and Preferences Act, R. S. O. 1897 c. 147, to remove an assignee for the benefit of creditors, the notice of motion should state the grounds, or they should at least appear in the material filed in support of the application. The ordinary procedure in an action is not applicable to such a motion; and where an appointment to examine the assignee in support of the application, under Con. Rule 491, was taken out and served, it was held that he was not obliged to attend upon it, the officer having no authority to issue it. *In re Wilson*, 24 Occ. N. 20, 6 O. L. R. 564, 2 O. W. R. 1033.

Creditor—*Inspector—Promissory Notes—Fraud.*]—A creditor of an insolvent estate was appointed one of the inspectors thereof. A compromise was proposed, but this inspector would only agree to the same upon the insolvent giving him promissory notes in return for his assent to the arrangement. An action was subsequntly brought on these notes:—Held, that the notes were null and void, both because they were made in fraud of the other creditors, and also as being against public order; and that, therefore, no action could be maintained on them, either by the creditor himself or by a prête-nom. *Cartier* v. *Geaser*, 22 Occ. N. 416.

Debtor of Insolvent—*Acquisition of Claim—Set-off.*]—A debtor of an insolvent (not in bankruptcy) may acquire the claim of a third person against such insolvent, and, after notice of the assignment of the claim, there may be a set-off between the two claims. *Villeneuve* v. *Matte*, Q. R. 11 K. B. 192.

Distribution of Assets of Insolvent—*Procedure — Allegations — Proof—Opposition—Acknowledgment—Error of Law.*]—It is not necessary that the allegation of the intention, should be supported by a deposition under conserver, or in an opposition en distribution, should be supported by a deposition under oath, in order to authorize an appeal by creditors; such deposition is required only for the purpose of proving that the sum claimed by the opposant is justly due.—2. An acknowledgment based upon an error of law may not be invoked against the party who made it. *Décary* v. *Brodit Pominville*, Q. R. 19 S. C. 563, 4 Q. P. R. 202.

Extension Agreement — *Secret Advantage—Voluntary Payments.*] — 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, 20 Occ. N. 437, affirmed; Armour, C.J.O., dissenting. *Langley* v. *Van Allen*, 21 Occ. N. 551.

Fraudulent Mortgage—Intent—Pre-existing greement—Consideration — Insolvency of grantor—Knowledge of grantee — Preference—Action begun within 60 days — Presumption—Costs—Summary remedy. *Brown* v. *Beamish*, 5 O. W. R. 722.

Fraudulent Secretion of Assets — *Proof of—Discrepancy in Statements—Penal Provisions of Code.*]—1. Proceedings instituted under Art. 885, C. C. P., against a debtor who has made a judicial abandonment, are of a penal nature, and the rules and principles

which govern evidence, and its effects in criminal cases, must be applied, and to justify a conviction the guilt of the debtor as to omission to enter property in his statement; or secretion of property must be established by clear and conclusive evidence.—2. A discrepancy between two statements made by the debtor,—one made 31st December, 1900, shewing a surplus of $1,227, and the other, made 26th July, 1901, shewing a deficit of $1,849, while it raises a presumption of mismanagement of his business and of extravagance in his business and of extravagance in his expenses, does not shew conclusively any omission to enter property belonging to him, in the statement filed with his declaration of abandonment, or secretion of any part of his property. *Bryce* v. *Wilks*, Q. R. 11 K. B. 464.

Goods in Possession of Insolvent — *Agreement between Insolvent and Vendor—Construction—Sale or Agency for Sale—Bills of Sale Act.*]—Certain goods were supplied by the defendant to a trading company, and it was arranged between the company and the defendant that the company might sell the whole or any part of the goods to whomsoever they chose, and for such price and on such terms as they might see fit; but they were, whenever a sale was made, to pay in cash to the defendant the price of the article sold, according to a price list which was furnished to them by the defendant when the goods were from time to time delivered to the company. The company had also the right, whether they had made a sale or not, to become the owners of the whole or any part of the goods at the prices named in the list, and they had also the right at any time to return the whole or any of the goods which remained unsold. The company made a statutory assignment to the plaintiff for the benefit of creditors, and the defendant took back the goods:—Held, in an action for return of the goods or damages for their conversion, that the goods were not at the time of the assignment the property of the company, but were in their possession either as bailees or agents of the defendant, with the right, of and when they elected to buy, to become the purchasers of the whole or any part of them at the prices mentioned in the price list. Ex p. White, L. R. 6 Ch. 397 and S. C. in appeal sub nom., Fowle v. White, 21 W. R. 465, 29 L. T. N. S. 78, explained and distinguished:—Held, also, that s. 41 of the Bills of Sale and Chattel Mortgage Act, R. S. O. 1897 c. 148, did not apply to this case; it refers to sales or transfers in the nature of sales, by which the possession is to pass presently, but not the property in the merchandise until the agreed price or consideration is paid. Mason v. Lindsay, 4 O. L. R. 265 applied. *Langley* v. *Kahnert*, 24 Occ. N. 225, 3 O. W. R. 9, 7 O. L. R. 356. Affirmed, 25 Occ. N. 69, 4 O. W. R. 396, 9 O. L. R. 169, 36 S. C. R. 114.

Insolvent Estate—*Claim of Inspector—Meeting of Creditors.*]—If the inspectors of an insolvent estate are equally divided as to the advisability of contesting a claim of their co-inspector against the estate, the Judge will order the curator to call a meeting of the creditors to decide upon the advisability of contesting the claim at the expense of the estate. *In re Dawes and Walsh*, 6 Q. P. R. 85.

Insolvent Estate—*Contestation by Creditors—Illegal Collocation.*]—Any creditor has a sufficient interest to contest illegal collocations, although it does not at the time appear whether he himself would be collocated in case those claiming to be creditors should be ruled out.—By such a contestation the creditor may allege a series of fraudulent acts calculated to defeat the just claims of the contestant, and, in particular, the non-existence of certain claims appearing as discharged by the trustee in the interest of the insolvent, in order to pay him back the amount. *In re Malouf and Beaulieu*, 7 Q. P. R. 152.

Insolvent Estate — *Creditor's Claim—Contestation—Costs—Fund for Payment.*]—A creditor whose claim is contested is not entitled to an order providing that no part of the moneys which will come to him out of the insolvent estate shall be made to contribute to the costs of the contestation. *In re May and Fisk*, 6 Q. P. R. 230.

Insolvent Estate—*Goods Taken Possession of by Guardian—Claim by Stranger—Replevin action — Summary Remedy.*]—The owner of articles of which the provisional guardian of an insolvent estate has taken possession, as being the property of the insolvent, may replevy them by an action, and is not obliged to claim them by a summary petition to a Judge. *Bergeron* v. *Campeau*, Q. R. 25 S. C. 26.

Insolvent Estate—*Liquidation—Mandate—Assignment—Fraud on Creditors.*]—An insolvent debtor may employ some one to liquidate his property for the benefit of his creditors. That is a mandate and not an assignment.—2. Even if he makes a voluntary assignment of all his property, it will be declared void only if made in fraud of creditors. *Chouinard* v. *Caron*, Q. R. 25 S. C. 254.

Insolvent Estate—*Sale of Timber by Insolvent — Rights of Workmen — Woodmen's Liens — Rights of Claimants — Duty of Assignee.*] — The privilege conferred by art. 1994c, of the civil code, on woodchoppers, for securing the payment of their wages, ceases when the timber passes into the hands of a third person, who has purchased it, obtained delivery of it, and paid for it. But this privilege is not lost by a sale of the timber cut, if, in fact, there has not been delivery, and the wood remains in the possession of the vendor, and the same is the case when the purchaser has made advances to the vendor, exceeding the amount realized by the subsequent sale of this timber by the assignees in insolvency of the vendor.—A contract of sale of such timber entered into before and during the time it is being cut, for which the consideration is advances and past due debts, is not in fraud of the rights of unpaid workmen, for their right in respect of the timber is preserved notwithstanding such sale. —In this case, the timber in question had been sold by direction of the Court, by the assignees in insolvency of the lumberman, and the proceeds of the sale paid into Court until the final disposition of the matter. By the judgment of the Superior Court, part of this timber had been declared the exclusive property of the claimants, and part to be subject to the workmen's right:—Held, that the

assignees were not bound to pay over directly to the claimants the proceeds of the sale of that part of the timber belonging to them; but they ought to make a regular distribution of it by way of an ordinary dividend. *In re Hurtubise and Birks*, Q. R. 26 S. C. 137.

Preferred Claim—*Board of Children.*]—A debt for board of the children of an insolvent in a convent during the twelve months preceding the bankruptcy ranks as a preferred claim upon the assets of the insolvent. *Les Sœurs de la Congrégation de Notre-Dame* v. *Bilodeau*, Q. R. 18 S. C. R. 152.

Sale of Estate by Assignee for Creditors—Covenant of purchaser to pay creditors—Enforcement—Privity — Trust. *Dominion Radiator Co.* v. *Bull*, 1 O. W. R. 672.

BANKS AND BANKING.

Advances—*Security—Bank Act—Chattel Mortgage—Insolvency — Assignment — Conversion.*]—H. held a chattel mortgage (unregistered) on G.'s sawmill, with the machinery and lumber therein, and all lumber which thereafter might be brought upon the premises. G., having an order for a large quantity of lumber from a contractor, applied to the bank for an advance. By agreement with the bank, G. assigned the contractor's order to his bookkeeper, and agreed to cut logs at a price fixed and deliver them to the bookkeeper at the millside. The latter assigned to the bank all moneys to accrue in respect of the contract, which assignment was agreed to by the contractor, and also assigned to the bank four booms of logs, by numbers, purporting to act under s. 74 of the Bank Act. Two or three days later G. made an assignment for the benefit of creditors, previous to which the logs had arrived at the mill and were mixed with other logs of G. The greater part had been converted into lumber when H. seized them under his chattel mortgage:—Held, affirming the judgment in 7 B. C. R. 465, that no property in the logs assigned to the bank had passed to G., and H. could not claim them.—Shortly before G.'s assignment, his bookkeeper transferred to the bank a chattel mortgage from G. to secure $800:—Held, that the assignee had been guilty of no acts of conversion, and was not liable to pay the bank the balance due on this mortgage. The mortgage was not given to secure advances, and did not give the bank a first lien. The bank were in the same position as if they had received the mortgage directly from G. when he was notoriously insolvent. *Merchants Bank of Halifax* v. *Houston*, 21 Occ. N. 401, 31 S. C. R. 361.

Bank Act, s. 46—*Inspection of Customer's Account—Evidence in Action—Company—Manager—Private Liabilities—Winding-up—Liquidator—Promissory Notes—Consideration.*]—Section 46 of the Bank Act, 1890, 53 V. c. 31 (D.), does not enable a bank to refuse to disclose its transactions with one of its customers, when the propriety of those transactions is in question in a court of law between the bank and another customer who attacks them, and shews good cause for requiring the information he seeks. The company had an account with the bank (claimant), and the manager of the company (who had power to sign notes for the company) had also an account at the same office of the bank. The claim of the bank against the company in winding-up proceedings included a number of promissory notes made by the manager and indorsed by the company. The liquidator shewed that notes so made and indorsed had been charged at maturity to the company's account by the direction of the manager, and that renewals of these notes formed part of the bank's claim:—Held, that the liquidator, in examining the agent of the bank for the purpose of shewing that the original consideration for several of the notes included in the bank's claim was an advance to the manager for his own private purposes, and that the agent, knowing these notes to be the private debt of the manager, had, at his request, charged them, to the company's account, was entitled to refer to the manager's own account with the bank, though the manager was not a party. Held, also that there was nothing to prevent the liquidator, who stood in the place of the company, from impeaching the consideration for the notes offered in proof by the bank, just as the company itself might have done, but no further. Held, also, that periodical acknowledgments given by the manager to the bank of the correctness of the company's account could not be set up as a bar to an inquiry into the account, where specific errors in it were charged, to the knowledge of the bank. *In re Chatham Banner Co., Bank of Montreal's Claim*, 22 Occ. N. 22, 2 O. L. R. 672.

Banker's Lien—*Overdrawn Accounts—Partner's Separate Account—Costs—"Good Cause"—Scale of Costs.*]—Decision of Martin, J., 21 Occ. N. 576, 8 B. C. R. 143, in favour of the plaintiff in an action for damages against a bank for refusing to pay a cheque, affirmed by the full court:—Held, that there was no good cause for depriving the plaintiff of costs, but his costs should be on the scale of the County Courts, the recovery being for $199.97, and interest. *Richards* v. *Bank of British North America*, 21 Occ. N. 567, 8 B. C. R. 143, 209.

Bill of Lading—*Draft Attached—Examination of Goods—Surrender of Bill—Conversion—Pleading — Amendment — Costs—Measure of Damages.*]—The judgment in 4 Terr. L. R. 498 affirmed on the merits with a variation in form and as to costs:—Held, by the majority of the Court, that had the consignees, as in Shepherd v. Harrison, L. R. 5 H. L. 116, sent the bill of exchange, with the bill of lading attached, directly to the defendant, they might have sued for the price on the basis of the defendant's acceptance of the goods, or for damages on the basis of a conversion. In the former case the defendant could have set up the defective quality of the goods in diminution of the price. In the latter case the measure of damages would have been the value of the goods to the consignors, which would probably be the same as in the former case. The bank, as the holders of the bill of lading, were in no better position than the consignors. *Imperial Bank* v. *Hull*, 4 Terr. L. R. 498, 5 Terr. L. R. 313.

Cheques—*Forged Indorsements—Fraud of Agent—Payment — Bills of Exchange Act—"Fictitious Person."*]—N. was the assistant-superintendent of a life insurance company, as well as its local agent at one of its branches, having sole control of the business

there. A number of applications were sent in by him to the head office, which, with the exception of five, were fictitious. As to these five the insurances subsequently lapsed, of which the company were kept in ignorance. Afterwards N., representing that the insured were dead, and the claims payable under the policies, sent in to the head office claim papers, filling in the names of the claimants and forging their signatures thereto, whereupon cheques for the respective amounts made by the company in favour of the alleged claimants, and payable at a branch of the defendants' bank, were sent to N., whose duty it was, on the receipt, to see the payees and procure discharges from them. The indorsements of the payees' names were forged by N., the genuineness of the signatures on most of the cheques being certified to by his attestation. The cheques were presented to and paid by the bank in good faith, to whom or how did not appear, the amounts thereof being charged to the company:—Held, Maclaren, J.A., dissenting, that there was no evidence that the bank were aware that N. had any connection with the transactions out of which the cheques arose, and that they were not entitled to rely on his identification of the payees or attestation of their signatures:—Held, however, that, under the circumstances, the cheques must be regarded as payable to fictitious or non-existent persons, and therefore, under s.-s. 3 of s. 7 of the Bills of Exchange Act, 1890, payable to bearer, and that the bank had the right to pay and charge the company with the amounts. Governor and Company of Bank of England v. Vagliano, [1891] A. C. 107, followed. Judgment of Meredith, C.J., 5 O. L. R. 407, 23 Occ. N. 155, 1 O. W. R. 457, 2 O. W. R. 34, affirmed on different grounds. *London Life Insurance Co.* v. *Molsons Bank*, 24 Occ. N. 330, 8 O. L. R. 238, 3 O. W. R. 858.

Collateral Securities—*Account of—Payments on—Evidence—Reversal of Finding of Fact.*]—A creditor who has received collaterals as security for a debt is bound, after payment of the debt, to return them or account to the debtor for their face value, in the absence of evidence to shew that the respective amounts of them could not be collected. Driffil v. McFall, 41 U. C. R. 313, followed. The County Court Judge disallowed certain sums of money which the defendants swore the plaintiff bank had received on certain collateral securities held for them, because their evidence shewed that these sums had first been received by defendants, and they were unable to give dates and particulars of the payments to the bank, and had no books or memoranda to support their statements, and he was of opinion that they should have given undoubted evidence of the times of receipt and payment to the bank, or in some other way brought home to the bank conclusively the receipt and non-credit of the money, but his verdict was not based on any finding that the defendants were unworthy of belief as witnesses:—Held, that, under the circumstances, it was proper for the Court above to review the finding of the County Court Judge upon the evidence, and that, taking into consideration the bank's duty to produce or account for the collaterals, which it had failed to do, and the presumption to be drawn from such failure, the defendants had sufficiently proved the receipt of said moneys by the bank, and were entitled to judgment. *Union Bank* v. *Elliott*, 22 Occ. N. 331, 14 Man. L. R. 187.

Directors—*False Reports—Right of Action—Statutory Suspension—Prescription—Demurrer.*]—The recourse of creditors against the President or directors of the Banque du Peuple, for false reports, etc., was suspended by 60 & 61 V. c. 75 and 62 & 63 V. c. 123. 2. The right of action against the directors of the Banque du Peuple, personally, was not taken away by 62 & 63 V. c. 123. 3. A director cannot invoke such Act by way of demurrer, but only by a plea to the merits. 4. Quære:—Can short prescriptions be pleaded by way of demurrer, when the time required for the acquisition thereof appears to have elapsed? *Préfontaine* v. *Grenier*, 4 Q. P. R. 21.

Discount of Notes—*Excessive Rates of Interest—Payment by Cheques on Overdrawn Account, Afterwards Met.*]—The plaintiffs, a banking corporation subject to the provisions of the Bank Act, discounted notes made by the defendant, one of their customers, and also allowed him to overdraw his current account. The notes were payable on demand, and purported to bear interest at 20 per cent. per annum. The defendant also agreed to pay interest at that rate on his overdraft; afterwards the rate was reduced to 18 per cent. The defendant from time to time gave the plaintiffs cheques to pay interest accrued; when the cheques were given, the accounts they were drawn against had already been overdrawn. But each account was at some date after the giving and charging up of such cheques on it changed into a credit balance in the defendant's favour by deposits or by collections made by the plaintiffs for the defendant's account. Those cheques covered such interest up to the 31st January, 1902.—The plaintiffs credited themselves with interest at 24 and 18 per cent. up to 31st January, 1902, and alleged that it was paid them by the above cheques:—Held, that judgment should be entered for the plaintiffs, with a reference to the Master to take the accounts. The defendant did not recall the cheques or stop payment of them. They were given to the plaintiffs as creditors of the defendant, and not as his bankers. They were in effect directions to the plaintiffs as the defendant's bankers to pay the amounts to themselves as creditors as soon as there should be available funds at his credit with them, as his bankers, to pay them with, and they were in fact paid out of such funds when available; and the defendant could not recover the excess over seven per cent.—From the 31st January, 1902, the plaintiffs could charge the defendant with interest at the rate of five per cent. only, that being the legal rate. *Bank of British North America* v. *Bossuyt*, 23 Occ. N. 338.

Insolvency of Bank — Winding-up — Claim on promissory note maturing after order—Set-off—Deposit in bank to credit of indorser—Note made by treasurer and indorsed by reeve of municipality for municipal purposes—Personal liability — Rectification. *Kent* v. *Munroe*, 4 O. W. R. 468.

Interest—*Cheques — Payment — Excessive Rate.*]—The defendant borrowed large sums of money from the plaintiff bank, by way of overdraft and on promissory notes. Having agreed to pay interest, first at 24 per

cent. and afterwards at 18 per cent. per annum, the defendant from time to time gave the bank cheques on his current account to pay the interest at those rates respectively up to the 31st January, 1902. When such cheques were given, the account had already been overdrawn, but it was afterwards changed into a credit balance in the defendant's favour by deposits or by collections made by the bank for the defendant's account:—Held, that such cheques should be deemed to have been payment of the interest, and that the defendant could not recover back such interest or any part of it, although it was in excess of the 7 per cent. rate which the Bank Act permits a bank to charge; also, that, under ss. 80 and 81 of the Bank Act, the bank were not entitled to sue for and recover interest accruing after the 31st January, 1902, at 7 per cent. per annum, but could only recover interest at the legal rate of 5 per cent. per annum from that date on the principal then due. *Bank of British North America* v. *Bossuyt*, 23 Occ. N. 338, 15 Man. L. R. 206.

Lien of Bank on Customer's Money—*Application—Insolvency of Customer—Promissory Notes.*]—A bank has a lien on all moneys, funds, and securities deposited, for the general balance of a customer's account. Where, therefore, a bank held two promissory notes of a customer, one payable three months after date, and secured by an indorser, and another payable on demand without any indorser, upon which the customer had made a payment, nothing being paid on the indorsed note, and on the customer's death there was a credit balance in his favour in the bank, which the bank applied toward payment of the unindorsed note:—Held, that the bank were justified in doing so, notwithstanding that it appeared at such time that the customer was insolvent. *In re Williams*, 24 Occ. N. 91, 7 O. L. R. 156, 1 O. W. R. 534, 2 O. W. R. 47, 3 O. W. R. 251.

Lien of Bank—*Forest Product — Manufactured Wood.*]—A bank cannot, under s. 74 of the Bank Act, obtain a lien upon the products of the forest for a pre-existing debt.—2. Manufactured wood, that is to say, wood transformed into joists, planks, plinths, and mouldings, does not constitute a forest product within the terms of s. 74; Hall, J., dissenting on this point; and Wurtele, J., pronouncing only on the first point. *Molsons Bank* v. *Beaudry*, Q. R. 21 S. C. 212.

Money Given to Notary — *Failure of Bank in which Deposited—Loss, by Whom Borne—Negligence.*]—The plaintiff gave the defendant, a notary, $412, with special instructions to use the same in payment of a hypothecary claim. The defendant used all due diligence to find the domicil of the creditor, but was delayed for a considerable period by the fact that he (the defendant) had not received from his principal the power of attorney which was necessary before he could complete the transaction. In the interval he deposited the money in trust at the branch of the Ville Marie Bank at Chambly. By the time the power of attorney reached the defendant the bank had closed its doors. The plaintiff sued the defendant for the money so deposited:—Held, that the defendant not having been negligent, the money was properly deposited in the bank, and was there at the risk of the plaintiff. *Tempest* v. *Bertrand*, 21 Occ. N. 131, Q. R. 19 S. C. 365.

Power of Bank to Take Security—*Bill of Sale — Sale of Goods — Recovery of Price—Bank Act—Liability of Purchaser—Consideration—Warranty.*]—Under s. 68 of the Bank Act security may be taken from the owner of horses for an existing debt by a bill of sale of the horses which expressly states that it is taken only by way of additional security for the debt, and s. 64 of the Act does not prevent the bank from recovering on promissory notes made in its favour by a person who purchases the horses from the transferor. Section 12, s.-s. 1, of the Sale of Goods Act, 1896, does not prevent the recovery by the bank of the price of horses sold under such circumstances; for, under s. 11 (c), a breach of the implied condition that the seller of goods has a right to sell them could be treated only as a breach of warranty, and not as a ground for repudiating the contract:—Held, also, under the circumstances, that the contract of sale between the vendors of the horses and the defendant was completed; that the property in the horses had passed to him; and that he was liable for the price agreed on. *Bank of Hamilton* v. *Donaldson*, 21 Occ. N. 317, 13 Man. L. R. 378.

Promissory Note—*Indorsement for Collection—Subsequent Indorsement—Rights of Parties—Cheque by Indorser for Collection—Refusal to Honour—Damages.*]—A bank to which a promissory note is indorsed "for collection," becomes, for that purpose, the agent of the indorser, to whom it is bound to account for the amount collected. The signature of another party, under that of the indorser, does not affect the relative rights and obligations growing out of such restrictive indorsement. The bank is bound to pay a cheque drawn for a part only of funds collected by it under the foregoing circumstances, and is liable in damages for refusal to do so. *Perreault* v. *Merchants Bank*, Q. R. 27 S. C. 149.

Taking Security for Past Debt — *Transfer of Goods—Agreement—Title—Purchaser—Execution against Debtor.*]—B., being indebted to a bank, gave them a document purporting to be a warehouse receipt, and also a general transfer or bill of sale. The bank took possession of a portion of the goods covered by the documents and removed them, and was proceeding with the removal of others of the goods, when the removal was forbidden by one of B.'s clerks. Two actions of replevin, brought by the bank to recover possession of the remainder of the goods, were compromised by B., who agreed that the bank should take the goods and sell them, and credit him with the amount received:—Held, that, notwithstanding any irregularities under the Banking Act, the title of the bank was complete under the compromise made between the bank and B., and that the plaintiff, who purchased a portion of the goods from the bank, was entitled to recover against the defendant sheriff, who levied on the goods under an execution against B.:—Held, also, assuming it to be correct that the security on the goods held by the bank was void under the provisions of the Act, not being for a present advance, but for a past due debt, and that the bank were not entitled to hold such

security against the creditors of B., that the bank were not obliged to rest their title on the document, and that its defects, if any, would not affect the subsequent transaction by which the bank became the actual purchasers of the goods and dealt with them as their property. *Armstrong* v. *Buchanan*, 35 N. S. Reps. 559.

Winding-up of Bank — *Contributory—Institute.*]—One who holds bank shares as institute may be held liable as a contributory when the bank is put into liquidation. *Ville Marie Bank* v. *Kent*, 4 Q. P. R. 429.

Winding-up of Bank—*Liquidator—Action on Promissory Note—Amendment—Intervention—Costs.*]—The liquidator of a bank in liquidation has no status to sue one of the debtors of the bank upon a promissory note which fell due before the winding-up order, but the action must be brought in the name of the bank. 2. The liquidator cannot, by way of amendment, add the bank as a party in an action which he has begun in his own name. 3. An intervention is not a separate and distinct demand, but is grafted upon the principal action, and must fall with it when that action is void ab initio. 4. In this case the intervention having been useless because founded upon grounds already set up by the plaintiff, the Superior Court was right in dismissing it with costs. Judgment in Q. R. 19 S. C. affirmed, *Kent* v. *Bastien*, Q. R. 12 K. B. 120.

Winding-up of Banking Company—Creditor's claim — Notarial charges on dishonoured cheques. *Re Central Bank of Canada, Grand Trunk R. W. Co.'s Claim*, 6 O. W. R. 372, 373.

BARBERS' ASSOCIATION.

Act of Incorporation—*By-law—Annual Dues—Liability for—Penalty — Alternative Remedy.*] — The defendant took a license as barber pursuant to the terms of the Act of incorporation of the plaintiffs (62 V. c. 90), and paid his annual dues until 1903; but, since then, refused to pay them, contending first, that he was no longer a member of the association, and, secondly, that, if he was a member, he could only be sued for the penalty of $10 imposed by the by-laws for their infraction:—Held, that he who takes a license as barber, becomes a member of the association and cannot, at his pleasure, withdraw from the obligations imposed on him by the association by virtue of the Act, and that the adoption of a by-law imposing a penalty is only an additional means of enforcing payment by those in default. In the present case the plaintiff association had the alternative of suing to recover the amount of the fee according to art. 13 of the charter, or of claiming the penalty by virtue of the by-law. *Barbers' Association of the Province of Quebec* v. *Gagné*, Q. R. 27 S. C. 47.

BARGAIN AND SALE.

See DEED.

BAR OF ACTION.

See PEREMPTION.

BARRISTER.

See LAW SOCIETY—LOCAL JUDGES AND MASTERS—SOLICITOR.

BASTARD.

Filiation — *Paternity* — "*Preuve Testimoniale*"—"*Faits Constants*" — *Admissions by Putative Father—Denial of Allegation of Mother—Preponderance of Evidence.*]—In an inquiry as to the paternity of a natural child, "la preuve testimoniale complémentaire" will be admitted, if, in his answers, the defendant, when he is examined as to the facts and circumstances or as a witness, admits facts which raise presumptions or point with sufficient force to render probable the allegation that he has had carnal intercourse with the mother of the child and that he is its father; and in this case the facts admitted by the defendant constituted a set or continued succession of circumstances, which, taken altogether, give birth to a very strong suspicion that the defendant had carnal relations with the mother of the child at the date of its conception, and continuing until nearly up to the time of its birth. The facts thus admitted become, from that moment, "faits constants" satisfying the requirements of art. 232 of the Civil Code, and sufficient for the admission of "preuve testimoniale complémentaire" of the paternity of the defendant. Whether the facts admitted are such or not is a question of fact to be decided by the Court (Demolombe t. 5, No. 235). Articles 241, 232, 233, and 234 of the Civil Code, which change the method of proof in force up to the time the code came into force, in the matter of proof of paternity, have not made any change in what up to that time was considered as raising presumptions or grave suspicions of a nature to make it probable that sexual relations existed between the mother and supposed father of the child, and consequently of the paternity attributed to the defendant. Despite the fact that the only "preuve complémentaire" adduced may be that furnished by the evidence of the mother, plaintiff in the case, ésqualité de tutrice to her child, who swears positively that the defendant is the father of her child, notwithstanding that the defendant on his side swears with no less assurance that he has never had sexual intercourse with the plaintiff, yet the undisputed fact of the birth of the child added to the admissions of the defendant when heard as a witness, give to the plaintiff's evidence a sufficiently preponderating force to justify the judgment in favour of the latter. In the absence of evidence contradicting that of the plaintiff, proof of the identity of the child of which she is the mother and whose fatherhood she attributes to the defendant, established by the testimony of the mother alone, is sufficient, and this notwithstanding the fact that in the certificate of baptism, the child is represented as being of unknown parents ("né de parents inconnus."). *Rattigan* v. *Robillard*, Q. R. 26 S. C. 222.

Proof of Paternity—*Commencement of Proof in Writing—Deposition of Mother—Admission of Father—Presumption.*]—A deposition on oath before a justice of the peace by the mother of an illegitimate child cannot serve as the commencement of proof in writing, according to the terms of art. 233, C. C., in an action for the declaration of paternity subsequently begun by the child's tutor, although such deposition has been made part of the record without objection from the opposite part. 2. However, it matters little whether the existence of "the facts thence appearing," which may, in such an action, authorize proof by witnesses (art. 232, C. C.), be demonstrated before or during the enquête; it is enough that such facts be established and proved before the oral evidence is admitted. 3. When, in such an action, the defendant admits carnal relations with the child's mother, but at a date outside (though very near) the period fixed by art. 227, C. C., as that of the longest gestation, such avowal of the defendant constitutes a presumption and an indication resulting from "facts thence appearing," and weighty enough to determine the admission of proof by witnesses; and then, if it appears that the mother has not had relations with other men about the time of conception, the Court will give credit to her declaration under oath that the defendant is the father of her child, especially if such declaration is supported by circumstances and evidence supporting it. *McAulay* v. *McLennan*, Q. R. 20 S. C. 205.

BENEVOLENT SOCIETY.

Expulsion of Member—*Good Cause.*]—A resolution of a benevolent society decreeing the expulsion of a member who has sued the society before a civil Court, instead of submitting his grievance to an arbitration tribunal established by the rules of the society, is not contrary to public order, nor oppressive, nor unreasonable, and the expulsion is valid. *St. Joseph de St. Hyacinthe Union* v. *Cabana*, Q. R. 10 K. B. 324.

Misstatement of Age—*Rules Regulating Mode and Amount of Payment.*] — A benevolent society's certificate provided for payment to the plaintiff, upon his total disability or upon his attaining the age of seventy years, out of the total disability fund, in accordance with the laws governing the fund, sums not exceeding in the aggregate $1,000. In his application, upon which it was declared the certificate was founded, the plaintiff gave his age as fifty-four, when it was in fact fifty-five, the latter age being within the age allowed for entrance, and the assessments and fees chargeable being the same for both ages. The plaintiff attained the age of seventy on the 10th December, 1899, and brought this action on the 15th May, 1900, asking for payment of $1,000. The jury found that the plaintiff's age was not material to the contract, and that the statement as to age was made in good faith and without any attention to deceive:—Held, that the certificate was binding, and that the plaintiff was entitled to payment thereunder upon in fact attaining the age of seventy, but that the "laws governing the fund" applied though not set out, and that under them the plaintiff was entitled at the time of action brought only to a benefit of $225. *Hargrove* v. *Royal Templars of Temperance*, 21 Occ. N. 372, 2 O. L. R. 79. Appeal refused, 22 Occ. N. 1, 31 S. C. R. 385. See also S. C. 2 O. L. R. 126, 21 Occ. N. 432.

Pension—Police fund—Police officer permanently incapacitated—Retirement from service—Injuries received in execution of duty—Evidence—Private tribunal — Police commissioners. *Gummerson* v. *Toronto Police Benefit Fund*, 5 O. W. R. 581, 6 O. W. R. 517, 11 O. L. R. 194.

Rules — *Construction — Participation of Member in Benefits.*]—The 12th rule or by-law of the relief society established in connection with the mines of the Dominion Coal Co., provided that "no member shall participate in the benefits of the society until two full months after the date of his first payment:"—Held, that a member was absolutely excluded from any participation in the benefits of the society in case of illness or accident happening within the period of two months, and that the right to participate only began in cases where the inability to work was due to causes arising after the lapse of the two months. *McDonald* v. *Dominion Coal Co.'s Relief Fund*, 36 N. S. Reps. 15.

Sick Benefits — *Majority Vote—Condition Precedent — Gratuity.*] — The plaintiff sued the defendants for sick benefits, being a member of the association in good standing, and producing the certificate of a physician as to his illness. By s. 1, article 11, of the constitution of the society, it was provided that "every member is entitled to $3 per week during sickness, provided he produces certificate from a doctor, and provided he obtains a majority vote of either a special or regular meeting of the society authorizing the payment of such benefit claim." The majority of the meeting voted against payment of the claim:—Held, that a majority vote was necessary before the claim could be collected, being a condition precedent to the right to recover, and that the payment of sick benefits was simply a gratuity. *Hughes* v *Benevolent Irish Society*, 21 Occ. N. 516.

BEQUEST.

See WILL.

BETTING.

See CRIMINAL LAW.

BIGAMY.

See CRIMINAL LAW.

BILL OF COMPLAINT.

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BILLS OF EXCHANGE AND PROMISSORY NOTES.

Absence of Consent of Maker—*Mistake as to Nature of Instrument—Holder for Value—Damages.*]—A promissory note being a contract, the consent of the parties to it is of its essence as in other contracts. If a person signs a note wishing to sign and believing that he is signing an order for goods, the note is completely void even in the hands of a holder for value given in good faith. Quære, whether, where one who has so signed a note has done so negligently, he can be sued for damages for quasi-tort by such holder. *Jacques Cartier Bank* v. *Lalonde*, Q. R. 20 S. C. 43.

Acceptance—*Account Stated—Mistake—Opening Account—Pleading—Amendment.*]—Acceptance of a bill of exchange is evidence of an account stated to the amount of the bill. In order to open a second account it is necessary to particularize specific errors in the account. In an action by the drawer of bills of exchange against the acceptor, the defendant pleaded generally that he accepted the bills under a mistake as to the state of the account. This defence was struck out, with leave to the defendant to amend on terms of filing an affidavit verifying the facts to be set out in the proposed amended defence. The proposed amended defence alleged that when the defendant accepted the bills he did so under the mistaken idea that he was indebted to the plaintiff in the amount thereof; that such mistaken belief was occasioned by the plaintiff having represented to him, by statements of account in writing and by drawing the bills, that he justly owed the plaintiff that amount, whereas, in fact, he was not indebted to him in any amount; that the defendant had dealt extensively with the plaintiff for over six years; that in course of such dealings plaintiff had, without defendant's knowledge or consent, made many exorbitant and illegal charges, and that if accounts were taken it would be found that the defendant was not indebted to the plaintiff in any amount. This proposed defence and a counterclaim based on the same allegations, for an account, were held bad; and were not allowed to be filed, and there being, therefore, no defence on file, judgment was given for the plaintiff. *Clark* v. *Hamilton*, 5 Terr. L. R. 178.

Accommodation Acceptor—*Release — Payment by Drawer.*]—The plaintiff agreed to sell certain cattle to M., on condition that M. would procure some one to accept a draft for the price. The defendant, at the request of M., accepted a draft for the amount, and a second draft given in renewal of the first, and agreed to accept a third draft in renewal of the second, but afterwards refused to do so at the instance of M., who, in the meantime, had become insolvent. The plaintiff furnished all the money used to retire the second draft with the exception of $10 paid by M.:—Held, that the defendant was not relieved from his liability on the second acceptance by the payment made by the plaintiff, and that the plaintiff was entitled to judgment for the amount of the acceptance, less the $10 paid by M. Held, that the case was distinguishable from one where the acceptor accepts for the accommodation of the drawer, who takes up the bill at maturity and negotiates it to someone who sues the acceptor. *Dill* v. *Wheatley*, 34 N. S. Reps. 526.

Accommodation Indorser — *Action for Indemnity Against Maker—Condition Precedent—Notice of Dishonour.*]—The obligation of the indorser of a promissory note is a conditional obligation, the condition being that the note shall be protected and that notice of protest shall be given to him. Therefore, he has no right of action against the maker for indemnity in respect of his obligation, even after the note has fallen due, if it has not been protested and notice of protest given to him. *Trottier* v. *Rivard*, Q. R. 23 S. C. 526.

Accommodation Indorser — Wife indorsing the benefit of husband—Absence of independent advice—Notice to plaintiffs — Benefit for plaintiffs. *Bank of Montreal* v. *Scott*, 3 O. W. R. 523, 6 O. W. R. 411.

Accommodation Indorsers — *Co-sureties—Contribution—Order of Indorsements.*]—The plaintiffs and defendant were both accommodation indorsers of a promissory note. The plaintiff was the payee, but, when the instrument was given to him to indorse, the defendant's name was already on the back of it, and the plaintiff indorsed under the defendant's indorsement. Each testified that his liability was to be secondary to that of the other—not that they so agreed with each other, but that the maker so agreed with each of them respectively:—Held, that, being sureties for the one debt, the rule of equitable contribution applied, and the plaintiff, having paid the debt, was entitled to recover only half of it from the defendant. *Macdonald* v. *Whitfield*, 8 App. Cas. 733, discussed. *Steacy* v. *Stayner*, 24 Occ. N. 309, 7 O. L. R. 684, 3 O. W. R. 244, 557.

Accommodation Indorser—*Waiver of Notice of Protest.*]—Action on a promissory note against the defendant O. as indorser. The defendant pleaded that he was only a guarantor on the note, and had received none of the proceeds thereof, and that, as he had received no notice of protest, he was discharged from all liability. The evidence shewed that when the note fell due Q. had gone to the plaintiff, offered a renewal note, and had asked for time in which to pay:—Held, that this action on the part of Q. was a waiver of protest under the Bills of Exchange Act. *Smith* v. *Lang*, 22 Occ. N. 418.

Accommodation Maker — *Conditional Delivery—Bank—Notice to Agent.*]—In an action brought by the plaintiffs against the defendant M., as indorser of a promissory note made by S., and as joint and several maker with S. of two other promissory notes, the defence chiefly relied on was that the notes were signed by M., and delivered to the plaintiffs' agent under a special agreement, of which the plaintiffs had notice, that they were not to be used until they had been indorsed or signed by certain other parties, as co-sureties. The evidence shewed that the defendant S. was largely indebted to the plaintiffs for advances made by the plaintiffs' agent, for which the plaintiffs were anxious to obtain collateral security, and that the notes were taken for that purpose, and not as ordinary discounts; also,

that the signature of the defendant M. to the notes was obtained by the plaintiffs' agent, under instruction from the cashier of the bank; also, that, at the time the notes were signed, the plaintiffs' agent was told by M. not to take them unless the other signatures were obtained, and replied, "that is all right:" also, that the notes were signed in the defendant's office, and that no part of the transaction took place in the office of the bank:—Held, setting aside the findings of the jury, that the signature of M. was obtained in the course of the business of the agency, and within the scope of the agent's authority, and that his knowledge of the condition upon which the signatures were obtained must be held to be the knowledge of the bank. Held, also, that if the agent, acting under the authority of the cashier, applied to the defendant M. to sign the notes, and, in order to induce him to do so, agreed to any condition, or did anything to lead M. to believe that they would not be used by the bank until another person had signed them, the bank would be bound, although the conduct of the agent was unauthorized, and knowledge thereof was concealed from their officers. *Commercial Bank of Windsor* v. *Smith*, 34 N. S. Reps. 426.

Accommodation Maker — *Holder for Value—Equities—Defects in Title—Agreement for Renewal—Parol Evidence—Agreement—Signature—Amendment — Parties.*]— The trial Judge found that the promissory note sued on was made by the defendant for the accommodation of K., the payee, subject to the conditions that: (1) it was not to be used at all except in a certain stated event; (2) it was to be negotiated, if at all, only at a certain named bank; and (3) it was renewable for the stated period, which had not expired at the commencement of the action. He also found that the second and third of these conditions had been broken; that the plaintiff acquired the note, though for value, after maturity, from one C., the trustee for the benefit of the creditors of K., and not from a certain bank which, at the time of the arrangement whereby he acquired the note, actually held it as a collateral security for an indebtedness of K.:—Held, that these conditions were "equities attaching to the note," and their breach "defects in the title of the person who negotiated it;" that the note was affected by them in the hands of both C. and the plaintiff; and that therefore the plaintiff could not recover. The nature and effect of an accommodation note discussed. Where a note is subject to an agreement for renewal, if the renewal is not contemplated, except on the happening of an event not within the knowledge of the holder alone, the obligation of offering to renew is on the party entitled to renew. The necessity for such offer and the time within which it must be made discussed. In this case there was a continuing offer to renew, and a continuing refusal to accept a renewal. The character of the evidence of notice of defects in title discussed. Where it is made to appear that a note, transfer, or other writing is merely an incident in or part of a larger agreement, and there is no writing in which the parties professed to set down all the terms of their agreement, oral evidence of the agreement is admissible. Signature is a conventional mode of declaring a writing to be the record of an agreement; but it is not essential, except where made so by statute. The fact that such a writing is directed to a third party does not prevent its being taken as the record of such an agreement. On the plaintiff's application an amendment was allowed adding the bank, with its consent, as a co-plaintiff, on the terms that the bank stand on the title of the plaintiff. *MacArthur* v. *MacDowall*, 1 Terr. L. R. 345.

Accommodation Maker *–Renewal Note Obtained by Fraud of Principal Maker — Right to Sue on Original Note — Division Court—Power to Amend — Evidence.*]—The defendant joined in making a promissory note, as the payees, the plaintiffs, knew, for the accommodation of his co-maker. When it became due, the latter brought a renewal note, purporting to be signed by the defendant, which the payees accepted, and gave up the original note stamped "paid." The primary debtor becoming insolvent and dying, and the plaintiffs failing to get payment of the renewal note out of his estate, they sued the defendant upon it, in a Divisional Court, where there was a trial by jury. The defendant swore he never signed the renewal note, but, nevertheless, there was a verdict for the plaintiffs. A new trial was then granted, resulting in a verdict for the defendant. A further new trial then being granted, the Judge at the trial allowed the plaintiffs to claim in the alternative upon the original note, as well as claiming upon the renewal note, and to amend their claim accordingly. The jury then returned a verdict for the plaintiffs on the original note. The defendant applied for a new trial, which was refused, and he then appealed to this Court:—Held, that the Division Court Judge had jurisdiction to amend the plaintiffs' claim as he had done, under Rule 4 of the Division Courts.—2. That the renewal note being a forgery, so far as the defendant's signature was concerned, and the plaintiffs, therefore, having been induced by the primary debtor's fraud to give him up the original note, the plaintiffs retained a right to recover in equity on the original note.—3. That a witness was entitled to refer to entries in the books of the primary debtor, made by him or under his direction, to refresh his memory. *Matthews* v. *Marsh*, 23 Occ. N. 154, 5 O. L. R. 540, 2 O. W. R. 247.

Accommodation Maker—Holder in due course—Discount—Finding of trial Judge—Credibility of witness — Appeal. *Molsons Bank* v. *Stearns*, 5 O. W. R. 479, 6 O. W. R. 667.

Account Stated—*Yukon Appeal—Final Judgment—Right of Appeal—Leave to Appeal to Privy Council—Costs.*]—In an action by executors against the appellant to recover certain sums of money due to their estate, the Judge of the Territorial Court, at the request of the plaintiffs, selected one of the items, and adjudicated on the evidence taken that the action in respect thereof be dismissed:—Held, that this was, within the meaning of the Yukon Territorial Act, 1899, s. 8, a final judgment in respect thereof, notwithstanding that the remaining items in suit were referred, and the costs were reserved. No appeal therefrom to the British Columbia Court lay after the expiration of 20 days. Special leave having been granted to appeal from a decree of the Supreme Court of Canada on a petition stating that the construction

of the said statute was a matter of general public importance, without stating that it had been repealed:—Held, that, as the omission was immaterial and bona fide, the appellant should not be deprived of his costs. Judgment in Belcher v. McDonald, 33 S. C. R. 321, reversed. *McDonald* v. *Belcher*, [1904] A. C. 429.

Accord and Satisfaction — *Agreement to Accept Land in Payment of Debt—Solicitor's Authority — Agent's Authority.*]—One C., a commercial traveller in plaintiffs' employ, called on defendant and pressed for payment of an overdue promissory note. Defendant offered to give a parcel of land in payment, and C. in company with defendant inspected the land, C. wrote plaintiffs submitting the proposition and giving a specific description of certain land. Plaintiffs wrote a solicitor instructing him to prepare a conveyance thereof. The solicitor, finding that there had been a misdescription in the letter to plaintiffs, accepted a conveyance of the land actually shewn by defendant to C.:—Held, in an action on the note, that plaintiffs were bound as by an accord and satisfaction and could not recover. *Pither* v. *Manly*, 9 B. C. R. 257.

Action for Money Demand—*Plea of Bill of Exchange—Reply that Bill not Paid—Necessity for Deposit of Bill.*]—Where the defendant pleads that the plaintiff has drawn upon him a bill of exchange for the amount of the claim, the plaintiff may reply that the bill is overdue and unpaid, and this without depositing the bill in Court; the neglect to deposit will only affect the costs. *McKee* v. *Falardeau*, 5 Q. P. R. 159.

Action for Money Lent—*Proof that Note Given—Production of Note—Proof of Loss—Indemnity—Costs.*]—Where, in an action of a loan the defendant admits the loan, but alleges that he gave a promissory note for the amount, and this admission constitutes the sole proof of the loan, it cannot be divided. 2. A person who, on making a loan of money, receives a promissory note for the amount, cannot maintain an action upon the loan without producing and tendering to the debtor the note so given, or in the event of its being lost, without proving the loss, and obtaining an order that its loss shall not be pleaded by the defendant upon plaintiff giving security to the satisfaction to the Court or Judge against the claim of any other person upon the note. 3. Although the defendant is entitled, in the absence of compliance with the above conditions, to ask for the dismissal of an action brought simply for the recovery of the loan, yet where he has declared his readiness to pay on proof of loss being made, and indemnity given, the Court, in order to avoid further litigation, may treat the case as an action on a lost note, and give judgment for the plaintiff on condition that security be given according to law,—the defendant's costs in such case to be paid by plaintiff. *Tessier* v. *Caillé*, Q. R. 25 S. C. 207.

Action on—Defence—Accommodation — Evidence—Set-off. *Laduc Gold Mining and Development Co. of Yukon* v. *Prudhomme* (Y.T.), 2 W. L. R. 482.

Action on—*Defence — Agreement—Violation—Condition—Parol Evidence of.*]—To the plaintiff's claim against the defendant, as maker of a promissory note for $238.58, the defence was set up that in consideration of the defendant's forbearance to commence proceedings, in the Probate Court, for proof in solemn form of the will of A. C., the plaintiff agreed to advance the defendant, on account of a legacy to which she was entitled, as guardian of her infant children, a sum of money, to be expended in repairs to property of the said children, and that the plaintiff, not having the money required for that purpose, requested the defendant to sign a note for the amount, which note was indorsed by the plaintiff to a firm which had done a portion of the repairs, and that the note was given on the understanding that the plaintiff would pay it when it became due, and would deduct the amount from the amount payable to the defendant, as guardian of her said children; and in answer to the plaintiff's claim on a second note, for the sum of $150, the defendant, on the trial, sought to give evidence to shew that the note, although expressed to be payable on demand, was made subject to a condition that the defendant should not be called upon for payment, unless her children should die before a legacy to which they were entitled under the will of A. C., should become payable:—Held, that the defendant, having violated her agreement by commencing proceedings in the Probate Court, and having succeeded in setting the will aside, could not set up the agreement as a defence to the plaintiff's action on the first note; and that the second note being absolute on its face, evidence could not be given to vary its terms, there being no evidence to shew that it was given on a condition, or as an escrow, or only to be treated as a note in a certain event. *McNeil* v. *Cullen*, 37 N. S. Reps. 13.

Action on —Defence—Payment—Forgery — Conflicting evidence — Onus — Laches. *Hebert* v. *Harel* (Man.), 2 W. L. R. 18.

Action on, Brought by Assignee of Administratrix of Holder—Transfer after maturity—Set-off of claims against estate of holder—Services—Account—Evidence. *O. W. Kerr Co.* v. *Burkman* (N.W.T.), 2 W. L. R. 430.

Action on, by Trustee for Payee—Indorsement by payee after action—Equitable right of action. *Watson* v. *Coates*, 6 O. W. R. 509.

Action on Promissory Note—*Pleading —Consideration—Administrators — Illegal Appointment by Foreign Court.*]—A defendant, sued upon a promissory note, may plead that the note was given without consideration and may set this up as a defence against the holder deriving his title from administrators illegally appointed by a foreign Court. *Poirier* v. *Arnault*, 5 Q. P. R. 139.

Action on Promissory Note—*Pleading —Irregular Protest—Affidavit.*]—A plea to an action against the indorser of a promissory note, alleging that notice of protest was not regularly given, should set out especially the irregularity complained of; and, further, such plea must be supported by affidavit es-

tablishing the facts alleged: Art. 208, C.C.P. *Western Loan and Trust Co.* v. *Ross*, Q. R. 12 K. B. 226.

Action on Promissory Notes—*Defence —Composition and Discharge—Payment into Court — Costs.*]—The defendant, being in difficulties, procured from all his creditors, among whom were the plaintiffs, a deed of composition and discharge, on the terms that within 60 days he should give them secured promissory notes representing 75 cents on the dollar. Before the expiration of the 60 days, the defendant, under pressure from his creditors and by an arrangement with them, sold his entire assets on certain terms, which netted to the creditors 64½ cents on the dollar, payable and paid by the purchaser's promissory notes. All the creditors except the plaintiffs, upon receiving the 64½ cents on the dollar, gave a formal discharge to the defendant. The plaintiffs sued upon the promissory notes for the balance of their original debt, or, alternatively, for the difference between 64½ and 75 cents on the dollar. The defendant pleaded several defences and paid the amount representing this difference into Court together with costs up to defence. The jury found in answer to certain questions: (1) that the plaintiffs did not receive the 64½ cents in full of their claim; (2) that they did receive it on account of the 75 cents; and (3) that the 64½ cents was not paid on account of the original claim:—Held, that the plaintiffs' right of action on the promissory notes was defeated by the agreement for composition and discharge, although its terms had not been fulfilled; and the action was dismissed with costs. Effect of payment into Court upon form of judgment and disposition of costs, discussed. *Howland* v. *Grant*, 2 Terr. L. R. 158, 26 S. C. R. 372.

Action on Promissory Notes—*Defence — Demand Note — Absence of Demand — Costs.*]—The neglect to demand payment of a promissory note payable on demand, or default of an allegation, in an action to recover the amount of the note, that such demand for payment was made, cannot be the subject of the defence in law, such an action importing a demand of payment.—2. The neglect to demand payment before the institution of the action may at the most permit the defendant to escape the costs of the action upon depositing the amount claimed or due. *Eastern Townships Bank* v. *Woodward*, 6 Q. P. R. 458.

Action on Promissory Notes—*Insolvency of Defendant—Notes Maturing Pending Action—Amendment.*]—A plaintiff who sued on several notes, some of which would not yet be due but for debtor's insolvency, may subsequently, by supplementary declaration, plead that some of those notes have matured and have been protested since the action. *Molsons Bank* v. *Steel*, 5 Q. P. R. 237.

Act of Commerce—*Joint and Several Judgment.*]—A person who signs a negotiable instrument, although not a trader, does an act of commerce, and, if he has contracted along with others, may have a judgment given against him jointly and severally with them. *Gauthier* v. *Drouin*, 5 Q. P. R. 63.

Advance on Bill—To whom made—Collateral security. *Davies* v. *Friedman*, 2 O. W. R. 220.

Agreement not to Negotiate—Notice. *Murray* v. *Wurtele*, 1 O. W. R. 298, 353.

Alteration—*Joint and Several Liability —Principal and Surety—Judgment.*]—The insertion by the holder of a promissory note signed by several persons, some of whom are sureties for the others, of the words "jointly and severally," before the words "promise to pay," is a material alteration which avoids the note, and the subsequent cancellation of the words by the holder does not do away with the effect of the alteration, even though the makers of the note do not know of the alteration until after the cancellation. A promissory note given to the holder after the alteration and cancellation, in renewal of the original promissory note and in ignorance thereof, cannot be enforced, there being no consideration to support it. Accepting in renewal of a promissory note, some of the makers of which are, to the knowledge of the holder, sureties of a promissory note not signed by one surety, discharges the cosureties. A judgment recovered against debtors in their firm name for the amount of the debt is not a bar to the recovery of judgment against them individually upon a promissory note given by them as collateral security for the same debt. *Banque Provinciale* v. *Arnoldi*, 21 Occ. N. 582, 2 O. L. R. 624.

Alteration After Signature of Maker —Insertion of interest clause—Material alteration—Avoidance of instrument — Subsequent conduct of maker—Estoppel — Ratification. *Jones* v. *Reid*, 6 O. W. R. 608.

Cheque—*Dishonour—Holder for Value—Banker Charging to Customer.*]—L., having sent his cheque to D. in payment for a certain quantity of hay, stopped payment of it on account of the bad quality of the hay. D., upon receipt of the cheque, had indorsed and deposited it to his credit with G., and G. in turn had deposited the cheque in his bank, from which he was obliged to withdraw it shortly afterwards, upon the refusal of payment by the bank upon which it was drawn, G. then charged the cheque to the account of D.; but D. had no longer sufficient funds to cover it. G. began this action against L., the drawer of the cheque, claiming the amount of the cheque:—Held, that G., having charged the cheque to the account of D. and having notified him of it, had ceased to be the owner of it, and had no right of action against L., the cheque having become again the property of D.; and the latter only could recover against L. *Garand* v. *Lamarre*, Q. R. 25 S. C. 380.

Cheque—*Marking by Bank—Fraudulent Alteration—Money Paid Under Mistake of Fact—Negligence — Notice of Dishonour — Reasonable Delay.*]—A cheque for $5 certified by the respondent bank's stamp was fraudulently altered to $500 and paid by

the respondent bank to the appellant bank, holders for value, under a mistake of fact, which was not discovered till the next day. In an action by the respondents to recover back $495 from the appellants:—Held, that the respondents were at liberty to prove, as between themselves and an innocent holder for value, that the cheque had been fraudulently altered after it had been certified. Schofield v. Earl of Londesborough, [1896] A. C. 514, followed.—2. No negligence was imputable to the respondents in cashing the cheque without examining the drawer's account; and, even if it were, it did not induce the appellants to treat the cheque as good. Kelly v. Solari, 9 M. & W. 54, approved. 3. Notice of forgery was unnecessary, and the cheque for $5 was not dishonoured; and, accordingly, the stringent rule laid down in Cocks v. Masterman, 9 B. & C. 902, 33 R. R. 365, to the effect that notice of dishonour of a bill of exchange must be given on the due date, did not apply. The rule will not be extended to other cases where notice of the mistake is given in reasonable time, and no loss has been occasioned by the delay. Judgment in 21 Occ. N. 400, 31 S. C. R. 344, affirmed. *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49.

Cheques—*Forged Indorsements—Fraud of Agent of Insurance Company—Payment by Bank.*]—N. was the assistant superintendent of a life insurance company, as well as its local agent at one of its branches, having sole control of the business there. A number of applications sent in by him to the head office were, with the exception of some five, on the lives of fictitious persons, and, as to these five, the insurances had subsequently lapsed, of which fact the company were kept in ignorance. Afterwards N., representing that the insured were dead and the claims payable under the policies, sent in to the head office claim papers, filling in the names of the fictitious claimants and forging their alleged signatures thereto, whereupon cheques for the respective amounts made by the company in favour of the alleged claimants and payable at a branch of the defendants' bank, were sent to N., whose duty it was, on the receipt thereof, to see the payees and procure discharges from them. On receipt of these cheques the indorsements of the fictitious payees' names were forged, and the cheques presented to the bank and paid in good faith, the amounts thereof being charged to the company's account:—Held, that the company were affected by what had been done by N. so as to preclude them from disputing the right of the bank to pay the cheques and charge the plaintiffs with the amounts thereof. *London Life Ins. Co* v. *Molsons Bank*, 23 Occ. N. 155, 5 O. L. R. 407, 1 O. W. R. 457, 2 O. W. R. 34, 3 O. W. R. 858.

Cheque — *Payment Refused — Right of Holder Against Drawee.*]—One R. gave the plaintiff, in payment of a debt due, a cheque drawn on the defendant bank. Upon presentation payment of the cheque (which was not accepted) was refused, the clerk stating that, as it was for the balance of the sum to R.'s credit, his pass-book must be produced before payment. Within a few days R. became insolvent, and the plaintiff lost payment of his debt. The bank admitted that there were funds of R.'s to meet the cheque when presented, and it was not set up that production of the pass-book when the balance was withdrawn was a custom of the bankers:—Held, that the plaintiff had no right of action against the defendant for damages incurred by reason of their refusing to pay the unaccepted cheque. *Silverstone* v. *Bank of Hochelaga*, 21 Occ. N. 309. [But see *Marler* v. *Molsons Bank* (1872), 23 L. C. J. 293.]

Cheque—*Specific Purpose — Payment—Application to Other Purposes — Notice — Trust.*]—The appellants made a cheque for $400 payable to the order of the respondents, intending that it should be applied as a deposit on account of a purchase of material which they wished to obtain from the respondents through the intervention of A. They handed the cheque to A. for this special purpose, and the word "deposit" appeared on the face of the cheque. The respondents indorsed and used the cheque, and applied the amount on an old claim which they had against A. Another cheque of the appellants, for $100, made payable to the respondents or bearer, was treated in the same manner:—Held, that by using the cheque for $400 payable to their order, the respondents became accountable to the appellants for the amount; they became trustees of the makers of the cheque, with the usual liability attaching to such relationship. And the subsequent cheque, although payable to the respondents or bearer, being part of the same transaction, and being used after notice that it had been obtained by false representations, the respondents should also be accountable therefor. *Leipschutz* v. *Montreal Street R. W. Co.*, Q. R. 9 Q. B. 518.

Collateral Security — *Pledge—Subsequent Debt—Tacking.*]—The plaintiff received from the defendants a promissory note at four months, dated the 21st January, 1895, for $450, as collateral security for an advance of $250 to one of the defendants, M. The plaintiff also received from the defendant M. two notes for $125 each, both dated 24th January, 1895, one at three and the other at four months, to cover the $250 advance. On the 8th February, 1895, the plaintiff received from M. another note for $150 at four months, for a new advance. The note at three months became due on the 27th April, 1895, and one of the defendants paid $25 on account and gave a renewal note for $100 at four months:—Held, that the sum of $100, represented by the renewal note, only became due after the note for $150, and that the plaintiff was entitled, under the circumstances stated, to the benefit of the second paragraph of Art. 1975, C. C., which says that "if another debt be contracted after the pledging of the thing and become due before that for which the pledge was given, the creditor is not obliged to restore the thing until both debts are paid." (Reversed in K. B.) *Bennet* v. *Cameron*, Q. R. 19 S. C. 192.

Company — Authority to make notes — Proof against estate of surety—Renewal or substitution of notes. *Baldwin Iron and Steel Works (Limited)* v. *Dominion Carbide Co.*, 2 O. W. R. 6, 170.

Conditional Indorsement — *Principal and Agent — Knowledge of Agent—Constructive Notice — Deceit.*] — A promissory note indorsed on the express understanding that it should only be available upon the happening

of a certain condition is not binding upon the indorser where the condition has not been fulfilled. Pym v. Campbell, 6 E. & B. 370, followed. The principal is affected by notice to the agent, unless it appears that the agent was actually implicated in a fraud upon the principal, and it is not sufficient for the principal to shew that the agent had an interest in deceiving his principal. Kettlewell v. Watson, 21 Ch. D. 685, and Richards v. Bank of Nova Scotia, 26 S. C. R. 381, referred to. *Commercial Bank of Windsor* v. *Morrison*, 22 Occ. N. 196, 32 S. C. R. 98.

Consideration—Purchase of seed grain—Warranty, implied or express — Breach — Findings of trial Judge. *Lawton* v. *Reid* (N. W.T.), 2 W. L. R. 240.

Consideration — *Advances by Father to Son — Gift —Expectation of Death.*] — A promissory note, freely signed by a son, who has had advances from his father, by which he engages, at the request of his father, who was on his death bed and in poor circumstances, and wished to provide for his daughter's future, to pay her (his sister) a sum of money or annuity for a certain number of years, is founded on valuable consideration and ought not to be regarded as a gift made by the father to the daughter during a supposed mortal illness, and, therefore, void as yielded to in consequence of the expected death of the father. *Brulé* v. *Brulé*, Q. R. 26 S. C. 77.

Consideration—*Failure of.*]—The plaintiff and defendant were joint makers of a note for the defendant's accommodation. The defendant gave the plaintiff the note sued on in consideration of the plaintiff undertaking to pay the joint note. When this action was brought the plaintiff had not been called on to pay nor had he paid the joint note, but after he brought this action and before the trial he had paid it:—Held, that the plaintiff could recover. *Ruffee* v. *Shaw*, 21 Occ. N. 507.

Consideration—*Sale of Animals—Defective Title—Affirmance after Discovery of Defect.*]—The defendants bought cattle from the plaintiff, gave her the promissory note sued on for the price, and took and kept the cattle, all parties believing that the plaintiff had an absolute title to them. It was subsequently ascertained that the plaintiff had only a life interest in the cattle. After learning this fact, the defendants paid a year's interest on the notes, and neither returned nor offered to return the cattle:—Held, that the defendants were liable on the notes, as there was no fraud and no total failure of consideration. They were bound to repudiate the transaction at once on learning of the defect in the plaintiff's title, if they wished to object, and must by their conduct be held to have elected, with knowledge of the facts, to affirm their purchases. *Primeau* v. *Mouchelin*, *Primeau* v. *Pantel*, 15 Man. L. R. 360, 1 W. L. R. 434.

Consideration — *Settlement of Disputed Account — Subsequently Discovered Error in Account.*] — The defendant was agent of the plaintiff to collect rents and profits of a wharf property. On the termination of the defendant's agency, the plaintiff brought an action for an accounting, which was settled by the defendant agreeing to pay the plaintiff the sum of $376, by paying $125 in cash and giving his note for the balance, and by the plaintiff agreeing to assign to the defendant all debts due in respect to the property during the period covered by the agency. The defendant refused payment of the note given by him on the ground that, before it became due, it was discovered that $100 had been paid the plaintiff on account of one of the debts assigned to the defendant, and that the defendant was entitled to credit for this amount on the note:—Held, Graham, E.J., dissenting, that, as the defendant's attorney had knowledge of the error, before the compromise which resulted in the giving of the note was effected, and as by the compromise the plaintiff was prevented from going fully into the accounts, and perhaps establishing a greater liability on the defendant's part, she was entitled to recover the full amount of the note. *Worrall* v. *Peters*, 35 N. S. Reps. 26.

Consideration — Stock dealings — No actual transactions — Knowledge — Acquiescence—Request to pay. *Carpenter* v. *Pearson*, 2 O. W. R. 526, 3 O. W. R. 483.

Countermanding Payment — *Innocent Holder for Value without Notice—Rights of Subsequent Holder with Notice—Holder in Due Course.*] — The defendant R., having given his cheque for $491.25 to the defendant D., the latter indorsed it to the defendant DeG., who deposited it to her credit in a savings bank, which in its turn accepted it and paid $450 to her, and credited her deposit with the balance. But payment had been countermanded by the maker the day after signing the cheque; and, as a consequence, when, in the ordinary course of business of the bank, and without unreasonable delay, the cheque was presented at the bank on which it was drawn, payment was refused. plaintiff, the teller who had received this cheque on deposit without its being marked "accepted," contrary to the rules, was held liable for the amount by the savings bank, but the latter handed over the cheque to him, thus subrogating him to its rights with a view to his having recourse against the parties. To this action the makers and the indorsers pleaded that the plaintiff was not a holder in due course, since he became a holder after refusal of payment and after he had notice of it:—Held, that the indorsers could not raise the question whether he was a holder in due course or not, the cheque not being tainted with any illegality. (2) That DeG. was a holder in due course, since she had become a holder before the cheque could have been presented for payment; and, as a consequence, the savings bank and the plaintiff taking title through her possessed all the rights of a holder in due course against the maker and indorsers. (3) That the maker and prior indorsers must pay the whole amount of the cheque to have a right to it and to be discharged from it; although the savings bank had retained the balance of DeG.'s deposit, that was a personal matter between them. *Gauthier* v. *Reinhardt*, Q. R. 26 S. C. 134.

Credit—*Payment.*] — Semble, that where goods are sold and delivered by the maker of a promissory note to the holder thereof, and their value credited by the latter, the transaction amounts in law to a payment pro tanto. *Pinder* v. *Cronkhite*, 34 N. B. Reps. 498.

Delivery—*Consideration—Onus.*] — Motion by the plaintiffs for summary judgment under Rule 616 in an action upon a promissory note. The defendant in his examination for discovery admitted the making of the note, and said that he left it with the officers of the Consolidated Pulp and Paper Company, to be used by them in procuring an advance from the plaintiffs, the payees of the note, for the purposes of the company, and that the note was, instead, deposited with the plaintiffs by the officers of the company as security for past advances. Fraud was not alleged. Notice to the plaintiffs of the terms on which the note was given was not alleged, and the only defence was want of consideration:—Held, that the onus of the defence lay on the defendant, and he had failed to sustain it: Watson v. Russell, 3 B. & S. 34; Bills of Exchange Act, s. 21, s.-s. 3. *Ontario Bank* v. *Young*, 21 Occ. N. 505, 2 O. L. R. 761.

Demand—*Prescription—Payments— Parol Evidence — Indorsements on Note.*] — A promissory note in these terms, "12 janvier, 1896. A demande je promets de payer à.... la somme de....d'ici au 15 février sans intérêt, et après le 15 avec intérêt à 6 par cent.," is payable on demand from the day of its date. 2. Where a promissory note is payable on demand, prescription runs from the date of the note, and not from the date of demand of payment. 3. Proof by parol is inadmissible of payments alleged to have been made by the maker on account of the note, for the purpose of establishing interruption of prescription. 4. Indorsements on a note of payments on account have no effect against the maker as regards proof of interruption of prescription. *Buchand* v. *Lalumière*, Q. R. 21 S. C. 449.

Duress—*Verdict of Jury.*]—In an action against the maker of a promissory note, the local manager of the plaintiff bank, the defence was that he had been coerced by the head manager, under threats of dismissal and criminal prosecution, into signing the note to cover up deficits in customers' accounts in which he had no personal interest. His evidence at the trial to the same effect was denied by the head manager:—Held, that the jury having believed the defendant's account and given him a verdict, which the evidence justified, such verdict ought to stand. Judgment of Court of Appeal (16th October, 1901, unreported) affirmed. *Western Bank* v. *McGill*, 23 Occ. N. 36, 32 S. C. R. 581.

Effect of Indorsement — *Maker—Proof of Signature—Presentment—Notice of Dishonour.*] — An indorsement of a negotiated promissory note, even though the indorser really be a surety, admits, prima facie at all events, the ability and signature of all prior parties. In an action by the holder of a promissory note and chattel mortgage against the makers of the mortgage and makers and indorser of the note, the plaintiff failed to prove the signature of one of the makers of the note, and the action, as far as the note was concerned, was dismissed as to that maker, although a judgment was recovered on the chattel mortgage. At the trial a defendant, an indorser of the note, although represented by counsel, gave no evidence, and judgment was given against her. She appealed to a Divisional Court, and her appeal was dismissed. She now applied for leave to appeal to the Court of Appeal The plaintiff gave evidence at the trial that, in payment for "the property" sold, he received a mortgage and the note in question and cash for the balance; that the note was not paid at maturity and was protested after presentment and notice sent. It was contended that no one could tell what notice was sent or to whom:: — Held, that it should be inferred from the evidence, in the absence of any weakening of it by cross-examination, that that presentment was made on the day the note became due, that payment was refused, and that due notice of dishonour was given; and leave to appeal was refused. *Wiedeman* v. *Guittard*, 22 Occ. N. 129.

Estoppel—*Forgery—Discount — Duty to Notify Holder.*] — E. & Co., merchants at Montreal, received from the Dominion Bank, Toronto, notice in the usual form that their note in favour of the Thomas Phosphate Co. for $2,000 would fall due at that bank on a date named, and asking them to provide for it. The name of E. & Co. had been forged to the note, which the bank had discounted. Two days after the notice was mailed at Toronto the proceeds of the note had been drawn out of the bank by the payees:—Held, affirming the judgment of the Court of Appeal, Dominion Bank v. Ewing, 7 O. L. R. 90, 24 Occ. N. 80, 1 O. W. R. 654, 3 O. W. R. 127, Sedgewick and Nesbitt, JJ., dissenting, that on receipt of the notice E. & Co. were under a legal duty to inform the bank by telegraph or telephone, that they had not made the note, and not doing so they were afterwards estopped from denying their signature thereto. *Ewing* v. *Dominion Bank*, 24 Occ. N. 285, 35 S. C. R. 133.

Failure of Consideration—Purchase of shares in mining company—Failure to allot shares — Abandonment of enterprise — Recovery back of moneys paid — Promissory notes—Effect of renewals. *Bullion Mining Co.* v. *Cartwright*, 5 O. W. R. 522, 6 O. W. R. 505.

Forged Cheques—*Crown — Forgeries by Clerk in Government Department—Liability of Bank—Duty of Customer to Check Accounts —Deposit of Cheques in Other Banks—Liability Over — Estoppel — Alteration of Position.*]—Action to recover $75,705, the aggregate amount of 12 cheques forged by Abendens Martineau, a clerk in the Department of Militia at Ottawa. These cheques were drawn upon the defendants, and were paid by them and charged against the account of the Receiver-General of Canada. The Quebec Bank, the Sovereign Bank, and the Royal Bank, were brought in by defendants as third parties, and relief over against them claimed, the forged cheques having been deposited by Martineau in these banks at Ottawa, and having been presented for payment to defendants by or through these banks. All Dominion Government moneys are deposited, with defendants, as with other banks, to the credit of the Receiver-General of Canada. Each of the forged cheques was in due course forwarded by the bank with which it was deposited to the Ottawa clearing-house. It was then charged up to the Bank of Montreal (defendants), and sent on to that bank, which debited it in the Militia Department "Letter of Credit Account." On the following day (the second after it had been originally deposited by Martineau), it was, with other cheques, transmitted by the Bank of

Montreal to the Militia Department, accompanying the daily sheet or statement, in nature of a pass book, which the bank furnished to the Department:—Held, 1. Plaintiff entitled to recover from defendants the amount claimed, $75,705, with interest from the respective dates; the component parts were charged against the account of the Receiver-General of Canada. From this, however, there was deducted $12,443.77 found upon Martineau when arrested, which was taken possession of by the Dominion Government. 2. The third party banks were not liable as indorsers, nor upon warranty or representation that the cheques were genuine. But in turn the Royal Bank had to pay defendants $250, and the Quebec Bank $5, the respective amounts still to Martineau's credit. His account had been closed with the Sovereign Bank. *Rex* v. *Bank of Montreal*, 5 O. W. R. 185, 10 O. L. R. 117.

Forged Indorsement of Payee — Deposit with bank by customer for collection—Indorsement by customer — Payment by drawee bank — Refund when forgery discovered—Liability of customer—Bills of Exchange Act—Evidence—Depositions of co-defendant on examination for discovery. *Bank of Ottawa* v. *Harty*, 6 O. W. R. 925.

Forgery—Conflicting evidence—Collateral circumstances — Comparison of handwriting. *Burton* v. *Lockeridge*, 5 O. W. R. 51.

Fraud—*Holder in Good Faith.*]—According to findings of fact at the trial, the evidence did not clearly shew that the promissory notes sued on had been signed by the defendants, and it was proved that, if they had signed them, they did so without knowing that they were promissory notes and in the belief, induced by the false representations of the agent of the payee, that the documents they signed were petitions to the government for a road:—Held, following Foster v. McKinnon, L. R. 4 C. P. 704, and Lewis v. Clay, 77 L. T. 653, that, notwithstanding the language of ss. 29 and 38 (b) of the Bills of Exchange Act, 1890, the defendants were not liable to the plaintiffs, although they were holders in good faith, for value and without notice of any defect or fraud, and had acquired the notes during their currency. *Alloway* v. *Hrabi*, 24 Occ. N. 253, 14 Man. L. R. 627.

Fraud or Duress — Bills of Exchange Act, s. 29—Holder in due course—Value—Good faith—Notice of defect—Note payable to bearer — Restrictive indorsement. *Gibson* v. *Coates* (Man.), 1 W. L. R. 556.

Holder—*Action—Ratification.*]—Where a promissory note was delivered by McG., the holder, to P., whose name McG. wished to use in the collection of the note, and, subsequently and before the note was due, McG. got it from P., telling him that he was going to place it with a banker, and he had better direct him to collect it. P. never gave any direction to collect it, and did not, before commencement, authorize the action, but he subsequently ratified it, stating he would have authorized it in the first instance if he had been asked to do so:—Held, in an action on the note in the name of P., that he was entitled to recover as holder. *Potter* v. *Morrisey*, *Potter* v. *Creaghan*, 25 N. B. Reps. 465.

Holder for Value—*Holder for Collection — Pleading.*] — In an action based upon a promissory note, where the defendant pleads that plaintiff is not a regular holder for value, the letter may reply that he holds the note for collection on behalf of the last indorser, and such answer will not be rejected on motion, as changing the basis of the action. *Legal and Financial Exchange* v. *Cameron*, 5 Q. P. R. 98.

Holder for Value — Notice — Executor. *Evans* v. *Rolls*, 4 O. W. R. 125.

Holder in Due Course—Defect in title —Onus—Indorsement after maturity—Equities—Payment on account—*Smith* v. *Gallnaith* (Man.), 1 W. L. R. 227.

Holder in Due Course — Effect of indorsement—Evidence. *Wiedeman* v. *Guittard*, 1 O. W. R. 110.

Holder in Due Course — *Indorsement in Blank — Special Indorsement by Transferee—Attempted Cancellation and Delivery to Further Transferee—Title—Right of Action—Undertaking — Amendment—Bills of Exchange Act.*]—Payee of a note indorsed it in blank. The Standard Bank of Canada became holders as collateral security. The bank stamped on the back over the indorsement the words, "Pay Standard Bank of Canada or order," thus converting it into a special indorsement to that bank. The plaintiffs took over the account, depositing the note, receiving the note and other securities, paying therefor $13,800. The note was again stamped "Pay to the order of the Sovereign Bank of Canada," over the words already there, "Pay Standard Bank of Canada or order," so as to partly obliterate them, but not so that both indorsements could not be plainly made out. On these facts it was held that the intention of the two bank managers was to transfer to plaintiffs all the title of the Standard Bank to the note, and that the effect was that plaintiffs became the holders of the note and entitled to maintain the action. *Sovereign Bank* v. *Gordon*, 4 O. W. R. 152, 9 O. L. R. 146.

Illegal Consideration — *Unreasonable Restraint on Marriage — Public Policy.*] — Appeal by plaintiff from judgment of Street, J. (2 O. W. R. 1129, 24 Occ. N. 17, 6 O. L. R. 708), dismissing action by an unmarried woman against administrator of the estate of Albert Rose, whose housekeeper plaintiff was, upon a promissory note for $1,500 made by the intestate. The consideration was an agreement by plaintiff not to marry while the intestate lived:—Held, that the contract was not one in restraint of marriage for such an unreasonable period as to be contrary to the policy of the law. Judgment for plaintiff for the promissory note sued on and interest. *Crowder* v. *Sullivan*, 4 O. W. R. 397, 25 Occ. N. 31, 9 O. L. R. 27.

Illegality — *Consideration — Election Fund.*] — There can be no recovery upon a promissory note given for the purpose of raising funds to be used at an election, or upon a renewal of such a note. *St. Pierre* v. *L'Ecuyer*, Q. R. 23 S. C. 495.

Indorsement — *Liability — Evidence to Vary Contract.*]—Parol evidence will not be received to shew that a person who indorsed

a promissory note to another for valuable consideration, stipulated at the time that he was not to be liable on the indorsement. Smith v. Squires, 13 Man. L. R. 360, followed. *Emerson* v. *Erwin*, 10 B. C. R. 101.

Indorser—*Note Payable to Another—Absence of Indorsement by Payee — Liability — Notice of Dishonour—Presentment — Waiver — Indorser Becoming Administrator of Maker.*]—The defendant A. M. put his name on the back of a promissory note made by M. M. to the order of the plaintiff, which was then delivered to the plaintiff:—Held, that the defendant A. M. was an indorser of the note, liable as such to the payee and entitled to notice of dishonour. M. M. died before maturity of the note, and the defendants A. M. and H. were appointed two of his administrators; after their appointment and before maturity, they had a conversation with the plaintiff in respect of the note, and the plaintiff swore that he told them when it would be due, and one of them asked for an extension of time, which was granted. The defendant A. M. swore that the plaintiff told him not to worry, that he would not look to him for payment, but take whatever the estate was able to pay, and he did not ask for an extension, nor did he hear the defendant H. ask for any. The defendant H. could not remember what took place:—Held, insufficient to prove that the defendant A. M. waived presentment or notice of dishonour. The plaintiff also, before maturity, pursuant to administrators' advertisement for creditors, filed with their solicitor a copy of the note and a statutory declaration that it was unpaid:—Held, that this is not such a presentment as is required by s. 45 of the Bills of Exchange Act, 1890:—Held, also, that, notwithstanding that the indorser became one of the deceased maker's administrators before maturity of the note, presentment and notice of dishonour were nevertheless necessary. *Fraser* v. *McLeod*, 2 Terr. L. R. 154.

Indorsement — *Parol Evidence to Vary Contract—Inadmissibility.*] — Parol evidence will not be received to shew that a person who indorsed a promissory note to another for valuable consideration stipulated at the time that he was not to be liable on the indorsement, that he would be contradicting the contract which such indorsement by s.-s. 2 of s. 35 of the Bills of Exchange Act, 1890, imports. Abrey v. Crux, L. R. 5 C. P. 37. Henry v. Smith, 39 Sol. J. 559, and New London Credit Syndicate v. Neale, [1898] 2 Q. B. 487, followed. Pike v. Street, Moo. & M. 226, dissented from. *Smith* v. *Squires*, 21 Occ. N. 216, 13 Man. L. R. 369.

Indorser — *False Signature of Maker — Holder in Due Course.*] — The indorser for accommodation or for value, of a bill or note cannot set up against the holder in due course that the signature of the maker is false. *Choquette* v. *Leclaire*, Q. R. 19 S. C. 521.

Indorser — Procurement by fraud — Discount—Notice to agent of holder—Notice to bank—Property in notes not passing—Conflict of evidence. *Merchants Bank* v. *Grimshaw*, 2 O. W. R. 729, 4 O. W. R. 179.

Joint and Several Notes—*Release of Co-maker — Reservation of Rights — Subsequent Deed — Implication.*[— One of five makers of a joint and several promissory note was absolutely released by the holder, by an instrument under seal, no reservation of rights against the other makers, but the plaintiff sought to recover against one of them, upon the ground that it was intended that there should be a reservation, and that this was recognized by a subsequent instrument under seal, to which the maker who had been released was not a party, but the defendant was, whereby it was stipulated that the individual liabilities and indebtedness of the defendant to the plaintiff should not be abandoned:—Held, that the defendant was discharged by the release of his co-maker, and that the effect was not changed by the subsequent instrument. *Bogart* v. *Robertson*, 24 Occ. N. 348, 8 O. L. R. 261, 3 O. W. R. 758, 6 O. W. R. 896, 11 O. L. R. 295.

Joint Makers — *Action against Both — Judgment against One — Subsequent Action against Other—Former Action—Amendment —Lapse of Time.*]—The defendants G. and N. were sued jointly as makers of a promissory note for $25. The writ of summons, which was issued in January, 1885, was served on the defendant N., and the defendant G. accepted service. N. appeared and pleaded, but, by arrangement, nothing was done in relation to the claim against the defendant G. In November, 1885, N. withdrew his defence, and confessed the action, and final judgment was entered against him, on which some payments were made. In 1899 the plaintiff commenced proceedings against the defendant G., who, under an agreement reserving his rights, appeared and pleaded:—Held, that the judgment entered on confession against the defendant N. was an answer to the claim subsequently made against the defendant G. McLeod v. Power, [1898] 2 Ch. 295, followed:—Held, further, that the action having been brought against defendants as joint debtors only, the position of G. in the suit was not affected by the fact that the note in question was a joint and several one, and that the plaintiff, in another suit, might have some claim against G. alone. Per Townshend, J.—The plaintiff could not succeed without an amendment, and no amendment should be permitted after the lapse of fifteen years. Per Meagher, J., dissenting:—As the reception of the note was not objected to on the trial, or the existence of the judgment against N. urged as an answer, a stage had been reached when the form of action was not material; also, that, as either objection, if raised upon the trial, could have been cured by amendment, the facts should be looked at rather than the form, and the defendant G. should not be permitted to succeed on a mere technicality. *McDonald* v. *Gillis*, 33 N. S. Reps. 244.

Joint Obligation — Statute of Limitations — Payments by one maker—Agency — Evidence of—Costs. *Harris* v. *Greenwood*, 4 O. W. R. 140.

Judgment against one Indorser — *Insolvency of Another Indorser—Acceptance of Part of Claim and Transfer of Same—Release from Transferee.*]—A bank, by their prête-nom H., had recovered judgment against L., the first indorser, and A., the second indorser, of a promissory note. A. having failed, H. filed with the curator of A.'s estate a claim based on this judgment. Shortly afterwards the bank accepted a certain sum

from A.'s daughter, by way of composition, and transferred their claim to her, retaining, however, possession of the note. Afterwards, by an agreement between them, she released L. from all claims which she might have against him by virtue of the transfer mentioned:—Held, that the transfer by the bank was of their entire claim under the judgment, that is, its right of recovery against all parties to the note, and not a release by the bank of their rights against the insolvent only; and that the discharge to L. was valid as against the bank and all claiming under them. *Langlois* v. *Harel*, Q. R. 13 K. B. 475.

Liability of Indorser — Agreement to become liable — Absence of indorsement by payee—Action by payee—Authority of decided cases. *Slater* v. *Laberee*, 5 O. W. R. 420, 539, 6 O. W. R. 628, 10 O. L. R. 648.

Lost Note—*Action on—Security.*] — The payee of a lost promissory note cannot sue upon the note, simply offering to reimburse the maker if the note is found, but he must offer to give security that the maker shall not be troubled on account of the note. 2. This rule applies as well to the case of a non-negotiable note which is probably destroyed, as to that of a negotiable note which is simply lost. *Pillow and Hersey Co.* v. *L'Espérance*, Q. R. 22 S. C. 213.

Lost Note—*Action on—Security — Pleading—Striking out—Costs.*]—In an action on a promissory note alleged to have been destroyed by error, where the plaintiff declares that he has offered to the defendant and is still ready to give him security against any liability thereon, and the defendant, after denying all the allegations of the action, further pleads want of security, and sets up facts tending to establish that he is not liable, a motion to set aside such defence will be dismissed, but without costs. *Rowan* v. *Ross*, 3 Q. P. R. 391.

Material Alteration — *Renewal—Conflict of Evidence—Appeal.*]—To an action on a promissory note the defendants pleaded that the note sued on was given in renewal of a prior note for a larger amount, and that the original note was rendered void by being materially altered by the addition thereto of a charge for interest, of which alteration the defendants had no knowledge at the time of making the renewal note. There was a conflict of evidence as to the alteration referred to, but the plaintiff's version was supported by the appearance of the note itself, which appeared, on the face of it, to have been all written at the one time, with the one ink, and in the one handwriting, and bore no evidence of having been altered. The appearance of the note being consistent with the plaintiff's evidence, and hardly reconcilable with that of the defendants, and the trial Judge, after seeing and hearing the witnesses, having accepted the plaintiff's version:—Held, that there was no reason for interfering with his decision. *Brennan* v. *Sutherland*, 37 N. N. S. Reps. 370.

Notice of Dishonour — Presentment — Demand prior to action—Power of attorney. *Patriarche* v. *Krammerer*, 1 O. W. R. 425.

Notice of Specific Purpose—Collateral security—Bank—Consideration — Holder in due course—"Negotiate." *Ontario Bank* v. *Poole*, 1 O. W. R. 20, 832.

Notice of Dishonour—*Sufficiency—Husband and Wife—Agency.*]—Notice is merely knowledge, and notice to an indorser, who is also agent for another indorser, at once becomes in law the knowledge of the principal, with all its consequences. In an action against husband and wife, indorsers on a promissory note given as one of a series of renewals during some years, under an agreement, of which the husband had knowledge, in which the notice of dishonour given was a letter in the words: "I beg to advise you that Mr. T. C. L.'s note for $3,500 in your favour, indorsed by yourself and wife, and held by our estate, was due yesterday. As I have not received renewal, will you kindly see that the same is forwarded with cheque for discount, as there is no surplus on hand;" addressed and sent to the husband only:—Held, on the evidence, that the husband was agent for the wife, and that such letter was a sufficient notice of dishonour to both the husband and wife. Paul v. Joel, 3 H. & N. 455, followed. Judgment of Falconbridge, C.J., 2 O. L. R. 582, 21 Occ. N. 563, affirmed. *Counsell* v. *Livingston*, 22 Occ. N. 360, 4 O. L. R. 340, 1 O. W. R. 444.

Notice of Protest—*Attack on—Inscription de Faux.*]—A notice of protest of a bill or note made by a notary can be attacked only by an inscription en faux. *Choquette* v. *McDonald*, Q. R. 19 S. C. 408.

Oral Agreement Contemporaneous with Note—Evidence of — Consideration — Contradictory written documents — New trial — Objection to evidence not taken at trial—Discretion of Court. *Conley* v. *Ashley*, 1 O. W. R. 704.

Order on Debtor—*Acceptance—Unincorporated Body—Officers—Personal Liability—Mechanics' Liens—Drawback.*]—The plaintiff brought an action on the following document: "The Board of Managers, Presbyterian Church, Moose Jaw. Please pay H. McDougall the sum of $817.85 on my account and oblige me. James Brass:" which was accepted as follows: "Accepted. D. McLean, Chairman; A. E. Potter, Treasurer." It was found as a fact that McLean and Potter were members of the board, an unincorporated body:—Held, that the document was a bill of exchange; and, following Owen v. Van Uster, 10 C. B. 318, that McLean and Potter were personally liable thereon. Brass was the contractor with the board for the erection of a manse. If the contract had been completed, $817.85 would have been owing to him; but the trial Judge found that it had been left uncompleted to the value of $80. This was allowed to be set off against the amount of the plaintiff's claim; and it was contended that the defendants were entitled further to retain 10 per cent. of the contract price for thirty days after the completion of the contract, under the provisions of the Mechanics' Lien Ordinance:—Held, that the defendants were not so entitled. *McDougall* v. *McLean*, 1 Terr. L. R. 450.

Partnership — *Liability — Evidence — Authority of Manager.*] — Action against the members of a partnership carrying on business under the name of the O. T. L. Co., on a promissory note reading as follows:—"Sixty days after date we promise to pay D. & B. or order $407.29 at the Imperial Bank here;

value received:" and signed "W. D. R., Manager, O. T. L. Co.:"—Held, Wetmore, J., dissenting, that evidence of the circumstances surrounding the making and the accepting of the note was admissible for the purpose of shewing who was intended to be liable on the note. That, on the terms of the note and the evidence of the surrounding circumstances in this case, the defendants were liable. The defendants carried on a lumbering business in partnership. R. was their manager at the place of operations. The partnership kept in the vicinity of their mill a boarding-house, at which their workmen boarded, and a store for the sale to them of supplies. R. ordered goods which were used in the boarding-house, the store, or the mill:—Held, that the ordering of the goods was within the scope of R.'s authority, and that the defendants were therefore liable. *Ferguson* v. *Fairchild*, 1 Terr. L. R. 329.

Payment—Price of goods—Destruction by fire—Application of insurance moneys—Interest of vendees—Insurable interest—Trust—Notice—Indemnity. *Imperial Bank of Canada* v. *Hinnegan*, 5 O. W. R. 247.

Payment—*Accord and Satisfaction—Mistake—Principal and Agent.*]—On being pressed for payment of the amount of a promissory note, the defendant offered to convey a lot of land (which he then shewed to the plaintiffs' agent) to the plaintiffs in satisfaction of the debt. The agent, after inspecting the land, made a report to the plaintiffs, but gave an erroneous description of the property to be conveyed. On being instructed by the plaintiffs to obtain the conveyance, the plaintiffs' solicitor observed the mistake in the description and took the conveyance of the lot which had actually been inspected at the time the offer was made. More than a year afterwards the plaintiffs sued the defendant on the note, and he pleaded accord and satisfaction by conveyance of the land. In their reply the plaintiffs alleged that the property conveyed was not that which had been accepted by them, and at the trial the plaintiffs recovered judgment. On appeal to the full Court the judgment at the trial was reversed and the action dismissed:—Held, affirming the judgment in 9 B. C. R. 257, that the plaintiffs were bound to accept the lot which had been offered to and inspected by their agent in satisfaction of the debt, and could not recover on the promissory note. *Pither* v. *Manley*, 23 Occ. N. 64, 32 S. C. R. 651.

Payment—Collateral security—Mortgage of lease—Receipt of rents by creditor—Charging creditor with rents not collected. *Barton* v. *Gilbert*, 4 O. W. R. 406.

Payment by Plaintiff—Liability of defendant as joint maker—Contribution—Defence—Counterclaim—Accounts—Costs. *Duncan* v. *Tobin* (B.C.), 2 W. L. R. 396.

Payment to Agent—Authority to receive—Notice to maker to pay to principal. *Murphy* v. *Canning* (N.W.T.), 2 W. L. R. 103.

Place of Payment—*Place of Making—Jurisdiction of Courts of Another Province—Election of Domicil—Statutes.*]—Action on promissory notes dated and payable at Montreal in the province of Quebec. Plea to the jurisdiction, the defendant alleging that he was domiciled in Ontario and served there, and that the cause of action did not arise in Quebec because the notes were made and signed in Ontario, although dated at Montreal:—Held, that 63 V. c. 38 does not affect prior elections of domicil made tacitly in a note by virtue of 52 V. c. 48, in force when the notes were made. 2. That the election of domicil was one of the terms of the contract, and a right could not be affected by a subsequent statute. *Merchants Bank of Halifax* v. *Graham*, 3 Q. P. R. 415.

Pledgee of Promissory Note—*Holder—Exchange.*]—1. A pledgee of a promissory note given as collateral security, is a holder in good faith. 2. A promissory note given in exchange for another note which had been handed over by the owner for collection, is the property of the person who owned the note for which it was given in exchange. *Bélanger* v. *Robert*, Q. R. 21 S. C. 518.

Power of Agent for Collection to Compromise—Striking out claim for wages. *Gucnot* v. *Girardot*, 1 O. W. R. 638.

Prescription—*Notarial Note en Brevet—Term.*]—A promissory note made before a notary en brevet, signed by a farmer, in favour of a person who is not a trader, for money lent, is subject to a prescription of 30 years. *Robert* v. *Charbonneau*, Q. R. 22 S. C. 466.

Prescription—*Part Payment—Proof of—Payment by Curator of Insolvent.*]—In a commercial matter part payments, amounting to a tacit acknowledgment, having the effect of interrupting prescription, may be proved by witnesses. 2. Article 1235, C.C., line 1, does not apply to a promissory note, the proof of promissory notes and bills of exchange being, by the terms of Art. 2341, subject to the law existing in England in 1849. 3. The payment of dividends by the curator of a person who has made an assignment of his property, has the same effect as to interrupting proscription as a payment made by the debtor himself. *Boulet* v. *Mctayer*, Q. R. 23 S. C. 289.

Prescription—*Statute of Limitations—Acknowledgment—Executor de Son Tort—Payments by—Bills of Exchange Act—Dominion and Provincial Legislation.*]—A payment or acknowledgment by an executor de son tort cannot be relied upon to prevent the Statute of Limitations from operating as a bar, where the action in which it is set up is brought against the lawful personal representative of the deceased. But where the executor de son tort has made payments of interest in respect to a promissory note, within six months before the action commenced, and the holder of the note brings action against him to make him answerable to the extent of the goods of the deceased come to his hands, it is not open to the defendant, for the purpose of preventing a payment giving a new start to the Statute of Limitations (which effect it would have if made by the lawful personal representative), to rely on his having been a wrongdoer and not the true representative. As between himself and the plaintiff, as respects payments made by the executor de son tort and

their effect, the latter is to be treated as the true representative of the deceased. The Bills of Exchange Act does not deal with the consequences which are to flow from the character which, according to its provisions, is attached to the promise which a bill or note contains, and therefore these consequences fall to be determined according to the law of the province in which the liability is sought to be enforced. *Cook* v. *Dodds*, 23 Occ. N. 325, 6 O. L. R. 608, 2 O. W. R. 936.

Presentment — *Pleading — Waiver — Amendment—Jurisdiction of County Court.*]—The plaintiffs inserted the defendant's advertisement in two of their publications for the sums of $10 and $15 respectively. Separate agreements were made in respect to each publication, but the agreements were made at the same time, and the defendant, at the same time that the agreements were made and signed, gave the plaintiffs his promissory note for the sum of $25 payable four months after date at the defendant's office. The plaintiffs' statement of claim contained claims based upon the note and upon the original consideration:—Held, that the claim based upon the original consideration was within the jurisdiction of a County Court. The defence that the note was not presented for payment, and that while it was current, the remedy upon the consideration was suspended, must be pleaded. If the defendant were allowed to amend by pleading such defence, the plaintiffs should also be allowed to amend by alleging that presentment was waived by subsequent promises in writing to pay. Something was to be inferred from the duty of a clerk whose duty it was to make presentments, and who testified that he had done so in the case in question. *Sharp* v. *Power*, 33 N. S. Reps. 371.

Protest—*Waiver—Curator of Insolvent.*]—The curator appointed upon an abandonment of property under the Code of Procedure has no authority, more particularly, as in the present case, without leave of a Judge of the Superior Court or the advice of the creditors or inspectors, to waive on behalf of the insolvent protest of a promissory note indorsed by the latter, and a waiver under such circumstances does not bind the indorser. Judgment in Q. R. 22 S. C. 474 affirmed. *Denenberg* v. *Mendelshon*, Q. R. 23 S. C. 128.

Protest—*Waiver—Curator of Insolvent.*]—The curator to an abandonment of property has no right to waive protest of a promissory note of which the insolvent is the indorser. *Molsons Bank* v. *Steel*, Q. R. 23 S. C. 316, 5 Q. P. R. 84.

Protest—*Waiver—Form of Pleading.*]—The words "I hold myself responsible for the note," written and signed by the indorser upon the face of the note, amount to a waiver of protest; and a declaration alleging this fact is sufficient law. *Ranger* v. *Aumais*, 5 Q. P. R. 184.

Power of Attorney—*Renewal of Accommodation Note—Indorsment by Agent—Authority of Agent—Extension of Time for Payment.*]—A power of attorney given by one person to another authorizing the latter to attend to the affairs of the former, does not empower the attorney to indorse a promissory note for the accommodation of the maker thereof, although such note may be a renewal of an accommodation note indorsed by his principal. The holder of a promissory note who consents to a renewal thereof is deemed to extend the time, so far as the maker is concerned, for payment, to the time the renewal falls due. An indorser of a promissory note has a right to avail himself of an extention of time given to the maker. *Molsons Bank* v. *Cooke*, Q. R. 27 S. C. 130.

Purchase Price of Shares—Misrepresentations as to value—Confidential adviser—Agency—Evidence. *Atlas Loan Co.* v. *Davis*, 5 O. W. R. 31.

Renewal — *Consideration—Acknowledgment of Value—Connection.*]—The company respondents sued on a promissory note signed by the appellant and payable to the order of the respondents, for value received. The respondents admitted that they paid no cash consideration to the appellant for this note, but stated that it was given in part renewal of a previous note for a similar amount, which appellant executed in favour of one S., and which was indorsed and transferred to respondents, with another of like amount, in settlement of the overdrawn account of S., who was their general manager:—Held, that where the connection between the first note, for which valid consideration was received, and the notes given in renewal thereof, is clearly established, want of consideration is not a valid defence to an action by the payee against the maker on a renewal note in which the latter acknowledges to have received value. 2. Such connection may be proved, as in this case, by a consecutive and uninterrupted series of dates in the payee's books in regard to the transaction, together with the probability that the payee would not have surrendered a valid note without receiving a valid renewal. 3. Even in the absence of positive proof that the first note was indorsed by S. to the company, the Court may reasonably presume that such was the case from the fact that it was delivered to the company and was in custody of the company's cashier, together with the fact that the note now sued upon was given by appellant for value received and was payable directly to the company. *Ross* v. *Western Loan and Trust Co.*, Q. R. 11 K. B. 292.

Release—*Proof by Entries in Books—Transfer Without Indorsement — Notice of Transfer.*]—Where the payee and the maker of a promissory note agree that it should be released, but the note is afterwards transferred by the payee, with other assets, to a company incorporated to take over the business of the payee, the maker may prove the release of the note by entries made in the company's books, with the knowledge and under the direction of the payee, and by corroborative verbal evidence of other officers of the company. 2. When a promissory note is transferred after maturity, not by indorsement, but by being included in a general transfer of the assets of a business, the person acquiring the note must have notice of the transfer served on the maker before a right of action exists in favour of such transferee. In re Prowse and Nicholson, M. L. R. 5 Q. B. 151, followed. *Clonbrock Steam Boiler Co.* v. *Browne*, Q. R. 18 S. C. 375.

Revendication—*Summary Procedure.*]—An action by which the plaintiff demands that a certain promissory note shall be given up to him or declared void and of no effect, is of a summary nature. *Ekenberg* v. *Mousseau*, 3 Q. P. R. 348.

Security for Debt—*Husband and Wife—Parent and Child—Undue Influence—Lack of Independent Advice—Conspiracy.*]—C., a man without means, and W., a rich money lender, were engaged together in stock speculations. W. advancing money to C. at a high rate of interest in the course of such business. C. being eventually heavily in the other's debt, it was agreed between them that if C. could procure the signatures of his wife and daughter, each of whom had property of her own, as security, W. would give him a further advance of $1,000. Though unwilling at first, the wife and daughter finally signed promissory notes in favour of C. for sums aggregating over $7,000, which were delivered to W. Neither of the makers had independent advice:—Held, reversing the judgment to the Court of Appeal, Adams v. Cox, 2 O. W. R. 93, 3 O. W. R. 32, 4 O. W. R. 15, 5 O. W. R. 419. Taschereau, C.J.C., dissenting, that, though the daughter was 23 years old, she was still subject to the dominion and influence of her father, and the contract made by her without independent advice was not binding:—Held, also, Taschereau, C.J.C., and Killam, J., dissenting, that his wife was also subjected to influence by C. and entitled to independent advice, and she was, therefore, not liable on the note she signed. Per Sedgewick, J., that the evidence produced disclosed that the transaction was a conspiracy between C. and W. to procure the signatures to the notes, and that the wife of C. was deceived as to his financial position and the purpose for which the notes were required. Therefore the plaintiff could not recover. *Cox* v. *Adams*, 25 Occ. N. 25, 35 S. C. R. 393.

Signatures Procured by Representation that Another Would be Obtained—Failure to obtain—Absence of repudiation—Consideration—Indorsee—Holder in due course for value without notice. *First National Bank of Minneapolis* v. *McLean* (Man.), 1 W. L. R. 538.

Stamp Act, 1853, s. 19 (Imp.)—*Application to British Columbia—Bills of Exchange Act—Company — Cheques.*]—Section 19 of the Stamp Act, 1853 (Imperial), which exonerates bankers from liability if they pay on what purports to be an authorized indorsement, is inapplicable to British Columbia, and hence did not come into force by virtue of the English Law Act. Even if it were brought into force, it was annulled by the repugnant legislation of the Bills of Exchange Act, although not mentioned in the repealing schedule to the Act. The Canadian Bills of Exchange Act was intended to modify and alter as well as to codify the law relating to bills of exchange, cheques, and promissory notes. A local manager of an incorporated company, who was authorized only to indorse cheques for deposit with the Bank of British Columbia, indorsed and cashed at the Bank of Montreal cheques payable to the company drawn on that bank:—Held, that the Bank of Montreal were liable to the company for the amount of the cheques so cashed. *Hinton Electric Co.* v. *Bank of Montreal*, 23 Occ. N. 292, 9 B. C. R. 545.

BILLS OF LADING.

See SHIP.

BILLS OF SALE AND CHATTEL MORTGAGES.

Absolute Transfer — "*Defeasance*"—*Oral Understanding—Property Remaining in Grantor's Possession—Filing — Renewal.*]—The defendant, a constable, levied upon goods and chattels in the possession of S. under an execution issued on a judgment recovered against S. by M. At the time of the levy the goods were covered by a bill of sale to the plaintiff to secure $150. The document purported on its face to be an absolute transfer, with a right to immediate possession, but it was referred to in the affidavit as a bill of sale, and the evidence shewed that there was an understanding, not reduced to writing, that S. should get the property back on payment of the amount secured. After the filing of the bill of sale, the property was allowed to remain in the possession of S.:—Held, that the fact of the property remaining in the possession of the grantor was not a fraud in itself, but a matter for the consideration of the trial Judge, and he having found that the amount named as the consideration was due from the grantor to the grantee, and that the transaction was not tainted with fraud, and the amount of property transferred not being excessive, there was no reason for disturbing his finding. The same principle would apply to the fact that the provision for redemption of the property covered was not reduced to writing. The oral agreement for the return of the property was not a "defeasance" in the sense in which that term is used, and the section of the Act which requires every defeasance to which a bill of sale is subject to be filed with it, was not applicable. The bill of sale having been made and filed prior to the passage of the Bills of Sale Act of 1899:—Held, that it was validly filed subject to the special clause as to the filing of a renewal statement, and, the time prescribed for the filing of a renewal statement not having elapsed, that the bill of sale was in no way affected by such provision. *Fraser* v. *Murray*, 34 N. S. Reps. 186.

Actual and Continued Change of Possession—Rights of execution creditors—Rule 356 (N.W.T.)—Consideration—Past indebtedness—False statement in bill—Interpleader. *Mueller* v. *Cameron* (N.W.T.), 2 W. L. R. 524.

Chattel Mortgage — Renewal—Change of possession—Parent and child—Execution creditor: *Goodyear* v. *Goodyear*, 1 O. W. R. 405.

Chattel Mortgage — *Renewal—Statement of Payments—Repetition.*]—In an interpleader matter between an execution creditor and a chattel mortgagee of the execution debtor, the validity of the renewals of a chattel mortgage was questioned, on the

ground that, while the first renewal statement shewed all the payments made during the year and the total amount due, the subsequent renewal statement began with the total amount due in the preceding statement, and did not repeat the payments there set out and credited:—Held, sufficient. Christin v. Christian, 1 O. L. R. 634, followed. Kerr v. Roberts, 17 Occ. N. 337, overruled. Judgment of MacWatt, Co.J., in the 2nd Division Court, Lambton, 3 O. W. R. 327, affirmed. *Rogers* v. *Marshall*, 24 Occ. N. 172, 7 O. L. R. 291, 3 O. W. R. 327.

Chattel Mortgage — Seizure under — Breach of trust—Damages. *Watts* v. *Sale*, 1 O. W. R. 681, 2 O. W. R. 1020.

Chattel Mortgage—Seizure under without default—Possession of goods till default—Absence of re-demise clause—Collateral security—Covenant to keep up stock—Arrears—Interest—Issue of writ of summons—Condition against selling—Damages: *Stevens* v. *Daly*, 1 O. W. R. 621.

Consideration—*Indorsement of Promissory Note.*]—Under s. 56 of the Bills of Exchange Act, 1890, a person who indorses a promissory note, not indorsed by the payee, is liable as an indorser to the latter. Judgment of the Court of Appeal, 2 O. L. R. 63, 21 Occ. N. 375, on this point reversed. The provisions of the Ontario Bills of Sale Act requiring the consideration of a chattel mortgage to be expressed therein is satisfied when the mortgage recites that the indorsement of a note is the consideration, and then sets out the note. Only the facts need be stated, not their legal effect. Judgment of the Court of Appeal on this point affirmed. *Robinson* v. *Mann*, 22 Occ. N. 2, 31 S. C. R. 484.

Description — *Construction — Ejusdem Generis Rule.*]—Held, that the following description in a chattel mortgage, "All office fixtures, lamps, desks, chairs, furniture, stationery, and all goods, chattels, and effects now in the store and office of the mortgagors," did not include a safe, the general words being restricted by the preceding words. *Goldie* v. *Taylor*, 2 Terr. L. R. 298.

Document Having Effect of Bill of Sale—*Taking Possession Under—Necessity for Filing—"Hirer, Lessor, or Bargainor."*]—Action for a declaration that a transfer of goods from the defendant to his brother, was void under c. 11 of the Acts of 1898, and ss. 1, 3, and 4 of R. S. N. S., 5th ser., c. 92, because it was not filed. By the document in question the defendant transferred a stock of goods in store to the amount of $1,500, and agreed to pay for the same by paying notes of B. & Co. to the amount of $500, and by giving ten notes for the balance of $100 each, one payable every six months. The document concluded: "The said G. H. to hold the goods in store, and whatever goods may come in after shall become the property of the said G. H. until the said G. H.'s claim is paid in full. If I fail to pay any of the above named notes, the said G. H. can take over possession of the business and all stock in the said store at time of me failing to meet or pay above or aforesaid named notes." This document was not filed, and was not accompanied by any affidavit. After G. H. had taken possession of the stock of goods under the power, plaintiffs attached the goods as the property of an absent or absconding debtor, and sought to have the transfer set aside.—Held, that the document in question came within the term "bill of sale," as defined by R. S. N. S. c. 92, s. 10, and should have been filed, and was liable to be defeated for non-filing up to the time that G. H. took possession under it:—Held, also, that G. H. did not come within the category of a "hirer, lessor, or bargainor," within the meaning of s. 3 of c. 92, and that such section had therefore no application. *Manchester* v. *Hills*, 34 N. S. Reps. 512.

Execution—Filing—Validity — Renewal—Machinery—Interpleader—Rights of execution creditor—Payment out of court—Costs. *Trussler Brothers Limited* v. *Quinn*, 6 O. W. R. 371.

Failure to Renew—*New Bill—Previous Agreement—Validity — Absence of Fraud — Statute of Frauds—Possession—Affidavit — Commissioner — Solicitor.*]—A bill of sale given in connection with the sale of a business held by the vendor for the benefit and protection of the plaintiff, who had indorsed certain promissory notes given by the vendee in payment of the purchase money, having expired, in consequence of failure to renew it under the provisions of the Act, the plaintiff, in pursuance of an agreement made at the time of the sale, demanded and received a second bill of sale, to secure the amount for which he remained liable in respect of the original indorsements, as well as certain amounts for which he had become liable as indorser of other promissory notes. There being no question of insolvency on the part of the maker at the time the second bill of sale was given, and no fraudulent purpose, and the terms of the agreement being accurately set forth:—Held, that there was no pretence for holding the bill of sale void under the Statute of Elizabeth; that the fact that the plaintiff had taken possession under his bill of sale, and was in possession at the time the sheriff made his levy, was sufficient, in the absence of fraud, to enable the plaintiff to maintain his action; and, following Creighton v. Reid, 27 N. S. Reps. 72, that the affidavit to the bill of sale was not bad because it had been sworn before the solicitor by whom the bill of sale was prepared. *Mosher* v. *O'Brien*, 37 N. S. Reps. 286.

Foreign Chattel Mortgage — *Removal of Goods to Territories—Non-registration—Rights of Mortgagee—Bona Fide Purchaser.*]—A chattel mortgage made in a foreign country upon goods there, which is valid and binding there as against not only the mortgagor, but also subsequent mortgagee and purchasers, is valid and binding to the same extent in the Territories, notwithstanding that the provisions of the Bills of Sale Ordinances of the Territories have not been complied with. Where, therefore, goods then being in a foreign country were comprised in such a mortgage and subsequently removed to the Territories, and there taken by the agent of the mortgagee out of the possession of a bona fide purchaser for value without notice to the mortgagor, and the latter sued the agent for conversion:—Held, that the plaintiff could not succeed. *Bonin* v. *Robertson*, 2 Terr. L. R. 21, 14 Occ. N. 150.

Indorsement of Note—*Payment — Setting Aside Mortgage.*]—While the indorsing

by a person not a party to a note of his name upon it, before it has been indorsed by the payee, is not an indorsement in the legal sense so as to make that person legally liable to the payee, a chattel mortgage to the intending indorser to secure him against the liability intended to be incurred cannot be set aside by the mortgagor's assignee for creditors after the mortgagee has paid the note in question. *Robinson* v. *Mann*, 21 Occ. N. 375, 2 O. L. R. 63.

Invalidity of Bill of Sale—Transfer of goods in the ordinary course of business—Sale of stock en bloc—Application of Bills of Sale Act. *Greenburg* v. *Lenz* (B.C.), 2 W. L. R. 64.

Registration — *Subsequent Purchaser — Removal of Goods.*]—For purposes of registration of deeds the North-West Territories is divided into districts, and it is provided by Ordinance that registration of a chattel mortgage, not followed by transfer of possession, shall only have effect in the district in which it is made. It is also provided that if the mortgaged goods are removed into another district, a certified copy of the mortgage shall be filed in the registry officer thereof within three weeks from the time of removal, otherwise the mortgage shall be null and void as against subsequent purchasers, etc.: — Held, reversing the judgment in appeal, that the "subsequent purchaser" in such case must be one who purchased after the expiration of the 3 weeks from the time of removal, and that, though no copy of the mortgage is filed as provided, it is valid as against a purchase made within such period. *Hulbert* v. *Peterson*, 25 Occ. N. 118, 36 S. C. R. 324.

Renewal — *Statement—Affidavit—Payments—Principal—Interest.*]—The objection taken to the validity of a chattel mortgage was, that the renewals were not sufficient, in that (1) they were not signed by the mortgagee, and (2) were not upon their face sufficiently explicit in regard to the payments made. On the back of each statement was an affidavit, signed by the mortgagee and sworn by him, referring to the statement upon which it was indorsed:—Held, following Barber v. Maughan, 42 U. C. R. 134, that this might be read as part of the statement and being so read shewed the statement to be that of the mortgagee, which was all that the statute required: R. S. O. 1897 c. 148, s. 18. The statement of payments made did not set forth in detail the date and amount of each payment made, but only the total sum paid. It went on to state "that no payments have been made upon the said mortgage;" but it clearly shewed that payment of a certain sum had been made on account of interest, and no other payments:—Held, that the statute had been sufficiently compiled with. *Christin* v. *Christin*, 21 Occ. N. 284, 1 O. L. R. 634.

Right of Mortgagor to Possession—Seizure by mortgagee — Damages—Counterclaim — Costs. *Clay* v. *Canada Grocers, Limited*, 3 O. W. R. 850.

Sale of Business as a Going Concern —*Chattel Mortgage by New Firm Covering Book Debts.*]—V. & C. sold their grocery business, including all their stock in trade and book debts, to H. & B., who shortly afterwards gave a chattel mortgage to E. covering the stock-in-trade of the grocery business and also all book debts due to H. & B. in the business carried on by them as grocers. —Held, that the book debts originally due to V. & C. and assigned by them to H. & B. were covered by the chattel mortgage. *Robinson* v. *Empey*, 24 Occ. N. 343, 10 B. C. R. 466.

Sale or Exchange of Mortgaged Property—*Verbal License—Ordinary Course of Business.*]—The defendant, a farmer, executed a chattel mortgage to one M., whereby he assigned all the goods, chattels, and property mentioned in a schedule, and also any and all the property that might thereafter be bought to keep up the same, in lieu thereof and in addition thereto, either by exchange or purchase. The instrument also contained a proviso that the defendant should remain in possession of the mortgaged property until default, with power to use the same in the ordinary way while so in possession, but with full power, right, and authority to M. to enter and take possession of the property in case of default of payment, or on the death of the defendant, or in the event of the seizure of the property at the suit of any creditor, or in the event of the defendant disposing of or attempting to dispose of or make away with said property or of any part thereof without the written consent of M. Included in the property mortgaged was a stallion, which, a few months after the execution of the mortgage and before any default on the part of the defendant, but without the written consent of M., he exchanged with the plaintiff for a horse belonging to him. After the exchange the plaintiff, having discovered that the stallion was covered by the mortgage, attempted to avoid the transaction, sending the stallion back to the defendant and demanding the return of his own horse, which the defendant refused to deliver:—Held, that, as the mortgage must be taken to contain the whole contract entered into between the defendant and M., the Judge of the Court below was in error in giving any effect to a mere verbal license, which preceded the mortgage and was not in harmony with many of its provisions; and that it was clearly a condition of the mortgage, and the intention of the parties thereto, that the defendant should be allowed to sell or exchange the mortgaged property, provided such sale or exchange was in the ordinary course of the defendant's business, and, as whether this exchange had been in the ordinary course of the defendant's business or not was a question of fact which had not been passed upon by the Court below, there should be a new trial in order to have that point determined. *McPherson* v. *Moody*, 35 N. B. Reps. 51.

Sale Without Change of Possession — *Absence of Fraud — Pledge— Third Persons.*]—The sale of an immovable thing, not followed by change of possession, but made in good faith and without fraud, even if the purpose be to give the article in pledge to the purchaser, transfers the property to him as well against third persons as between the contracting parties. *Bergeron* v. *Campeau*, Q. R. 25 S. C. 26.

Security in Form of Absolute Sale—*Bills of Sale Act.*] — When the transaction

evidenced by an instrument in the form of an absolute bill of sale is in fact the giving of security for an existing debt, the parties cannot evade compliance with ss. 2 and 3 of the Bills of Sale Act, R. S. O. 1897 c. 148, merely by the form of the instrument. If, however, the real transaction is a sale with a right of re-purchase upon certain terms, the vendor can only be required to observe the provisions of s. 6. *Hope* v. *Parrott*, 24 Occ. N. 206, 7 O. L. R. 496, 2 O. W. R. 248, 3 O. W. R. 499.

Taking Possession—*Bills of Sale Act—Defeasance—Authority of Partner to Execute Bill—Locus Standi of Creditor.*]—Where the goods comprised in a bill of sale were within 21 days after its execution bona fide taken possession of by the bargainee, the Bills of Sale Act was held not to apply, and it was immaterial that the bill was subject to a defeasance not contained in it. Semble, that a judgment creditor of the bargainors (a partnership) had no locus standi to attack the bill on the ground that a member of the firm had no authority to execute the bill on behalf of the firm:—Held, that he had implied authority, or that his act was ratified, or that his partners were estopped from denying his authority. *McClary Mfg. Co.* v. *Howland*, 9 B. C. R. 479.

Transfer of Ownership of Goods — *Possession Retained—Rights of Creditors—Fraud—Preference—Pressure.*]—The defendant, by an agreement in writing, transferred to the opposant, his creditor, the ownership of his furniture, as security for the opposant's claim. The transfer was made subject to a right on the defendant's part to recover the ownership, on paying the amount of his indebtedness, for which he had given the opposant a demand note. By the contract transferring the effects, it was agreed that the opposant should have the right to take possession of the effects if the note were not paid, and that the effects should be left in the defendant's possession until he made default. The note had not been paid, but some small payments had been made on account, and judgment had been obtained by the opposant on the note. The effects transferred having been seized in the defendant's possession by the plaintiff, a judgment creditor, the opposant claimed them as his property, under the transfer:—Held, that where there is no evidence of intention to defraud or of simulation, a debtor from whom his creditor demands security, can, for the purpose of furnishing such security, transfer to the creditor the ownership of movable effects, so as to give the latter, without his taking possession of the movables transferred, a good title thereto as against other creditors of such debtor, including even a creditor anterior to the one whose claim was secured by the transfer. *Creed* v. *Haensel*, Q. R. 24 S. C. 178.

Valid Agreement to Give Mortgage —*Mortgage Subsequently Given — Right to Rely on Agreement.*]—Where an agreement to give a chattel mortgage is duly made and registered under R. S. O. c. 148, s. 11, and subsequently a mortgage is made and registered, the giving of such mortgage, whereby the legal estate becomes vested in the mortgagee, does not revest in the debtor the equitable title which the mortgagee had by virtue of the agreement, but it continues to exist as before, and the mortgagee is enabled to rely on it where the legal mortgage is ineffectual for any purpose. Judgment of Boyd, C., 2 O. L. R. 128, 21 Occ. N. 378, affirmed. *Fisher* v. *Bradshaw*, 22 Occ. N. 281, 4 O. L. R. 162, 1 O. W. R. 282.

Validity—*Form — Witness — Affidavit of Execution — Irregularities — Interpleader — Amendment of Affidavit.*]—The Bills of Sale Ordinance, C. O. 1898 c. 43, s. 7, provides that "except, &c., a mortgage . . . may be made in accordance with form A . . ." Form A., in the place intended for the witness's signature, has the words, "Add name, address, and occupation of witness." No form of affidavit of execution is given:—Held, that neither (1) the omission to state the address and occupation of the witness after his signature, nor (2) the omission of the deponent's name and occupation in the body of the affidavit of execution, which was signed by him, nor (3) the omission to state in the jurat a more definite place than "the North-West Territories," rendered the registration of the mortgage invalid. The claimant in interpleader was allowed an adjournment to amend the affidavit supporting his claim. *Commercial Bank of Manitoba* v. *Fehrenbach*, 4 Terr. L. R. 335.

BISHOP.

See WILL.

BLASPHEMY.

See PUBLIC MORALS.

BOARD OF HEALTH.

See PUBLIC HEALTH.

BOND.

Breach—*Agreement to Exchange Land—Infant — Indemnity.*] — The plaintiff and an infant owner of land entered into an agreement for the exchange of land, the land of the plaintiff being subject to a mortgage, the interest upon which to a certain date he agreed to pay, nothing being said in the agreement as to payment of the interest after that date. The defendant gave a bond to the plaintiff conditioned to be void if the infant owner, after arriving at the age of twenty-one years, should convey his land to the plaintiff, and should "do and perform all acts, covenants, and agreements to be done and performed by him as in the said agreement mentioned." The infant went into possession of the plaintiffs' land, but, the interest after the named date not having been paid, the land was sold by the mortgagee before the infant attained the age of twenty-one years, and the infant upon attaining that age did not convey his land to the plaintiff:—Held, though the infant was impliedly bound to indemnify the plaintiff against payment of interest after the named date, yet that right of indemnity

was not to be enforced until the infant attained his majority, the plaintiff in the meantime being primarily liable to pay the interest; and that, not having done so, he was in default and not in a position to complain of the infant's refusal to convey or to enforce the bond:—Held, also, that the implied obligation to indemnify was not an act, covenant, or agreement within the agreement, and, therefore, not within the bond. *Learn* v. *Bagnall*, 21 Occ. N. 223, 1 O. L. R. 472.

Breach — *Penalty—Damages—Commencement of Action — Subsequent Breaches.*] — Held, per Tuck, C.J., McLeod and Gregory, JJ., that in an action on a bond conditioned for maintenance, where the breach assigned is refusal to maintain, the plaintiff may recover the whole penalty as damages. In assessing the damages the jury are not limited to those suffered up to the time of the issue of the writ; but they may take into consideration the damages up to the time of the trial, and that there has been a complete breach of the condition. Per Hannington, Landry and Barker, JJ., that judgment may be entered for the penalty upon which subsequent breaches may be assigned under 8 & 9 Wm. IV. c. 11, but damages can only be assessed on the breaches assigned up to the commencement of the action. *Barthelotte* v. *Mclanson*, 35 N. B. Reps. 652.

Limit Bond — *Action on—Defence—Extension of Time after Breach.*] — See *Kelly* v. *Thompson*, 35 N. B. Reps. 718.

See PRINCIPAL AND SURETY.

BONUS.

See MUNICIPAL CORPORATIONS.

BOUNDARIES.

Action to Settle — *Formalities of—Dispensing with — Appointment of Surveyor by Consent.*]—In an action for the settlement of a boundary the parties may consent that a surveyor be appointed to fix the boundary without proceeding with the formalities of measurement and preparation of a plan. *Lacroix* v. *Lanctot*, 7 Q. P. R. 24.

Trespass — *Line Fence — New Trial — Onus.*] — The plaintiff and defendant were owners of adjoining lots of land, the title to which was derived from the same original grantor. The plaintiff's lot was described as being bounded on the north by the south line of the defendant's lot. In an action for trespass the plaintiff complained that the defendant, in erecting a new fence, had placed it on a line different from the line of the fence which existed previously, and which was admitted to have been on the true line between the two lots. The question whether the defendant had, as a matter of fact, departed from the old line or not, having been left undetermined:—Held, that there must be a new trial. Per Weatherbe, J. (dissenting), that the burden was upon the plaintiff to prove the south line of the defendant's lot, and that, as she had failed to do so, she could not recover. *Dixon* v. *Dauphinee*, 34 N. S. Reps. 239.

See MUNICIPAL CORPORATIONS—RAILWAY—SCHOOLS—TITLE TO LAND — TRESPASS TO LAND.

BREACH OF PROMISE OF MARRIAGE

See HUSBAND AND WIFE.

BRIBERY.

See PARLIAMENTARY ELECTIONS—PENALTIES AND PENAL ACTIONS.

BRIDGE.

See MUNICIPAL CORPORATIONS—NEGLIGENCE—RAILWAY—STATUTES—WAY.

BRITISH COLUMBIA ARBITRATION ACT.

See ARBITRATION AND AWARD.

BRITISH COLUMBIA ASSESSMENT ACT.

See ASSESSMENT AND TAXES.

BRITISH COLUMBIA PROVINCIAL ELECTION ACT.

See CONSTITUTIONAL LAW.

BROKER.

Action by Stock-broker — *Gaming Transaction—Contract Void.*]—The plaintiff, a stock-broker, brought an action against the defendant for a balance alleged to be due on account of certain transactions. The defendant pleaded that the alleged contract was illegal, and therefore null and void. The evidence shewed that the corn and cotton which were the subjects of the alleged contract were never delivered, and that there was no intention that they should be delivered:—Held, that the contract sued on was a gaming one and was therefore prohibited by law. Forget v. Ostigny, [1895] A. C. 318, distinguished. 2. That the broker, having knowledge of the nature of such contract, had no recourse against his client for moneys advanced in furtherance of such contract. 3. That, even if the defendant had recognized his debt and offered his property to cover the same, as alleged by the plaintiff,

such acknowledgment was of no effect, as the debt claimed resulted from an illegal contract. 4. That, in any event, the responsibility of a person speculating in stocks to his broker is limited to his margin, unless he has given contrary instructions. *Morris* v. *Brault*, 23 Occ. N. 120, Q. R. 23 S. C. 190.

Gaming Contract—*Principal and Agent—Mandate—Speculation—Delivery of Goods.*]—Held, reversing the judgment in 23 Occ. N. 120, Q. R. 23 S. C. 190, that where a broker enters into a transaction on the stock exchange for the purchase or sale of goods in behalf of a customer, and the transaction takes place in the ordinary course of business, the broker's sole interest being his commission, he is entitled to recover from the customer the amount of the loss resulting from the operation. 2. The broker's claim is not restricted to the amount of margin in his hands, but, in the absence of any contract to the contrary, includes the entire loss. 3. A contract does not fall under the head of gaming contract merely because it is entered into in furtherance of a speculation. It is a legitimate commercial transaction to buy a commodity, in the expectation that it will rise in value, and with the intention of realizing a profit by its resale. 4. Where a real contract of purchase has been made and carried out by a broker on behalf of a principal, delivery of the goods to the broker by transfer of warehouse receipts is delivery to the principal, just as much as if it had been made directly to himself. *Morris* v. *Brault*, Q. R. 24 S. C. 167.

Shares—*Advance by Brokers—Margins—Speculative Shares — Fall in Price — Sale without Notice to Customer — Damages — Measure of—Intention of Customer to Retain Shares—Price at Time of Trial—Unreasonable Delay in Objecting to Sale.*] — Action for moneys advanced by plaintiffs as defendant's brokers to protect shares bought by plaintiff for defendant on margin. The bought note delivered by plaintiffs to defendants at the time of purchase contained the following stipulation: "When carrying stocks for clients we reserve the right of pledging the same or raising money upon them in any way convenient to us." The price of stocks purchased at first advanced, and plaintiffs returned defendant's deposit and advanced him an additional $4,000 upon the stock. Afterwards the price fell and stock was sold (without notice to defendant) at a loss. Then plaintiffs notified defendant of the loss, and at the same time rendering a bill for balance due them on the transaction. Then this action was brought: Held (5 O. W. R. 328, 9 O. L. R. 631), plaintiff entitled to recover the amount of their advances, with interest on them at the rates shewn in the account rendered, deducting the dividends received and the proceeds of the sale of stock. There was no evidence to shew that the defendant would not have held the stock until the trial. The Court presumed that he would have done so, therefore, held: That the defendant was not entitled to recover any damages for the wrongful sale of the stock by plaintiffs, as the stock at the time of the trial could have been bought very much below the prices at which it was sold by plaintiffs. Judgment appealed, but dismissed with costs. *Ames* v. *Sutherland*, 6 O. W. R. 20.

Shares—*Purchase on Margin — Depreciation — Sale by Broker — Notice — Acquiescence.*]—The defendant instructed the plaintiffs' manager at Winnipeg to purchase for him, on a margin of 3 per cent., 100 shares of Erie Railway stock. The plaintiffs, through their agents, bought the shares on the New York Stock Exchange, and the agents thereafter held them subject to the control and order of the plaintiffs. The defendant was informed within an hour of the purchase and the price paid. The next day he received the usual advice note of the transaction, in which it was stated that on all marginal business the plaintiffs reserved the right to close transactions when margins are running out, without further notice. Two weeks afterwards the price of the shares began to fall, and the margin became so small that the manager telegraphed the defendant at Gladstone to send $500 additional margin; and later on the same day, the margin being entirely lost, he telegraphed the defendant to put up $1,000 further margin. Defendant replied to these telegrams: "Will attend message, down to-morrow." The manager gave no express notice that he would sell the shares unless the margins demanded were put up, but waited until the delivery of the mail from Gladstone the next morning. Then, not having heard from the defendant, he telegraphed to have the shares sold, which was done at a loss of $1,150:—Held, that there was an actual purchase of the shares for the defendant, and it was not necessary that the shares should have been actually transferred on the books of the railway company, either to the defendant or to the plaintiffs. 2. There was an actual sale of the shares regularly made on the defendant's account, according to the usages of the stock-broking business. 3. The plaintiffs were entitled, under the terms of the notice sent to the defendant, to sell the shares, without notice to him, when the margin was exhausted, as the defendant, not having objected to these terms, must be taken, after a reasonable time, to have assented to them. *VanDusen Harrington Co.* v. *Morton*, 24 Occ. N. 29, 15 Man. L. R. 222.

Shares—*Purchase for Customer on Margin—Moneys Advanced to Keep up Margins—Recovery—Instructions — Usual Course of Dealing—Practice — Brokers—Discharge of Customer — Obligation of Broker to Sell — Several Orders Included in One Contract—Interest — Hypothecation of Shares by Broker.*]—Action by brokers against a customer to recover moneys paid to keep up margins on shares bought by plaintiffs for defendant, and interest thereon. The contract established by the evidence is that plaintiffs would purchase and carry for defendant 300 shares of Lake Superior Consolidated stock. The defence raised two questions of fact. 1st. That when he paid $3,000 on 28th April, 1902, he did so for the purpose of investing that amount in the stock mentioned, and if the stock should appreciate he would get the benefit of it, and if the price went down he would lose his money, and the plaintiffs could protect themselves from loss by selling before the drop was sufficient to use up the $3,000, put in as a ten point margin; and 2nd, That when defendant subsequently paid $1,800 he did so upon the express agreement that this should be in full satisfaction of any claim plaintiffs

had in reference to this transaction. Evidence went against defendant upon each contention. The questions of law were (1) As to the right of plaintiffs to hypothecate the stock for advances made to them:—Held, there was the right of hypothecation. (2) Were the shares sold by Chandler & Co. to the plaintiffs in December defendant's shares so that he was entitled to call that a conversion and to compel plaintiffs to account as of that date? [Reference to Clarkson v. Snider, 10 O. R. 568]:—Held, plaintiffs never parted with the stock so as to prejudice defendant, and always had such control of a sufficient amount of the stock as would enable them to deliver it to defendant upon demand and upon payment of balance due by him. Stock was sold without instructions from defendant, as the memorandum of the bought note permitted them to do. Held, plaintiffs entitled to what they paid Chandler & Co., but to no profit on that sale (a sale for their own benefit). Plaintiffs apparently paid 1-16, equivalent to $18.75. Credit to defendant of $56.25. A greater rate of interest than the statutory 5 per cent., and that not compounded was not allowed. Otherwise judgment for plaintiff for principal, interest and costs. *Ames* v. *Conmee*, 4 O. W. R. 460, 6 O. W. R. 89, 10 O. L. R. 159.

Stock Dealings on Margin—*Obligation of Broker to Sell.*]—There is no obligation on a broker, in the absence of the customer's orders, to sell shares during a falling market after he has demanded further margins and received no reply from his customer; and therefore if he does not sell the stock under such circumstances he has no responsibility for any loss that may arise to the customer. *Kerr* v. *Murton*, 24 Occ. N. 293, 7 O. L. R. 751, 3 O. W. R. 801.

Stock Transactions—*Contract with Customers—Purchase of Shares on Margin—Sale—Default—Notice.*]—Operations on the stock market consisting in the purchase of shares upon margin are operations permitted by law and cannot be compared to gaming or betting. 2. Stock brokers are not obliged to give notice to their customers that they are about to sell their stocks if they do not furnish margin to cover sudden fluctuations of the market. 3. A demand for margin by telegram does not create, as regards the brokers, the obligation not to sell the stock of the customer where the latter has consented to furnish the margin demanded, and has informed the broker of his consent. *Bellean* v. *Lagueux*, Q. R. 25 S. C. 91.

BUILDING SOCIETY.

Mortgage — *Mortgagor Becoming Shareholder—Liability for Losses.*]—It was held that, under the mortgage in question in this case and the by-laws and rules of the defendants and their predecessors in interest applicable thereto, the plaintiff was entitled to a discharge of his mortgage, given in form as collateral security for payment of shares subscribed for by him, upon payment of the principal and interest therein provided; and that the defendants could not charge against the mortgage a share of losses incurred in the management of the company. Judgment of MacMahon, J., 3 O. L. R. 191, 22 Occ. N. 60, reversed. *Lee* v. *Canadian Mutual Loan and Investment Co.*, 23 Occ. N. 165, 5 O. L. R. 471, 2 O. W. R. 370.

Shares — Advances — Trusts —Notice — Mortgage—Parties to Action: *Birkbeck Loan Co.* v. *Johnston*, 6 O. L. R. 258, 1 O. W. R. 163, 2 O. W. R. 556.

BURGLARY.

See CRIMINAL LAW.

BUYING OFFICES.

See CRIMINAL LAW.

BY-LAWS.

See COMPANY — MUNICIPAL CORPORATIONS —TRADE UNION—WAY.

CABS.

See MUNICIPAL CORPORATIONS.

CALLS.

See COMPANY.

CANADA EVIDENCE ACT.

See CRIMINAL LAW.

CANADA TEMPERANCE ACT.

Conviction — *Autrefois acquit — Commencement of Prosecution—Sale by Agent—Consent of Defendant—Constitutional Law—Jurisdiction of Parish Court Commissioners.*] Where a person is convicted of an offence under the Canada Temperance Act, committed at a time falling within the period covered by a previous information upon which he was acquitted, in order to sustain a plea of autrefois acquit he must shew that the offence for which he was convicted and that for which he was acquitted were identical. The laying of the information is the commencement of the prosecution. Whether the sale of the liquor was by the consent or contrary to the order of the defendant is a question for the magistrate. Section 106 (d) of the Canada Temperance Act, R. S. C. c. 106, in so far as it attempts to confer upon parish court commissioners jurisdiction to try offences against the Act, is ultra vires of the Parliament of Canada. *Ex p. Flanagan*, 34 N. B. Reps. 577.

Conviction—*Certiorari—Sale of Liquors—Delivery by Agent.*] — Trenholm was the agent of the Dominion Express Company at Botsford in the county of Westmoreland.

One S. T. had ordered from L., a merchant residing and doing business in Amherst, Nova Scotia, some whisky, directing that it should be forwarded to him at Botsford, by express C.O.D. The company in due course of business sent the package to S. T., the purchaser, and it was delivered to him at Botsford by Trenholm, the company's agent, to whom S. T. paid the price and charges, which were remitted in the ordinary way to the company's agent at Amherst. Upon these facts Trenholm was charged and convicted for selling liquor contrary to the provisions of the Canada Temperance Act:—Held, that there was no sale by Trenholm, and, even if a delivery was necessary to complete the sale, it only completed a sale which took place in Amherst, and with which Trenholm was in no way concerned. *Ex p. Trenholm*, 21 Occ. N. 55.

Conviction—*Costs and Expenses—Variance between Minute and Conviction—Conveyance to Gaol—Criminal Code.*]—A conviction for selling intoxicating liquors, contrary to the provisions of the Canada Temperance Act, provided for the imprisonment of defendant for the period of forty days "unless the said sums (the penalties and costs of conviction) and the costs and charges of the said distress and of the conveying of the said M. D. V. to the common gaol shall be sooner paid:"—Held, that the expression "costs and charges" in the conviction, and the expression "costs and the expenses" in the Criminal Code, s. 872 (a), mean the same thing. There was a variance between the minute of conviction and the conviction—the minute providing for payment of the costs of conveying to gaol, and the conviction for the "costs and charges of the said distress and of the conveying," &c.—Held, that as the provision was properly set out in the conviction, and its insertion in the minute was unnecessary, the variance was immaterial. A second conviction for a similar offence omitted the provision as to the costs of conveyance to gaol:—Held (Meagher, J., dissenting), that the conviction was bad and must be set aside with costs, not having been made in conformity with the terms of the Code, s. 872 (a). Regina v. McDonald, 26 N. S. Reps. 94 (where the imposition of costs under the provisions of the Summary Convictions Act, R. S. C. c. 178, s. 66, was held discretionary), distinguished. *Regina* v. *Vantassel*, 34 N. S. Reps. 79.

Convictions—*Motion to Quash—Convictions not Properly Before Court — Certiorari.*]—An application to quash two convictions for violations of the Canada Temperance Act was made, upon reading an affidavit of the defendant, and an order made by a Judge for a return of papers, and the return thereto. The order and return were made in connection with a previous application of the defendant for his discharge from imprisonment:—Held, that there being no writ of certiorari, and no proper return thereto, the matter was not properly before the Court, and the Court had no jurisdiction to quash the convictions:—Held, that the mere fact of the papers referred to being found on the files of the Court was not sufficient to constitute a cause in Court, in respect to which the application to quash the convictions could be made:—Semble, that a writ which required the sending up of papers in two distinct causes would be liable to attack on the ground of multifariousness. *Rex* v. *McDonald*, 35 N. S. Reps. 323.

Conviction—*Several Prosecutions Pending at Same Time—Evidence—Influence on Magistrate.*]—The defendant was summoned to appear before a stipendiary magistrate to answer two informations for selling intoxicating liquor, in violation of the second part of the Canada Temperance Act. Evidence was heard in both cases, and both cases were then adjourned until a subsequent day, when judgment was given, convicting the defendant under one information, and quashing the other:—Held, that the conviction must be quashed, the magistrate having heard evidence in both cases, and had them pending before him when he made the conviction; the evidence in the one case, although dismissed, being calculated, in the circumstances disclosed, to influence the magistrate in the case in which the defendant was convicted. Regina v. McBerney, 26 N. S. Reps. 327, followed. *Rex* v. *Burke*, 36 N. S. Reps. 695.

Conviction—*Third Offence — Date of—Conviction for Second Offence.*] — An information for a first offence against the Canada Temperance Act was laid on the 13th May, and a conviction had thereon on the 27th May, for an offence on the 8th May. Information for a second offence was laid on the 6th August, and a conviction had thereon on the 19th August for an offence between the 1st June and the 11th July. An information for a third offence was laid on the 10th October, and a conviction had thereon on the 2nd November for an offence on the 12th July:—Held, per Hanington and Landry, JJ., that a third offence to be punishable as such must be one committed after a conviction for the second offence, and the third conviction in this case was bad.—Per Barker and Gregory, JJ., that the conviction was bad because the information for a second offence had not been laid before the commission of the offencee for which the third conviction was made.—Per McLeod, J., that, as the conviction was for an offence committed on a different day from the first and second offences, and after information was laid for a first offence, it was good. *Red* v. *Marsh*, *Ex p. McCoy*, 36 N. B. Reps. 186.

Conviction—*Third Offence — Failure to Shew Offence Committed after Information for First Offence—Affidavits—Form of Conviction—Separate Offences.*]—The defendant was convicted by a magistrate for unlawfully selling intoxicating liquor within a town between the 15th March, 1904, and the 5th April, 1904, contrary to the provisions of the second part of the Canada Temperance Act, then in force in and throughout the county of Cumberland, the conviction being a conviction as and for a third offence against the second part of the Canada Temperance Act. On application for a writ of certiorari the chief point argued was that it did not appear from the conviction that the offence for which the defendant was convicted, was committed after an information laid for the first offence, as required by R. S. C. c. 106, s. 115 (d). Affidavits were read in reply shewing that, although it was not so stated in the conviction, such in fact was the case:—Held, that the affidavits were receivable:—

Held, that the provisions of the statute having been complied with, although it was not so stated in the conviction, the conviction in form "V" provided by the Dominion Act, 1888, c. 34, s. 14, was sufficient. Regina v. Brine, 33 N. S. Reps. 43, and Regina v. Ettinger, 32 N. S. Reps. 181, referred to.—Held, also, that the conviction was not invalid although it did not therein appear that the second and third convictions were for separate offences. *Rex* v. *Swan*, 24 Occ. N. 239.

Conviction — *Stipendiary Magistrate of County—Offence in Town—Jurisdiction.*]—The defendant was convicted of a violation of the Canada Temperance Act by selling intoxicating liquor at Sydney in the county of Cape Breton. Sydney is an incorporated town within the county of Cape Breton. The convicting magistrate was appointed to be "a stipendiary magistrate in the county of Cape Breton:"—Held, that the magistrate had jurisdiction. *Rex* v. *Conway*, 21 Occ. N. 396.

"County"—*Incorporation of City — Reduction of Area.*]—The word "county," for the purposes of the Canada Temperance Act, simply means "geographical area," and there is therefore no reason for construing the Act in such a way as to effect a reduction of the prohibited area, when a city incorporated under provincial legislation is carved out of it.—By order in council dated the 15th October, 1881, the second part of the Canada Temperance Act, 1878, was declared to be in force and take effect in the county of Cape Breton. In the year 1904, by Act of the legislature of Nova Scotia passed in that year, the city of Sydney was incorporated. The defendant was convicted of having unlawfully kept intoxicating liquor for sale in the city of Sydney, contrary to the provisions of the second part of the Canada Temperance Act, then in force in said city:—Held, affirming the conviction, that, so far as the Canada Temperance Act was concerned, the word "county" was to be read as applying to the county as it existed when the Act was brought into force by order in council, and that the incorporation by the provincial legislature of a portion of the territory as a town or city would not have the effect of displacing the operation of the Act. *Rex* v. *McMullin*, 25 Occ. N. 108.

Dismissal of Charge—*Appeal to County Court — Costs of Appeal — Addition of to Penalty.*]—Upon the trial of an information charging the defendant with a violation of the provisions of the second part of the Canada Temperance Act, before two justices of the peace, the justices dismissed the charge and made a formal order of dismissal. From the order so made the prosecutor appealed to a County Court, which quashed the order made by the justices, convicted the defendant of the offence charged, and ordered that he pay, in addition to the fine imposed, &c., the prosecutor's costs, amounting to the sum of $27.16, and that the same be levied by distress, &c.:—Held, (Ritchie and Henry, JJ., dissenting) that the County Court Judge had jurisdiction to include in the penalty imposed the costs of appeal to that Court. *Regina* v. *Hawbolt*, 33 N. S. Reps. 165.

Illegal Sale of Liquors — *Action for Price.*]—In an action for the price of intoxicating liquors sold by the plaintiff to the defendant at North Sydney, in the county of Cape Breton, it was admitted that the plaintiff knew that the Canada Temperance Act was in force in North Sydney, that the defendant was then carrying on a business in intoxicating liquors, that the order for the liquors was given by the defendant to an agent of the plaintiff at North Sydney, but subject to the approval of the plaintiff, and that the defendant purchased the liquors as a retail dealer for sale in that country:—Held, that there was sufficient ground to justify a judgment for the defendant. *Ross* v. *Morrison*, 36 N. S. Reps. 518.

Jurisdiction of Provincial Magistrates—*Conviction — Justices of the Peace —Adjournment—Proof of Service—Delay in Hearing.*]—The defendant was convicted before two justices of the peace for the county of Kings of the offence of having unlawfully kept for sale in his hotel at K., in said county, intoxicating liquors, contrary to the provisions of the second part of the Canada Temperance Act then in force in said county:—Held, that the Provincial Legislature having made provision for the appointment of justices of peace, and having conferred jurisdiction upon them to impose penalties and punishments for the enforcement of provincial statutes, it was competent for the Parliament of Canada, by statute, to provide that punishments and penalties for the enforcement of laws of the Parliament of Canada might be recovered and inflicted before these Courts. Therefore the Magistrates had jurisdiction. The justices having met at the hour appointed did not lose jurisdiction by the fact of their having adjourned the hearing until a later hour of the same day. Proof of the service of summons being a part of the hearing, it was not necessary that the justices should have had such proof before them as a preliminary to making the adjournment. The delay in the hearing of the case from the hour of ten o'clock in the morning until about two o'clock in the afternoon of the same day was not unreasonable. *Rex* v. *Wipper*, 34 N. S. Reps. 202.

Jurisdiction of Stipendiary Magistrates—*County and Town.*]—The defendant was convicted by the stipendiary magistrate for the county of Cape Breton, of the offence of having kept for sale upon his premises intoxicating liquors contrary to the provisions of the second part of the Canada Temperance Act. The offence was committed within the limits of the town of Sydney, an incorporated town in the county of Cape Breton. Under the provisions of R. S. N. S. 1900 c. 33, relative to the appointment and authority of stipendiary magistrates, it is enacted that "every stipendiary magistrate shall have jurisdiction, power, and authority throughout the whole of the county for which he is appointed:"—Held, that, in the absence of legislation giving exclusive jurisdiction to the stipendiary magistrate for the town of Sydney, the words of the statute must be construed as including that part of the county embraced within the limits of the town. Section 14 of c. 33, which was relied upon as indicating a contrary intention, was not to be given such a construction, but was merely intended to give certain powers to stipendiary magistrates for the counties, where exclusive jurisdiction had

been conferred upon the magistrates for incorporated towns. *Rex* v. *Giovanetti*, 34 N. S. Reps. 505.

Offences against—*Sale of Liquor Outside County — Delivery and Collection of Price — Agent.*]—The agent of an express company in the county of W., where the Canada Temperance Act was in force, in the ordinary course of business, delivered a parcel containing intoxicating liquor to the person to whom it was addressed, and collected from him the price thereof, the liquor, by the buyer's instructions, having been sent to him by express, c. o. d. The sale of the liquor was effected at a place outside of the county of W.:—Held, that the agent could not be convicted of selling intoxicating liquor contrary to the provisions of the Act. *Regina* v. *Cahill, Ex p. Trenholm, Ex p. Mitton*, 21 Occ. N. 55, 35 N. B. Reps. 240.

Previous Conviction — *Evidence—Defendant Represented by Counsel.*]—On application to quash a conviction for a fourth offence against the provisions of the Canada Temperance Act, on the ground that the question whether the defendant had been previously convicted was not addressed to him, as required by s. 115 (a) of the Act:—Held, dismissing the application with costs, that it was not necessary that the question referred to should be addressed to the defendant in a case where he was represented by counsel:—Held that, if the defendant could be adequately represented by counsel in pleading to and trying the main case (which it was clear he might be, under ss. 850, 854, 855, 856, and 857 of the Code), he could equally be represented by counsel in respect to this inquiry. *Rex* v. *O'Hearon*, 34 N. S. Reps. 491.

Search Warrant—*Execution by Prosecutor—Order for Destruction of Liquors.*]—The prosecutor of a charge of keeping liquor for sale contrary to the Canada Temperance Act, being personally liable for costs in the event of the prosecution failing, is, though a peace officer, disqualified from executing a search warrant or an order for the destruction of the liquor for the keeping of which for sale the information was laid. *Ex p. McCleave*, 20 Occ. N. 89, 35 N. B. Reps. 100.

Second Arrest on Same Warrant.]—The prisoner, who had been arrested under a warrant to serve a sentence of imprisonment for an offence against the Canada Temperance Act, was, upon his own request, suffered to go at large for a time by the officer who had the execution of the warrant. Shortly afterwards he was again arrested upon the same warrant and conveyed to the county gaol to serve his term of imprisonment. Upon an application for an order in the nature of a habeas corpus:—Held, by the full Court, that the second arrest upon the same warrant was legal, and that the order should be refused. *Ex p. Doherty*, 35 N. B. Reps. 43. [But see a subsequent decision in the same case, 20 Occ. N. 20.]

CANAL.

See CONSTITUTIONAL LAW—CROWN.

CAPIAS.

See ARREST.

CARRIERS.

Agreement for Carriage of Goods—*Cost of Transport—Bills of Lading—Non-delivery of Goods—Damages.*] — The appellant had made an agreement with the agent of the respondent company, at a fixed price and under penalty, for the delivery of goods which were to be forwarded from Paris, France. The respondent, having brought a package to Montreal, addressed to the appellant, refused to deliver it unless the appellant paid $11.84 for disbursements and expenses of conveyance, but did not produce the bills of lading and way bills, which had been sent to him at New York:—Held, that the respondent company could not, arbitrarily and before the delivery, impose on the appellant the payment of this sum, without verification and right of subsequent reimbursement for any overcharge, if there was any, and that the respondent should make to the appellant an indemnity for damages which the non-delivery had caused him. *Poindron* v. *American Express Co.*, Q. R. 12 K. B. 311.

Express Company—*Liability for Damaged Goods—Connecting Lines—Bill of Lading—Clause Limiting Liability.*] — An express company is not responsible for damages to goods intrusted for carriage, when the accident happened on another and connecting line of transfer, and the bill of lading contained a clause by which the company was relieved from any liability if the loss or injury happened at a place beyond its lines or control. *Neil* v. *American Express Co.*, Q. R. 20 S. C. 253.

Expressman — *License — Liability for Goods Destroyed by Fire.*]—An expressman, duly licensed under a by-law of the police commissioners of a city, and carrying goods for hire, is a common carrier, and as such liable for the loss of the goods by fire not caused by the act of God, or of the King's enemies, or by the inherent quality of the goods. *Culver* v. *Lester*, 21 Occ. N. 295.

Ferryman — *Transportation of Animals —Liability.*]—1. To render a person liable as a common carrier he must exercise the business of carrying as a public employment, and must undertake to carry goods for all persons indiscriminately, and hold himself out, either expressly or by course of conduct, as ready to engage in the transportation of goods for hire as a business, not merely as a casual occupation. Therefore, the owner of a boat propelled by oars and rowed for hire across a river, from time to time, by employees usually occupied in other ways, does not fall within the definition of a common carrier. 2. Where a traveller put his horses upon a ferry boat of the above description, with side-rails only 15 inches high, saw the risk to which his animals were exposed, and kept them under his own charge during the crossing, he is not entitled to recover from the owner of the ferry boat the value of a horse which became frightened

jumped overboard, and was drowned, where the accident occurred through no fault or omission or commission on the part of the carrier or his employees, but from the restless disposition of the horse and the inability of the owner to keep him quiet. *Roussel* v. *Aumais*, Q. R. 18 S. C. 474.

Injury to Goods — *Liability — Negligence — Contract — Owner — Consignor.*] —A carrier cannot stipulate that, by reason of the tariff of charges for the transport of goods being reduced, he shall not be responsible for damages which may be caused to the goods carried by the fault or negligence of his servants, but when such a stipulation has been made, the owner of the goods damaged in conveyance has to prove that the damage was caused by such fault or negligence. 2. The owner of goods is bound by the contract of carriage signed by the person forwarding them. *Drainville* v. *Canadian Pacific R. W. Co.*, Q. R. 22 S. C. 480.

Ship — *Bills of Lading — Stipulation against Liability for Thefts.*] — The owner may lawfully stipulate for immunity from liability for thefts committed on board his ship, even by the captain of the crew. When the damage of which the shipper or consignor complains falls apparently within the scope of a stipulation against liability in the bill of lading, the plaintiff must prove some default on the part of the carrier personally to entitle him to recover. *Mathys* v. *Manchester Liners*, Q. R. 25 S. C. 426.

Ship — *Contract Limiting Liability— "Wearing Apparel." Meaning of—Question First Raised on Appeal.*]—The plaintiff was a passenger for Dawson on the defendants' line of steamboats, and his ticket contained the proviso: "Baggage liability limited to wearing apparel only. Each ticket is allowed 150 lbs. of baggage free, and not exceeding $100 in valuation, and half tickets in like proportion. All exceeding this rate and valuation will be charged for. This company shall not be held accountable for merchandise, notes, bonds, documents, specie, bullion, jewellery or similar valuables, nor stores to be landed under designation of baggage, unless bills of lading are regularly signed, and freight charges paid thereon, and under no circumstances shall this company be held responsible in case of loss of baggage for over $100, unless extra charge has been paid on excess of valuation." He paid $10 excess baggage. Part of the baggage, including a sealskin jacket, a lady's dress, men's suits, and wolf robes, to the value of $655, was lost. The plaintiff sued for the full amount, and the defendants pleaded that their liability under the contract was limited to $100:—Held, by Craig, J., and by the full Court (Irving, J., dissenting), that the defendants were liable for more than $100, but under the Carriers' Act for not more than $500:—Held, also, on appeal, that the contention that the defendants were not liable for certain articles, not the wearing apparel of the plaintiff himself, was not open to the defendants, as that point was not raised in the pleadings nor taken at the trial. Remarks of Drake and Martin, JJ., as to what is included in the term "wearing apparel," which must differ according to different circumstances and climates. *Wensky* v. *Canadian Development Co.*, 21 Occ. N. 601, 8 B. C. R. 190.

Ship—*Failure to Notify Consignee—Liability for Damages—Action in Name of Consignor.*]—Cheese was consigned to the Hochelaga Bank at Montreal, and at the foot of the bills of lading were written the words "Notify James Irvine, Gould Cold Storage, Montreal." Irvine was the selling agent for the factory from which the cheese came, and the usual course was (as evidenced by previous transactions) that the cheese was only to be delivered to him by the bank upon payment of the draft attached thereto, and usually drawn upon Irvine payable at the Hochelaga Bank. As the bank thus had very little to do with the matter, the carriers commenced to regard Irvine as the only person with whom they had the deal. On the occasion in question the carriers did not give any notice to the bank, but stored the cheese according to the instructions of Irvine, who subsequently sold it and absconded with the proceeds of the sale:—Held, that the receipt of the bank or its order for delivery was the only discharge which could terminate the liability of the appellants as carriers, and that the fact that the latter were directed on the bills of lading to "notify James Irvine" should have warned them, in any event, against dealing with him as the consignee:—Held, further, that, while a right of action probably did exist in the bank as consignees, it was concurrent with the right of the consignor, since the bank only acted as agents of the shipper to collect his drafts for the price of the cheese, and had neither purchased nor made advances on them. And this common law doctrine is not impaired by 52 V. c. 30, s. 1. *Montreal and Cornwall Navigation Co.* v. *L'Ecuyer*, 21 Occ. N. 249.

Special Contract—*Variation—Authority of Agent—Limiting Liability—Sale of Goods —Conversion—Damages.*]—Conditions in a shipping receipt relieving the carrier from liability for loss or damage arising out of the "safe keeping and carriage of goods," even though caused by the negligence of the carriers' servants, without the actual fault or privity of the carriers, and restricting claims to the cash value of the goods at the port of shipment, do not apply to cases where the goods have been wrongfully sold or converted by the carriers. A shipping receipt, with terms as above, was for carriage by the defendants' line and other connecting lines, and made the freight payable on delivery of the goods at the point of destination. The defendants had previously made a special contract with the plaintiff, but delivered the receipt to his agent at the point of shipment with a variation of the special terms made with him in respect to all shipments to him as consignee during the shipping season of 1899, the variation being shewn by a clause stamped across the receipt, of which the plaintiff had no knowledge. One of the shipments was sold, at an intermediate point on a connecting line, by the company in control, on account of non-payment of freight; — Held, that the plaintiff's agent at the shipping point had no authority to consent to a variation of the special contract, nor could the carriers vary it without the concurrence of the plaintiff; that the sale amounted to a wrongful conversion of the goods by the defendants; and that they were not exempted by the terms of the shipping receipt from liability for

their full value. Damages reduced by Supreme Court of Canada, instead of a new trial being ordered. Judgment in 22 Occ. N. 271, 9 B. C. R. 82, reversed. *Wilson* v. *Canadian Development Co.*, 33 S. C. R. 432.

See NEGLIGENCE—RAILWAY.

CAUTION.

See DEVOLUTION OF ESTATES ACT.

CAVEAT.

See REAL PROPERTY ACT.

CEMETERY.

Owner of Plot — Removal of corpse—Mistake of caretaker—Right of action. *McNulty* v. *City of Niagara Falls*, 4 O. W. R. 443, 5 O. W. R. 63.

Private Burial Ground—Setting apart—Reservation in deed—Ascertainment of location — Injunction against interference—Title—Interest of plaintiffs—Status to maintain action—Right of access—Way of necessity. *May* v. *Belson*, 6 O. W. R. 462, 10 O. L. W. 686.

CENSUS.

See INJUNCTION.

CERTIFICATE OF ENGINEER.

See CONTRACT.

CERTIFICATE OF IMPROVEMENTS.

See MINES AND MINERALS.

CERTIORARI.

Acquiescence in Conviction—*Bar.*]—The acquiescence of the accused in a conviction made by a justice of the peace, in a matter for summary trial, deprives the accused of his remedy by certiorari, even when moved for within the proper time. *Meunier* v. *Beauchamp*, 5 Q. P. R. 280.

Assessment Roll — *Return—Default—Proceedings of Ministerial Character—Superseding Writs Improvidently Issued.*] — A writ of certiorari was directed to the road commissioners of district 17 in the municipality of Halifax, to remove the record of the assessment roll of said district assessing the inhabitants for road taxes, and the return made to the county treasurer of persons who had made default. A writ was also directed to the stipendiary magistrate for the county to remove the record of a return of defaulters who had not paid or commuted their taxes, and the warrant of distress issued by him thereon. There was a motion to quash or set aside the assessment roll, the warrant of disuress, etc. It appeared that the allowance of the writs had not been opposed, and there was no motion to set aside the orders, or to quash the writs or either of them. The amount of the tax was fixed by law, the value of the property by the county assessors, and the rate of assessment by the county council; and the stipendiary magistrate, in issuing his warrant of distress against defaulters, was not called upon to exercise any judicial function:—Held, that the proceedings were of a purely ministerial character, and were not a proper subject for certiorari:—Held, that, the process having improvidently issued, the Court had power of its own motion to set it aside, and that, in the circumstances appearing, the writs should be superseded and the returns thereto taken off the files of the Court. The affidavits filed shewed an intention to attack the legality of the formation of the district under Acts of 1900, c. 23, and the appointment of the commissioners:—Held, that this could not be done in this form of proceeding. *Rex ex rel. Corbin* v. *Peveril*, 36 N. S. Reps. 275.

Commitment by Justice — *Sunday—Resisting Peace Officer.*]—A certiorari will not be granted to remove a justice's commitment of an accused person for trial. Semble, that the arrest and commitment of the defendant on a Sunday for resisting a peace officer were legal. *Rex* v. *Leahy, Ex p. Garland*, 35 N. B. Reps. 509.

Costs — *Fees of Respondent.*]—The respondent or the mis-en-cause upon a motion for a certiorari is not entitled to a fee. 2. Upon such a motion a fee upon the hearing will not be taxed. 3. A respondent who does not contest the motion has no right to a fee for appearing. *Wing Tee* v. *Choquet*, 6 Q. P. R. 305.

Evidence before Magistrate.] — The Court upon certiorari cannot inquire into the evidence taken before a magistrate whose conviction is in review. *Wing Tee* v. *Choquette*, 3 Q. P. R. 461.

Irregularities—*Prejudice.*] — A certiorari will not be granted on account of irregularities in procedure, if such irregularities have not prevented justice being done. *Huot* v. *Paquette*, 3 Q. P. R. 502.

Jurisdiction — *Irregular Procedure — Injustice.*]—The sole duty of the Superior Court upon a writ of certiorari is to ascertain if the inferior court has acted within the limits of its jurisdiction, and if in the procedure it has followed the forms and rules indicated by law; and a certiorari will not be sustained, on the ground that the procedure has been irregular, unless the petitioner demonstrates that he has suffered injustice. *Carpentier* v. *Lapointe*, 6 Q. P. R. 292.

Justice of the Peace—*Jurisdiction—Interest—Statute Taking Away Right—Appeal—Crown—Discretion.*] — 1. Certiorari and not appeal is the appropriate remedy to raise

the question of want of jurisdiction, e.g., whether proper service has been made and jurisdiction over the person acquired, or whether the justice was disqualified through interest. 2. A statutory provision taking away the right to certiorari does not deprive the Superior Court of its power to issue the writ to quash a proceeding on the ground of want of jurisdiction. 3. When there is a defect in the jurisdiction of justices or inferior courts, the common law right of certiorari should not be refused merely because a new trial might be had by means of an appeal. 4. Even where an appeal is pending, a certiorari for want of jurisdiction should not be refused unless the question of jurisdiction is being raised on the appeal. 5. A writ of certiorari may be claimed by the Crown as a matter of right on application of the Attorney-General, without the production of any affidavit. 6. Except where applied for on behalf of the Crown, a certiorari is not a writ "of course," and the Court must be satisfied that there is a sufficient ground for issuing it. 7. No more latitude is given the Court for the exercise of its discretion in granting or refusing a certiorari than in respect to other applications which are in the discretion of the Court. *Re Ruffles*, 35 N. S. Reps. 57.

Motion for — *Preliminary Objection—Dismissal — Second Application.*]—Where an application for a writ of certiorari has been dismissed, the Court will not entertain another application for the same purpose, although the first was dismissed on a preliminary objection. *Rex* v. *Geiser*, 9 B. C. R. 503.

Motions to Maintain and Quash Writ.]—In a matter of certiorari, an inscription alone is sufficient, and a motion made by the petitioner to maintain the certiorari, and another made by the respondent to quash the certiorari, will both be dismissed with costs as useless. *Levesque* v. *Asselin*, 6 Q. P. R. 63.

Motion to Quash for Delay — *Necessity for Notice to Proceed.*]—Rule 188 of the Crown Rules (Nova Scotia) directs that in all causes in which there have been no proceedings from one year from the last proceeding had, the party, whether prosecutor or defendant, who desires to proceed, shall give one calendar month's notice to the other party of his intention to proceed. The defendant, pursuant to the order of a Judge, removed a conviction made by a magistrate into the Court, and took no further steps in the matter. The informant moved to quash the certiorari on the ground that no steps had been taken by the defendant for upwards of a year:—Held, that the informant must first give one month's notice of intention to proceed. *Rex* v. *McDonald*, 23 Occ. N. 17.

Motion to Quash for Delay — *Practice—Costs.*]—To an application by the prosecutor to quash a certiorari removing a conviction for delay in proceeding it is not an answer that the defendant had given notice of motion to quash the conviction before the launching of the motion to quash the writ, as long as the delay is unexplained. Costs were given against the defendant. *Rex* v. *McDonald*, 23 Occ. N. 95.

Petition for—*Service.*]—A petition for a writ of certiorari must be served on the parties interested, and a notice of its presentation must be given to them. *Rex* v. *Warren*, Q. R. 25 S. C. 31.

Prosecution — *Diligence — Extension of Time.*]—There must be continuous diligence throughout the stages of applying for a writ of certiorari, causing it to issue, and proceeding to judgment upon it; and where the delay fixed for the return of the writ is allowed to lapse without any step being taken to obtain a new order, the petitioner cannot afterwards obtain an extension of the delay; and especially where more than two years have lapsed since the expiration of the delay, and the reason for not complying with the original order is not shewn. *Joannette* v. *Weir*, Q. R. 26 S. C. 288.

Recorder's Court—*Jurisdiction—Review of Judgment.*]—Certiorari does not lie to review the decision of the recorder in a case in which he has jurisdiction, and the Superior Court will not upon certiorari inquire whether his judgment is right or wrong. *Wolf* v. *Weir*, 4 Q. P. R. 430.

Recorder's Court—*Removal of Conviction—Remedy by Appeal.*]—A certiorari will not be granted to remove a conviction or order of a recorder, when there is an appeal to the Court of King's Bench on its criminal side. *O'Shaughnessy* v. *Recorders' Court*, 6 Q. P. R. 287.

Recorder's Court — *Writ to Recorder Personally—Objection.*]—A writ of certiorari against a decision of one of the recorders for the city and district of Montreal, may be directed to the recorder personally and not necessarily to the Court, and if objection to its being so directed could be taken at all, it could only be taken by the recorder himself and not by the party in whose favour the judgment complained of was given. *Poirier* v. *Weir*, 7 Q. P. R. 69.

Removal of Cause from Inferior Court—*Grounds—Want of Jurisdiction—Irregularity—Injustice.*]—The only duty of a superior Court, on an application for certiorari, is to determine whether the inferior Court has acted within the limits of its jurisdiction, and whether it has complied with the practice and principles of law, and it will not be granted upon the latter ground if the applicant does not shew that he has suffered an injustice. Therefore, the application will be dismissed and the conviction of the lower Court sustained when the applicant alleges only that justice has not been done and the decision of the lower Court is erroneous, without alleging any grave irregularity in the proceedings. *Carpentier* v. *Lapointe*, Q. R. 25 S. C. 395.

Removal of Conviction. Notwithstanding Statute — *Jurisdiction.*]—Notwithstanding the amendment to s. 7 of the Ontario Summary Convictions Act. by s. 14 of 2 Edw. VII. c. 12, taking away the right to certiorari, a conviction made by a magistrate without jurisdiction may be removed by certiorari; and where the offence for which a conviction is made is found not to come within the statute defining the offence, or the municipal by-law defining the offence is not within the statute which gives the power

to pass a by-law, there is such absence of jurisdiction as warrants the issue of a certiorari. *Rex* v. *St. Pierre*, 22 Occ. N. 233, 4 O. L. R. 76, 1 O. W. R. 365.

Review of Decision of Inferior Court—*Grounds.*]—There is no appeal to the Superior or Circuit Courts by way of certiorari from decisions of Courts of inferior jurisdiction, on the ground of mal jugé, or where the Judge of the lower Court has failed to properly appreciate the evidence. *Calvert* v. *Perrault*, Q. R. 26 S. C. 94.

School Rates—*Judicial Act.*]—An application to bring up by writ of certiorari the school rate fixed by the trustees of the section, was granted. *In re Cape Breton School Section No. 121*, 24 Occ. N. 95.

Security — *Deposit—Preliminary Objections.*]—A deposit by the accused with the proper officer of $100 cash, though unaccompanied by any written document, is a sufficient compliance with the requirements of Rule 13 of the Consolidated Rules of Courts, 1895. After a writ of certiorari has issued preliminary objections thereto should be raised promptly and by means of a substantive motion to quash the writ. *Regina* v. *Davidson*, 21 Occ. N. 98, 4 Terr. L. R. 425.

Time for Issue—*Extension.*]—A party who has obtained an order for a writ of certiorari, must cause the same to be issued and returned within the delay fixed when his application was granted, and cannot, by motion, obtain leave to issue it afterwards. *Joannette* v. *Buster*, 6 Q. P. R. 146.

See ARBITRATION AND AWARD—ARREST—ASSESSMENT AND TAXES—COURTS—JUSTICE OF THE PEACE—LIQUOR LICENSE ACT.

CHAMPERTY.

Contribution to Costs of Appeal — *Members of Family—Agreement to Divide Lands in Question — Succession Rights — Litigious Rights — Deed—Description.*]—The appellants who were desirous of recovering certain property, known as the Dorval Islands, which had formerly belonged to an ancestor, entered into an agreement with the respondents, who were all connected with the same family by relationship or marriage, by which, in consideration of each contributing one-tenth of the cost of taking an appeal to the Supreme Court, they agreed to transfer to each of them one-tenth of what might be recovered in the suit. The appeal was successful, and the present action was brought by the respondents to be declared proprietors of their shares of the island:—Held, that the agreement was not champertous, all the parties contributing to the cost of the appeal having an interest to see the property restored to the family, and either a direct or contingent expectancy of succeeding thereto. To constitute champerty there must be an unlawful interference of a third person to support litigation in a matter which in no way concerns him, for a compensation consisting of a share of the amount recovered. 2. Art. 710, C. C., had no application to this case inasmuch as the rights sold by the appellants were not succession rights. 3. Art. 1582, C. C., cannot be invoked by the party who has sold a litigious right, to annul his own contract. 4. The real estate in question constituting a distinct and separate area, and bearing a single cadastral number, a special description thereof in the deed of sale was unnecessary. *Meloche* v. *Deguire*, Q. R. 12 K. B. 298.

Deed of Land — *Contract—Joinder of Claims—Partition — Specific Performence — Litigious Rights—Retrait Successoral.*]—The heirs of M. induced several persons related to them, either by consanguinity or by affinity to assist them as plaintiffs in the prosecution of a law suit for the recovery of lands belonging to the succession of an ancestor, and, in consideration of the necessary funds to be furnished by these persons, six of the respondents and the mis-en-cause entered into the agreement sued on by which the plaintiffs conveyed to each of the seven persons giving the assistance one-tenth of whatever might be recovered should they be successful in the law suit. In an action au petitoire et en partage by the parties who furnished such funds, for specific performance of this agreement:—Held, reversing the judgment in Q. R. 12 K. B. 298 (Davies, J., dissenting), that the agreement could not be enforced, as it was tainted with champerty, notwithstanding that the consanguinity or affinity of the persons in whose favour the conveyance had been made, might have entitled them to maintain the suit without remuneration as the price of the assistance:—Held, further, that there could be no objection to the demande au petitoire being joined in the action for specific performance. 2. That the defence of retrait de droits litigieux could not avail in favour of the defendants, as it is an exception which can be set up only by the debtor of the litigious right in question. Powell v. Watters, 28 S. C. R. 133, referred to. 3. That, as the conveyance affected a specific share of an immovable, the exception of retrait successoral could not be set up under Art. 710, C. C. Baxter v. Phillips, 23 S. C. R. 317, and Leclerc v. Beaudry, 10 L. C. Jur. 20, referred to. 4. That the laws relating to champerty were introduced into Lower Canada by the Quebec Act, 1774, as part of the criminal law of England, and as a law of public order, the principles of which and the reason for which apply as well to the province of Quebec as to England and the other provinces of the Dominion of Canada. Price v. Mercier, 18 S. C. R. 303, referred to. *Meloche* v. *Deguire*, 24 Occ. N. 75, 34 S. C. R. 24.

Interest in Mineral Claims—*Transfer — Consideration — Prior Litigation.*]— In Briggs v. Newswander, 32 S. C. R. 405, the plaintiff was held entitled to a conveyance from the defendants of a quarter interest in certain mineral claims. In that action Newswander et al. were only nominal defendants, the real interest in the claims being in F. After the judgment was given the plaintiff conveyed nine-tenths of his interest to G., the expressed consideration being moneys advanced and an undertaking by G. to pay the costs of that action and another brought by Briggs, and by a subsequent deed, which recited the proceedings in the action and the deed of the nine-tenths, he conveyed to G. the remaining one-tenth of his interest, the consideration of that deed being $500 payable by instalments. Briggs afterwards assigned the above mentioned judgment and his

interest in the claims to F. In an action by G. against F. for a declaration that he was entitled to the quarter interest:—Held, affirming the judgment in 10 B. C. R. 309, that the transfer to G. of the nine-tenths was champertous, and the Court would not interfere to assist one claiming under a title so acquired:—Held, also, that the transfer of one-tenth was valid, being for good consideration and severable from the remainder of the interest. *Giegerich* v. *Fleutot*, 25 Occ. N. 7, 35 S. C. R. 327.

Void Agreement — *Parties Entitled to take Advantage of—Res Judicata—Estoppel by Conduct—Costs.*]—The laws of maintenance and champerty, as they existed in England on the 19th November, 1858, are in force in British Columbia, and an agreement for a champertous consideration is absolutely null and void. The defence that an agreement is champertous and therefore void is open to others than those who are parties to the agreement. Per Hunter, C.J., it is not open to a man to stand by and assist another to fight the battle for specific property to which he himself claims to be entitled, and, in the event of the latter's defeat, claim to fight the battle over again himself. He is not bound to intervene, and if he does not, he must accept the result so far as concerns the title to the property. At the trial the plaintiffs obtained judgment declaring that the defendant was a trustee of an undivided one-quarter interest in two mineral claims; on appeal by the defendant the plaintiffs' interest was declared to be only one-fortieth. The Court allowed the defendant the costs of the appeal, but allowed no costs of the trial to either side. *Briggs and Giegerich* v. *Fleutot*, 24 Occ. N. 299, 10 B. C. R. 309.

CHARITY.

See WILL.

CHARTER.

See MUNICIPAL CORPORATIONS.

CHARTERED ACCOUNTANTS.

Fees — *Tariff.*] — The tariff of chartered accountants contains no provision allowing fees for attendance at Court to be sworn, or attendances at their offices to receive papers, etc. 2. Chartered accountants are only allowed a fee of $10 for attendance at a meeting for hearing parties or to take evidence, when the duration of the session is over an hour and a half. 3. A chartered accountant is not entitled to any fee upon a provisional report prepared by him. *Singer Manufacturing Co.* v. *Pinsonnault*, 6 Q. P. R. 112.

CHARTERPARTY.

See SHIP.

CHATTEL MORTGAGE.

See BILLS OF SALE AND CHATTEL MORTGAGES.

CHEESE AND BUTTER COMPANIES ACT.

See ARBITRATION AND AWARD.

CHEQUE.

See BANKS AND BANKING—BILLS OF EXCHANGE AND PROMISSORY NOTES.

CHILD STEALING.

See EXTRADITION.

CHINESE IMMIGRANTS.

See ALIENS.

CHOSE IN ACTION—ASSIGNMENT OF.

Action by Assignee—Claim for damages by defendant — Set-off — Counterclaim—Consideration—Notice. *Lillie* v. *Thomas* (N.W. T.), 1 W. L. R. 467.

Assignment of Legacy—Rights of assignee for creditors of legatee—Interpleader. *Lamb* v. *Secord*, 2 O. W. R. 43.

Equitable Assignment — Consideration —Notice—Appropriation of fund to specific purpose. *Hunter* v. *Wilkinson Plough Co.*, 2 O. W. R. 1029.

Equitable Assignment — *Form of — Solicitor.*]—No writing or particular form of words is necessary to constitute an equitable assignment; an intention to pass the beneficial interest being all that is required. Hughes v. Chambers, 22 Occ. N. 333, 14 Man. L. R. 163, approved. A client who was indebted to a solicitor for costs incurred, instructed him that, on the receipt by him of certain moneys which he was to collect for the client, he was to pay certain obligations, including his own bill of costs:—Held, that this constituted a good equitable assignment. *Re McRae Estate*, 6 O. L. R. 238, 2 O. W. R. 220, 268, 409, 618.

Equitable Assignment — Oral promise to repay overdraft at bank—Specified source. *Ray* v. *Oliver*, 2 O. W. R. 988.

Litigious Rights — *Offers—Contract — Conditions — Action by Contractor before Completion of Work.*] — A defendant may plead at the same time the nullity of the obligation invoked against him and the fact that it constitutes a litigious right. 2. Offers made on condition that the party to whom they are

made gives a quittance upon receipt of the sum offered, are legal offers. 3. If in a contract for the performance of work it is stipulated that the contractor will be paid in the course of the work to the extent of 75 per cent, of the value of the work done as certified by the architect charged with the superintendence of the work, and the balance 30 days after completion, such contractor cannot, without having finished the work, sue for such balance, even where he offers to deduct the costs of the work remaining to be done. 4. The smallness of the price paid for an assignment of a debt is a circumstance which raises a presumption that the claim is a litigious one. 5. The litigious character which a claim has at the time of its first transfer remains attached to it if it is again transferred by the first transferee. *Crevier* v. *Evans*, Q. R. 21 S. C. 309.

Money Order — *Indorsement of — Parol Assignment—Interpleader.*] — The defendant, under contract to build for one W., purchased the materials from the plaintiffs, who subsequently got judgment against him, and who garnished the moneys due from W. to the defendant under the contract. Moneys due the contractor were to be paid on the certificate of the architect. Before the garnishee proceedings the defendant had accepted the following order drawn upon him by a firm to whom he was indebted on a sub-contract: "Please pay to Champion & White the sum of $270, and charge the same to my account for plastering Place Block, Hastings street, W., in full to date;" upon which order the defendant indorsed a memorandum addressed to the architect as follows: "Please pay that order and charge to my account on contract for Robert Walker block on Hastings street, city:"—Held in interpleader, that, apart from the order, there was a parol assignment specifically appropriating to the assignees the sum in question, of the moneys to arise out of the contract. *British Columbia Mills Lumber and Trading Co.* v. *Mitchell*, 21 Occ. N. 363, 8 B. C. R. 71.

Money Payable "in Respect of the Contract"—*Damages for Interference with the Work — Attachment of Debts.*] — Held, affirming the decision of Street, J., 23 Occ. N. 334, 6 O. L. R. 428, 1 O. W. R. 138, 358, that the assignment to the claimants of the moneys to become due and payable "in respect of a certain contract" for municipal drainage work, included the damages awarded to the contractor by the judgment in Bourque v. City of Ottawa, 23 Occ. N. 263, 6 O. L. R. 287, and therefore these moneys were not attachable by a judgment creditor of the contractor. *Graham* v. *Bourque*, 24 Occ. N. 54, 6 O. L. R. 700, 2 O. W. R. 927, 1182.

Non-acceptance — *Action by Assignor.*] —A creditor who assigns a debt due him to a creditor of his own, does not thereby lose his right of action against his debtor, so long as his creditor has not accepted the assignment. *Legault* v. *Désaulniers*, 5 Q. P. R. 444.

Notice—*Cause of Action.*]—Where a debt has been assigned by way of mortgage, but no notice in writing of the assignment has been given to the debtor, the cause of action still remains in the assignor. *Okell* v. *Dickson*, 9 B. C. R. 151.

Notice—*Knowledge—Notice of Action.*]—1. A sale or transfer of a debt does not invest the transferee or purchaser with a right of action against the debtor, unless the transfer has been signified to him. 2. The necessity for such signification is not removed by proof of the debtor's knowledge of such transfer. 3. Signification of the action is insufficient and does not take the place of the signification to which the debtor is entitled. *Maple Leaf Rubber Co.* v. *Brodie*, Q. R. 18 S. C. 352.

Notice—*Notary—Notice of Action.*]—It is not necessary that notice of the transfer of a debt should be given by the instrumentality of a notary. 2. The service upon the debtor of process in an action brought in the name of the assignee, claiming payment of the debt, is a sufficient notice of the transfer. Judgment in Q. R. 11 K. B. 251 reversed. *Bank of Toronto* v. *St. Lawrence Fire Ins. Co.*, Q. R. 12 K. B. 556, [1903] A. C. 59.

Notice — *Service — Notary.*] — It is not necessary that service of a notice of a transfer of a debt should be made through the instrumentality of a notary. *Bayard* v. *Drouin*, Q. R. 22 S. C. 420.

Notice—*Sufficiency—Notarial Act—Debtor —"Third Person."*]—Under arts. 1570 and 1571 of the Civil Code of Lower Canada, signification to the debtor of the act of sale of his debt need not be by a notarial act. Quære, whether the debtor is a "third person," within the meaning of the latter article, against whom signification was necessary in order to perfect possession. Murphy v. Bury, 24 S. C. R. 668, doubted. The institution of an action against the debtor is of itself a sufficient signification of the transfer of the debt. Judgment of the Court of King's Bench, Quebec, affirming judgment in Q. R. 21 S. C. 251, reversed. *Bank of Toronto* v. *St. Lawrence Fire Ins. Co.*, [1903] A. C. 59.

Notice of Transfer of Debt—*Necessity for—Action—Service of Process.*]—A transferee of a debt cannot sue his transferor's debtor for the recovery of the same without first serving a copy of the transfer on the debtor, or, at least, serving a copy thereof on the defendant, with the action. Service of process in the action alone is not sufficient notice of the transfer, and is not a sufficient compliance with the law. *Karn (D. W.) Co.* v. *Lough*, Q. R. 26 S. C. 64.

Notice to Debtor — *Judicature Act — Sufficiency of Notice.*]—H., to whom the defendants owed $184.93 being $124.80 for oak lumber, and $60.13 for basswood lumber, assigned his claim to the plaintiff. The only notice which the plaintiff gave the defendants of this assignment stated that he had an order from H. for the amount due in respect to a purchase of oak lumber bought by the defendants' agent. At the same time an account of H.'s against the defendants in the matter went to shew that, as above stated, only $124.80 was due for oak lumber, while the balance, $60.13, was for basswood lumber. The plaintiff drew on the defendants for the amount, and the defendants refused to accept the draft, on the ground that they had no order from H. to pay the $184.93. Thereupon the present action was brought:—Held, that, though there was sufficient to put the defendants upon inquiry in the notice they received, as to an assignment to the plaintiff of the money due by them to H., yet it was not

sufficiently clear and express to entitle the plaintiff to sue, under the section of the Judicature Act relating to assignments of choses in action, being ambiguous enough to justify them in asking the plaintiff whether the assignment covered the oak lumber only, or the basswood as well as the oak. The statute requires the notice to be express notice in writing, and there should be nothing equivocal about it, nothing to put the debtor in doubt whether the whole debt or only a part of it has been assigned. The notice here fell short of this requirement. *McMillan* v. *Orillia Export Lumber Co.*, 23 Occ. N. 244, 6 O. L. R. 126, 2 O. W. R. 529.

Order for Payment of Money — Equitable assignment — Existence of fund. *Kelly* v. *Wilson*, 2 O. W. R. 508.

Power of Attorney—*Death of Grantor —Revocation.*]—Pending a suit upon a mortgage for foreclosure and sale of the mortgaged premises, the mortgagor executed and delivered a writing in favour of a creditor authorizing him to collect, recover, and receive, and apply on account of his debt, any surplus from the sale, and declaring that the power might be exercised in the name of the grantor's heirs, executors, and administrators, and should not be revoked by his death. The sale resulted in a surplus. Before the sale the mortgagor died:—Held, that the writing was not an equitable assignment, but a power of attorney revocable by the grantor's death. *Ex p. Welch—Chapman* v. *Gilfillan*, 21 Occ. N. 96, 2 N. B. Eq. Reps. 129.

Requirements — *Intention.*] — To constitute an equitable assignment of a chose in action neither writing nor any particular form of words is required, but any words or acts from which it is to be inferred that there was an intention to pass the beneficial interest are sufficient. *Hughes* v. *Chambers*, 22 Occ. N. 333, 14 Man. L. R. 163.

Right of Action—*Parties—Prête-nom.*] —Held, affirming the judgment in Q. R. 24 S. C. 119, that where fraud is not alleged, the transferee of a debt, under a transfer duly served upon the debtor, is entitled to sue for the recovery of such debt in his own name, although, in fact, the claim was transferred to him for collection only. *Descrres* v. *Dastous*, Q. R. 24 S. C. 119.

Right to Sue in Name of Assignor— *Acceptance of Assignee by Debtor — Novation.*]—The plaintiffs had transferred to another loan company their claim against the defendant. Subsequently the defendant accepted the transferees as his creditors, and by agreement became their debtor: — Held, that, in these circumstances, the transferees had no right of action in the name of their transferors against the defendant, although the deed of transfer, to which the defendant was not a party, authorized the transferees to use the name of the transferors; the transferees must bring the action in their own name. *Montreal Loan and Investment Co.* v. *Plourde*, Q. R. 23 S. C. 399.

Salary of City Solicitor—Agreement— Repudiation—Action — Notice to corporation —Service on treasurer—Public policy — Public officer — Equitable assignment — Parties. *Graham* v. *McVeity*, 5 O. W. R. 395, 521.

Sale of Goods by Partnership — *Subsequent Incorporation—Delivery by Incorporated Company—Necessity for Signification of Transfer.*]—Where goods are sold by an unincorporated commercial firm, representing the succession of a trader deceased, and this firm, before delivery of the goods, becomes an incorporated company, and as such carries out the contract of sale by making delivery of the goods, signification of the transfer from the firm to the company is not necessary to entitle the company to bring suit against the purchaser for the amount of the debt. Intention to effect novation is not apparent from the fact that the note of a third party was accepted on account of the debt, for which note a receipt was given in these terms: "Received from J. V. (the debtor) the note of M. S. & Sons for $100 at 30 days, on account of pony and buzz planer;" and in the event of the note not being paid at maturity the creditor retains his recourse against the debtor for the debt. *Cowan* v. *Vezina*, Q. R. 26 S. C. 7.

Trading Corporation — *Competency as Trustee—Objection by Debtor.*] — A trading corporation, created by letters patent under the Manitoba Joint Stock Companies Act, has power to take an assignment of a chose in action and hold and collect it by suit for the benefit of the assignor. In re Rockwood, etc., Agricultural Society, 12 Man. L. R. 655, Regina v. Reed, 5 Q. B. D. 483, and Ashbury Railway Carriage Co. v. Riche, L. R. 7 H. L. 653, distinguished. A debtor who has no interest in an assignment of the claim against him, and is in no way prejudiced by it, cannot raise any objection to the competency of the assignee to take the assignment and to sue upon the claim. Walker v. Bradford Old Bank, 12 Q. B. D. 511, followed. *Stobart* v. *Forbes*, 20 Occ. N. 446, 13 Man. L. R. 184.

Transfer Pendente Lite—*Action—Parties.*] — Where the plaintiff has transferred his debt after issue joined, he may, nevertheless, continue the action and obtain judgment in his own name. *Larivière* v. *Town of Richmond*, Q. R. 21 S. C. 37.

Validity—*Assignee not Named—Evidence to Supply Omissions.*]—By an informal instrument in writing an insolvent debtor professed to assign all his interest in certain specified property and "all moneys due to me from any source whatever," but did not in the operative part of the instrument name the assignee, who was indicated only by these words at the end of the document: "And I hereby appoint the said G. D. B. my irrevocable attorney . . . to receive any and all moneys owing to me from any source whatever." G. D. B. was the agent of the plaintiffs to whom the insolvent was indebted, and the insolvent sent the assignment to G. D. B. in an unsigned letter in his own handwriting, in which he wrote, "I have made an assignment of everything to you." A debt due to the insolvent having been attached by the defendants, who were also creditors, the plaintiffs claimed the amount under the assignment to their agent, and an issue was directed:—Held, that the letter could be looked at to aid the assignment, and the assignee's name should be read in; and, therefore, the plaintiffs were entitled to the money. Newell v. Bradford, 37 L. J. C. P. 1, Catling v. King, 64 L. J. Ch. 384, Warner v. Wilmington, 25 L. J. Ch. 662, Re Bacon's Will,

31 Ch. D. 460, Turner v. Hellard, 30 Ch. D. 390, Pearce v. Gardner, [1897] 1 Q. B. 688, and other cases, considered. *Bank of Montreal* v. *Burns*, 22 Occ. N. 342.

Validity—*Notice—Bank Act—Statute of Elizabeth — Execution—Interest in Partnership—Sale—Action — Parties.*] — Action by husband and wife to set aside an assignment to a bank by the husband's execution debtor of his share or interest in the assets and business of a partnership. The assignment was made in February, 1896, as security for a past due debt exceeding the amount of the assignor's interest in the partnership. The husband recovered judgment against the assignor in May, 1896, in an action brought before the assignment, and placed execution in the sheriff's hands in July, 1896. Under that execution, the sheriff, without making any actual seizure of the partnership assets, purported to sell and convey to the wife in October, 1896, all the undivided share or interest of the assignor exigible under execution in the partnership assets or business. This action was begun in November, 1898:—Held, that the assignment was not invalid under the Bank Act, nor under the Statute of Elizabeth, there being no evidence that it was made with intent to delay and defraud the husband in his action against the assignor. Under the law as it stood at the date of the assignment, notice thereof to the assignor's partners was not necessary to its validity. Per Armour, C.J.O.—Debts are not included in the expression "goods, wares, and merchandise," as used in the Bank Act. The effect of placing the execution in the sheriff's hands was to bind the goods of the partnership, so that they were liable to be seized, but no seizure of any specific assets having been made, and all the assets of the partnership having been sold, realized, and disposed of, the execution creditor lost any benefit which he might have derived from the seizure of specific assets and the sale thereunder of the undivided interest of the execution debtor therein; and nothing passed to the wife by the sale to her. Per Osler, J.A.—The husband was not a proper party. Judgment in 1 O. L. R. 303, 21 Occ. N. 183, affirmed. *Rennie* v. *Quebec Bank*, 22 Occ. N. 171, 3 O. L. R. 541, 1 O. W. R. 286.

CHURCH.

Churchwardens—*Accounts — Discharge — Vestry Board—Approval of Ordinary—Interference by Civil Court.*]—The accounts of a churchwarden going out of office must be submitted to the vestry board. 2. A churchwarden going out of office may be compelled to render an account at the suit of two parishioners. 3. The reception of accounts by the vestry board and their approval by the Ordinary, constitute a discharge in favour of a churchwarden going out of office. Such discharge is final and will not be interfered with by the civil Courts. *Dubé* v. *Mercier*, Q. R. 13 K. B. 114.

Change of Site—Resolution of congregation—Notice of meeting—Injunction. *Kopman* v. *Simonsky*, 2 O. W. R. 617.

Clergy Commutation Trust Fund — Canons and by-laws governing—Construction —Annuitants—"Junior on the pay list"—Decision of diocesan chancellor — Award — Acquiescence—Laches—Exchange of benefices. *Geoghegan* v. *Synod of Niagara*, 5 O. W. R. 364, 6 O. W. R. 717.

Diocese of Toronto—*Churchwardens — Agreement to Repay Rector's Expenditure — Award.*]—An agreement by the churchwardens of a congregation of the Church of England in the diocese of Toronto, raising funds by voluntary contributions, to repay to the rector thereof, in consideration of his resigning his charge as desired by the congregation, the amount theretofore expended by him in repairs and improvements to the rectory-house, such amount to be settled by arbitration, is an agreement beneficial to the congregation and binding upon the churchwardens in the corporate capacity conferred upon them in that diocese by 47 V. c. 89 (O.). An order was made for the enforcement of an award made in pursuance of the agreement, although the churchwardens had in their corporate capacity no property or funds out of which the award could be satisfied. Daw v. Ackerill, 25 A. R. 37, distinguished. *In re Kirkby and Churchwardens of All Saints, Collingwood*, 24 Occ. N. 358, 8 O. L. R. 385, 4 O. W. R. 142.

Discipline — *Expulsion of Minister — Domestic Forum—Appeal.*]—Where an appeal raised the question of the proper or improper exercise of disciplinary powers by the Conference of the Methodist Church, the Supreme Court refused to interfere, the matter complained of being within the jurisdiction of the Conference. Judgment of the Court of Appeal, 27 A. R. 602, 21 Occ. N. 21, affirmed. *Ash* v. *Methodist Church*, 22 Occ. N. 3, 31 S. C. R. 497.

Dispute as to Ownership of Land and Building—Rival claimants — Difference in tenets — Question of fact — Onus—Appeal. *Zacklynski* v. *Kerchinski* (N.W.T.), 1 W. L. R. 32.

Expulsion of Member—*Domestic Tribunal—Injunction.*]—The plaintiff sought an injunction restraining the trustees of St. Peter's Church, in Berlin, from enforcing a resolution, passed by them, expelling him from membership in the church, on the ground of certain actions of his, not necessary to mention here. No notification was given calling upon the plaintiff to attend the meeting at which the resolution was passed, nor was he made aware in any way of the intention of the trustees to expel him. The plaintiff's civil rights were not affected by the expulsion:—Held, that the civil Courts would not, after an adjudication by the domestic tribunal depriving the plaintiff of his membership, investigate the legality or regularity of the proceedings, and the action must be dismissed. *Pinke* v. *Bornhold*, 24 Occ. N. 395, 8 O. L. R. 575, 4 O. W. R. 257.

Members—Trustees—Meetings — Resolution authorizing new building—Regularity—Injunction. *Heinc* v. *Schaffer* (Man.), 2 W. L. R. 310.

Power to Allot Free Seats—*Power to Rent Pews.*]—Under the trusts set out in the schedule to 47 V. c. 88 (O.) and 47 V. c. 146 (D.), the trustees of a Methodist church have no power to allot free seats to particular members of the congregation, although they have the general power possessed by the

officers of any place of public worship, to distribute the members of the congregation in a particular manner at any particular service for the purpose of preventing disorder during the service. They have, however, the power to rent pews at a reasonable rent to particular members, reserving as many free seats where and as may be thought necessary or expedient. *Carleton Place Methodist Church Trustees* v. *Keyes*, 22 Occ. N. 50, 3 O. L. R. 165, 1 O. W. R. 10.

Syndic—*Election—Incapacity—Statute — Incapacity Arising After Election.*]—In this case the facts alleged and proved shewed an incapacity at common law, if not by statute, to exercise the office of syndic of a church. 2. It is not necessary that such incapacity should be declared by a statutory provision in order to bring it within art. 987, C. P. C., which applies to an incapacity arising after the election or nomination of the incumbent, as well as to an incapacity existing at the time of his election. *Martel* v. *Prévost*, 6 Q. P. R. 244.

Vestry Corporation—*Defence to Action —Authority—Resolution.*]—A vestry corporation may file a defence to an action without a resolution authorizing its solicitors to that effect. *Sénécal* v. *Vestry of the Parish of St. Paul*, 6 Q. P. R. 462.

Vestry-board—*Defence of Action—Authorization — Parish Meeting — Exception to Form.*] — A vestry-board cannot defend an action without previous authorization by the parish meeting, and the board must file this authorization with its defence, in default of which the plaintiff may, by exception to the form, obtain the striking out of the defence. *Sénécal* v. *Cure and Churchwardens of St. Paul*, Q. R. 12 K. B. 142.

Will—*Devise to Religious Institution — "Acquisition" of Land — Commencement of Period—Life Estate.*]—The seven years during which a religious institution may hold land after its "acquisition" under s. 19 of R. S. O. 1877 c. 216 (now s. 24 of R. S. O. 1897 c. 307), does not commence to run, in the case of a devise of a remainder dependent upon a life estate, until the expiry of the life estate. *In re Naylor*, 23 Occ. N. 69, 5 O. L. R. 153, 1 O. W. R. 809.

CHURCHWARDEN.

See CHURCH.

CIRCUIT COURTS.

See APPEAL—COURTS.

CIVIL ENGINEERS, CANADIAN SOCIETY OF.

Statute Incorporating—*Qualification of Members—Practising — Admission — Mandamus—Interference by Court.*]—The statute incorporating the Canadian Society of Civil Engineers gives the right to become a member to every one who practised as a civil engineer in this province at the time of the passing of the Act. The plaintiff, claiming to have satisfied this requirement, presented a request for admission containing allegations of fact to satisfy the law, verified by his own deposition under oath. On the refusal of the society to comply with his request, he prayed that a peremptory writ of mandamus be issued to effect his purpose:—Held, that it was not for the Court to decide whether the plaintiff was qualified as a civil engineer, or whether he had pursued the studies and possessed the knowledge requisite for a civil engineer, but only whether he had practised as a civil engineer at the time of the passing of the Act. (2) That he who has himself done work requiring the special knowledge of a certain profession is not by reason of that alone deemed to have practised such profession, but the contrary is the case with one who has devoted himself to the practice of a profession for the public and who in fact practises it, though his clientele may be very limited. (3) That the deposition on oath of the plaintiff did not constitute conclusive and irrefutable proof of the facts contained in it, but that it was only a formality to prevent useless applications, and only raised a presumption which might be refuted by evidence to the contrary. *Taché* v. *Society of Canadian Civil Engineers*, Q. R. 26 S. C. 215.

CIVIL SERVICE.

See CROWN.

CLOSING STREET.

See WAY.

CLUB.

Authority to Make Rules—*Expulsion of Member—Regularity of Admission—Meeting—Two-thirds Vote.*]—A club for amusement, etc., organized under arts. 5487 et seq. of the R. S. Q., by which such association is authorized to make rules and regulations respecting the admission and expulsion of its members, has authority to adopt a rule providing for the expulsion of any member who commits an act "derogatory to the honour and interests of the club," although no definition be given in the rule of what constitutes such acts. 2. Where a social club has formally passed a resolution expelling a member for acts derogatory to the honour and interests of the club, it cannot afterwards, in defence to an action of the member for the rescission of the vote of expulsion, be allowed to justify such expulsion on the ground that the plaintiff had never been regularly admitted a member. 3. Where the rule of the club provides for the expulsion of a member by a two-thirds vote at a general meeting regularly called, the resolution of expulsion must be voted for by two-thirds of the active members of the club present at the time the resolution is put to the meeting. *Lemarche* v. *Le Club de Chasse à Courre Canadien*, Q. R. 19 S. C. 470, 4 Q. P. R. 75.

Liability for Article Stolen,] — The plaintiff, who was not a member of the defendant club, went there upon the invitation of a member and put his coat in the cloak room. It was taken away during his absence in another part of the club, and he sued for its value and for money paid to detectives in attempting to recover it:—Held, that, as the defendants were a club, and did not fall under the provisions of the Civil Code respecting innkeepers, keepers of boarding-houses, and hotel-keepers, under similar circumstances, they were not liable for articles brought upon their premises. *Martel* v. *Military Institute Club*, 23 Occ. N. 119.

Life Member—*By-law Exacting Further Fees—Ultra Vires.*]—The plaintiff was duly elected a life member of the defendant club, and paid $50, the fee demanded by the by-laws. Subsequently, at a meeting of the members of the club, a by-law was adopted that every life member should pay an additional sum of $25 for that year only, and that any life member who failed to do so should be expelled from the club simply by a resolution of the board of directors to that effect. The plaintiff contended that the by-law was ultra vires, and asked that the Court should declare it to be so:—Held, that the by-law was ultra vires, and that the plaintiff was therefore not bound by it, nor could his status be thereby affected. *Beaudry* v. *Club St. Antoine*, 21 Occ. N. 83, Q. R. 19 S. C. 452.

Public Inquiries Act (B.C.)—Benevolent and Friendly Societies Act (B.C.)—Commission of inquiry—Jurisdiction. *Re Railway Porters' Club* (B.C.), 2 W. L. R. 162.

CODICIL.

See WILL.

COLLATERAL SECURITY.

Enforcement — Bar — Promissory notes for price of machinery—Retaking and selling machinery under conditional sale contract—Chattel mortgages collateral to notes—Effect on. *Massey-Harris Co.* v. *Lowe* (N.W.T.), 1 W. L. R. 213.

Life Insurance Policy — Promissory notes—Account—Entries in books — Appropriation of payments—Mortgage—Merger—Surety—Discharge. *Harvey* v. *McKay*, 5 O. W. R. 711.

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COLLECTION OF TAXES.

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COLLEGES.

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COLLUSION.

See INSURANCE—RAILWAY—SHIP.

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COMPANY.

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I. DIRECTORS—POWERS OF.

Action by Judgment Creditor Against—Payment of dividend when company insolvent—Preferential payments of defendants' claims against company—Judgment for damages—Companies Ordinances (N.W.T.) s. 65. *Snow* v. *Benson* (N.W.T.), 2 W. L. R. 359.

Appointment of Manager — *Want of By-law and Seal—Services Rendered—Salary—Compensation.*]—The plaintiff was appointed by the board of provisional directors of a company to be a director, and was also appointed manager before the company was organized. In an action for salary or compensation for services rendered, in which it was shewn that the services rendered had not resulted in any benefit to the company, and that the company had never gone into operation:—Held, that, as he was not appointed by by-law approved of by the shareholders, and had no contract under seal, he could not recover. Co., 25 O. R. 587, commented on. *Birnie* v. *Toronto Milk Co.*, 23 Occ. N. 11, 5 O. L. R. 1, 1 O. W. R. 736.

Articles of Association — *Privileged Shareholders—Right to Elect Majority of Directors—Ultra Vires.*]—In the memorandum of association of a joint stock company organized under the British Columbia Companies Act, 1890, and its amendment in 1891, there was a clause purporting to give to the holders of a certain block of shares, being a minority of the capital stock issued, the right at each election of the board of directors to elect 3 of the 5 directors, notwithstanding anything in the Act:—Held, that the shares to which such privilege was sought to be attached could not be considered preference shares within the meaning of the statute, and that the agreement was beyond the powers conferred by the statute, and null and void, being repugnant to the conditions

as to elections of directors imposed by the Act as matters of public policy. Judgment in 9 B. C. R. 275, reversed. *Colonist Printing and Publishing Co.* v. *Dunsmuir*, 23 Occ. N. 65, 32 S. C. R. 679.

Hypothec—*Promissory Note—Payment by Indorser—Absence of Protest—Recovery by Indorser.*]—Under the Joint Stock Companies Act of the Province of Quebec, directors may contract a hypothec, which will be binding on the company, if made in the interest of the company. 2. A director of the company who accepts such hypothec, to secure indorsations made by himself and other directors, cannot afterwards, in good faith, question the legal right of the directors to authorize the granting of such hypothec. 3. Where no proof of a protest, or the waiver of protest, is made, the indorser of a promissory note who pays, cannot recover, and he must be held to have paid without any obligation to do so; and the payment must be attributed to his own generosity. 4. Where the person who accepts an hypothec to secure the payment of certain debts, does not bind himself personally, there is no obligation on his part which renders him liable in case the debtor does not pay. *Savaria* v. *Paquette*, Q. R. 20 S. C. 314.

Illegal Transactions—Action by shareholder and director—Issuing of stock to director in payment of assets of business taken over—Payment of commission to director on sale of stock—Expenses of promotion—Sale of stock at a discount—Amendment—Participation of plaintiff in illegal transactions—Estoppel—Increase in number of directors—Costs. *Stickney* v. *Buckel*, 6 O. W. R. 469, 522, 751.

Indorsement of Bills for Accommodation—*Authority of Secretary—Discount—Notice to Bank—Presumption.*] — The secretary of a company, whose authority was limited to the acceptance of drafts, indorsed, in the company's name, a number of drafts in which the company had no interest, for the accommodation of C. The trial Judge found that the plaintiffs, who discounted the drafts, had knowledge that the indorsements were made for the accommodation of C.:—Held, that the defendants were not liable:—Semble, that where the directors might, under the power given them, delegate to the secretary power to indorse for the company, the bank taking the paper bona fide, would be entitled to assume that the secretary had such power, although it had not, as a matter of fact, been delegated. *Union Bank* v. *Eureka Woolen Mfg. Co.*, 33 N. S. Reps. 302.

Lease of Elevator—Shareholder's right to account of profits—Ratification by shareholders—Meetings—Irregularities — Parties —Amendment. *Meyers* v. *Cain*, 6 O. W. R. 297, 834.

Managing Director—*Powers of—Promissory Notes.*] — The defendant company were incorporated by letters patent under the Manitoba Joint Stock Companies Act, R. S. M. c. 25, for the purpose of carrying on a trading business, and the plaintiffs sued as indorsees of three promissory notes given by the managing director of the company in their name to C. for tea ordered from him, but never delivered. There was no by-law, resolution, or other act expressly defining the powers or duties of the managing director, but the evidence shewed that the course of business of the company was such that he had frequently given similar promissory notes which had been paid by the company's cheques, without objection on the part of the other directors or the auditors:—Held, that the notes sued on had been made in general accordance with the powers of the managing director, within the meaning of s. 62 of the Act, and were binding on the company. *Imperial Bank* v. *Farmers' Trading Co.*, 21 Occ. N. 449, 13 Man. L. R. 412.

Managing Director—*Warehouse Receipt—Disappearance of Goods.*]—The failure of an individual director of a warehousing company to inform the holder of a warehouse receipt of the disappearance of the goods covered by such receipt, does not, in the absence of any accusations of fault against the director in respect thereof, give the holder of such receipt a right of action against him. *Ontario Bank* v. *Merchants Bank of Halifax*, 5 Q. P. R. 392.

Mortgage — *Consent of Shareholders—Ratification.*] — A mortgage made by the directors of a company prior to the consent of its shareholders, without which consent there was no power to borrow, may be ratified by the shareholders. *Adams* v. *Bank of Montreal*, 8 R. 314, 32 S. C. R. 719.

Purchase and Sale of Land—*Irregularities in Proceedings.*]—A mining company subject to the provisions of the Ontario Companies Act, R. S. O. 1897 c. 191, and the Ontario Mining Companies Incorporated Act, R. S. O. 1897 c. 197, has power to buy and sell land, and a sale in good faith of all the land owned at the time by the company is not necessarily invalid, for there is nothing to prevent the business of the company being continued by the purchase of other land. Nor can such a sale made in good faith be restrained at the instance of a dissentient minority of shareholders on the ground that irregularities have occurred in the conduct of the proceedings of the company leading up to the sale, or on the ground that the approving majority are also shareholders in a rival company, and are in carrying out the sale furthering the interests of that rival company. Judgment of Street, J., 1 O. L. R. 654, 21 Occ. N. 291, affirmed. *Ritchie* v. *Vermillion Mining Co.*, 22 Occ. N. 382, 4 O. L. R. 588, 1 O. W. R. 624.

Resolution Authorizing Purchase of Land — *Power to Acquire—Absence of a Quorum—Subsequent Ratification—Representation by Company—Estoppel.*]—"The Montreal and St. Lawrence Light and Power Co.," which was named in the first place "The Chambly Manufacturing Co.," had, by 61 V. (Q) c. 65, obtained the repeal of the previous Acts of incorporation and a new charter increasing its powers. It had already constructed works and developed a water power on the River Richelieu near Chambly. In the summer of 1901, with a view to secure the lighting contract with the city of Montreal, negotiations were entered into with M. E. A. Robert, the owner of land on the Cascade rapids on the river St. Lawrence, in the county of Beauharnois, which the company wished to secure in case it undertook the lighting of the city of Montreal. A resolution was passed on the 17th

July at a directors' meeting, when only two directors were present, authorizing the president and secretary of the company to secure an option from Robert, the company paying $15,000 down, the balance of the purchase money being $260,000, the company having the right, if it did not wish to make further payments, to abandon the property, forfeiting the $15,000 already paid. On the 18th July a deed of sale pure and simple was executed between Robert and the company and by a deed of declaration it was provided that the company would abandon its purchase before the 30th November following and lose the $15,000, reconveying the property to Robert. At a subsequent directors' meeting the minutes of the meeting of the 17th July were adopted. The company allowed the stipulated period to pass, and on the 4th December, at a meeting of directors, a resolution was passed authorizing the president and secretary to deed back to Robert the property which the company had purchased from him on the 18th July, and on the same day a protest was served by the company on Robert offering to reconvey the property.—Held, that the company, by virtue of its charter aforesaid, had power to acquire the property in question. 2. That the company could not allege against the validity of the purchase the lack of a quorum at the meeting of the 17th July, and that it had represented it to be a regular meeting of its directors. 3. The resolution of the 17th July was sufficient authority for the purchase in question, with power for the company to reconvey before the 30th November. Mathieu, J., dissented on this point. 4. The resolution and protest of the 4th December were sufficient ratification of the purchase of the 18th July, even supposing that this deed would not have been authorized by the resolution of the 17th July and this ratification was not subject to the conditions of Art. 1214, C. C. *Montreal and St. Lawrence Light and Power Co.* v. *Robert*, Q. R. 25 S. C. 473.

II. Foreign Companies.

Authority to Representatives—*Directors—Advocates.*]—The authority which a foreign company gives to its advocates or to its representatives ought to be the act of the company itself, or of its directors sitting as a board of direction and acting for the company, and not that of a majority of the directors acting individually. 2. An authority given by an insurance company to one of its servants, authorizing him to inspect the agencies and to sue, does not authorize him to give advocates the authority required by Art. 177, C. P. *Kavanagh* v. *Norwich Union Fire Ins. Co.*, 4 Q. P. R. 229.

Authorization to Advocates—*Power of Attorney—Form—Date.*] — A foreign company may give a general power of attorney to their advocates for all the causes in which they are or may be concerned. 2. A power of attorney signed in the name of such foreign company by the presidents and the secretary before a notary in England, and sealed with the seal of the company, is valid until proof to the contrary, and there is no need to annex to it a resolution of the board of directors of the company authorizing the officers to sign and seal such power of attorney. 3. The power of attorney may be subsequent in date to the institution of the action. *Great Northern R. W. Co. of Canada* v. *Furness, Withy, & Co.*, 6 Q. P. R. 404.

Extra-Provincial Corporations which have not taken out a license under s. 6, 63 V. c. 24 (Ont.) are forbidden by the legislature to sell their goods in the province, and s. 14 provides that so long as such extra-provincial corporation remains unlicensed it cannot maintain any action in any Court in Ontario. *Bessemer Gas Engine Co.* v. *Mills*, 4 O. W. R. 325, 25 Occ. N. 12, 8 O. L. R. 647.

Shareholders—*Enforcement of Rights — Jurisdiction—Plaintiff Out of the Province—Inspection of Books — Proof of Foreign Statute—Rules of Construction—Protection of Public.*]—A shareholder in a company incorporated under the laws of a foreign state, but having its principal place of business, offices, and works in Nova Scotia, may maintain an action in this province to enforce the performance of duties imposed upon the company in relation to its shareholders. The non-residence of the shareholder is no bar to such action. There is no distinction between a foreign and a domestic corporation in respect to the relief asked in such case, and, notwithstanding the rule not to interfere in matters of internal management, the Court has power to compel the inspection of books in proper cases. Proof of a foreign statute by admission is as effective as proof by an expert in hæc verba. In the absence of proof to the contrary, it will be assumed that the rules of construction in the foreign state are the same as in this province. There being no individual right of action to enforce compliance with the provisions of statutes of this province intended for the protection of the public, the decree appealed from was varied to this extent. *Merritt* v. *Copper Crown Co.*, 36 N. S. Reps. 383, 22 Occ. N. 239.

III. Judgment Against.

Collusion of Directors — *Rights of Minority Shareholders — Application to Set Aside Judgment—Action.*]—At a meeting of directors of the defendant company a resolution was passed that an action brought by the plaintiff, who was president of the company and held a majority of the shares, against the company, should not be defended; that the plaintiff should be allowed to take judgment for the amount of his claim with interest; and that an account rendered to the plaintiff by the secretary of the company should be withdrawn and treated as rendered without authority. There was ground for inferring collusion, and a question as to whether the plaintiff was entitled to recover anything in his action against the company:—Held, that the judgment entered against the company was properly set aside, and that the applicant G., the secretary of the company, was properly permitted to defend and plead a counterclaim on behalf of the company. Northwest Transportation Co. v. Beatty, 12 App. Cas. 596, distinguished:—Held, also, as to the remedy in equity, that if the plaintiff's claim was not properly due, and the directors, representing a majority of the shareholders, were acting collusively in allowing judgment to go by default, G. could, on behalf of himself and

the others in the minority, maintain an action against the plaintiff and the directors to restrain proceedings on the judgment:—Held, also, that, by virtue of the Judicature Act, R. S. c. 155, s. 18, s.-s. 5, G. could have the remedy in the action itself. *Dimock* v. *Central Rawdon Mining Co.*, 36 N. S. Reps. 337.

Wages—*Liability of Director—"Labourer or Servant" — Foreman of Works.*] — The plaintiff, who did manual labour in the works of an insolvent company, but was a superior labourer exercising some supervision over others, was held to be a "labourer or servant" within the meaning of 2 Edw. VII. c. 15, s. 71 (O.), and entitled to succeed in an action against a director of the company to recover the amount of the plaintiff's unpaid judgment against the company for wages. *Turner* v. *Fee*, 24 Occ. N. 402.

IV. Parties to Actions.

Shareholders—Use of corporate name in litigation. *Cramp Steel Co.* v. *Currie*, 4 O. W. R. 270.

Use of Name as Plaintiff—Application to stay actions — Meeting of shareholders — Special circumstances. *Saskatchewan Land and Homestead Co.* v. *Leadley*, 2 O. W. R. 745, 850, 917, 944, 1075, 1112, 3 O. W. R. 133, 191, 4 O. W. R. 39, 378, 5 O. W. R. 449; *Saskatchewan Land and Homestead Co.* v. *Moore*, 2 O. W. R. 916, 944, 1075, 1112, 4 O. W. R. 39, 378.

V. Promoters.

Agent to Solicit Subscriptions—*False Representations — Ratification—Benefit.*]—Promoters of a company employed an agent to solicit subscriptions for stock, and W. was induced to subscribe, on false representations by the agent of the number of shares already taken up. In an action by W. to recover the amount of his subscription from the promoters: — Held, affirming the judgment of the Court of Appeal, 2 O. L. R. 261, 21 Occ. N. 493, that the latter, having benefited by the sum paid by W., were liable to repay it, though they did not authorize and had no knowledge of the false representations of their agent. Per Strong, C.J., that neither express authority to make the representations, nor subsequent ratification or participation in benefit, were necessary to make the promoters liable; the rule of respondeat superior applies as in other cases of agency. *Wilson* v. *Hotchkiss*, 22 Occ. N. 3; *S. C., sub nom. Milburn* v. *Wilson*, 31 S. C. R. 481.

Organization — Service of promoter—Claim for payment against co-promoters—Share of municipal bonus. *Patterson* v. *Brown*, 6 O. W. R. 204.

Undertaking to Subscribe for Shares—*Liability to Co-promoters.*] — The defendant wrote a letter to A., who was desirous of organizing a driving park company, undertaking to subscribe for $1,000 of stock in a company to be formed, subject to the conditions that before the formation of the company an amount of $7,000 be guaranteed, and that this subscription be obtained within three months from date. Subsequently the defendant cancelled this letter, and refused to sign the stock book. In an action for a first call, instituted by all the underwriters on the stock book, before the incorporation of the company:—Held, that an action for a first call could not be maintained on the defendant's letter, until the company had been organized. In the absence of a special contract on the part of and between the co-adventurers, no legal call can be made prior to the organization of the corporation, because until then there is no board of directors capable of making a call. *Cazelais* v. *Picotte*, Q. R. 18 S. C. 538.

VI. Shares and Shareholders.

Call—Action to invalidate—Parties—Addition of company—Resolution — Forfeiture of shares for non-payment of calls—Fraud and collusion — Qualification of directors—Payment of shares—Irregularities—Meetings of shareholders—Notice of call—Meeting of directors—Quorum — Adjournment — Sunday—Costs. *Paul* v. *Kobold* (N.W.T.), 2 W. L. R. 90.

Calls—*By-law—Time for Payment—Forfeiture of Stock—Assignee for Creditors of Shareholder—Right to Sue—Trust.*]—Under s. 35 of R. S. O. 1897 c. 191, stock may be forfeited, where the amount payable on a call for stock is not paid within the time limited by the special Act incorporating the company, or by letters patent, or by a by-law of the company. Where, therefore, no time was limited in the statute, or letters patent, or in the by-law making the call, such call was held to be illegal, and an attempted forfeiture of the stock ineffectual. An assignment by a shareholder for the benefit of his creditors excepted shares in companies not fully paid up and declared the assignor a trustee of such shares for the assignee:—Held, that the assignee was not entitled to call on the company to account to him for the shares or any dealings therewith. *Armstrong* v. *Merchants' Mantle Mfg. Co.*, 21 Occ. N. 123, 32 O. R. 387.

Calls—*Representatives of Deceased Shareholder—Defences to Action.*]—In an action by an incorporated company to enforce, against a shareholder's legal representatives, a call on shares subscribed for by the de cujus, the defendants cannot plead that the conditions of the Act of incorporation have not been complied with, and that the company has for more than a year carried on the business of insurance in violation of the conditions of the statute incorporating it. *Victoria-Montreal Fire Ins. Co.* v. *O'Neil*, 5 Q. P. R. 4.

Cemetery—*Rights of Owners of Lots.*] —The petitioner acquired two graves in the cemetery of a company. Subsequently he acquired two other graves. Owners of lots for which they had paid $20 were entitled by law to become shareholders in the cemetery company, and the petitioner had paid more than this amount. But the four graves did not form a complete lot on the plan of the cemetery, there being a fifth grave belonging to another person in the same lot. On

a petition for a writ of mandamus to compel the company to enter his name as a shareholder:—Held, that the price alone did not entitle the petitioner to the privilege of becoming a shareholder; the land acquired must form a complete lot. The distinction between a "lot" owner and a "grave" owner, which had always been recognized since the organization of the company, though not set forth in the charter or by-laws, was a reasonable one, and the owner of one or more graves forming only part of a lot was not entitled to be classed as a shareholder, or to have the graves entered as a lot in the books of the company. *Hart* v. *Mount Royal Cemetery Co.*, Q. R. 18 S. C. 515.

Certificates — *Binding Statement in—Purchasers—Discount.*] — A portion of the shares in a joint stock company, purporting on the face of their certificates to be of a certain par value and paid up, were allotted to three promoters. One of them sold part of his allotment at a discount and had them transferred by the company direct to the purchasers, who were not aware that the shares were not really paid up:—Held, in an action by the company, that the purchasers were not liable for the discount on such shares, inasmuch as the company were bound by their statement in the certificates that the shares were "fully paid and non-assessable." *Kettle River Mines (Ltd.)* v. *Bleasdel*, 7 B. C. R. 507.

Contract to Sell Shares—Consideration — Breach — Proposal — Acceptance — Seal —Mining company — Discount on shares—By-law — Release — Damages. *Gold Leaf Mining Co.* v. *Clark*, 5 O. W. R. 6, 6·O. W. R. 1035.

Deposit of Certificates — *Bailment—Trust—Detention.*]—The plaintiff loan company became the holder of 525 shares in the capital stock of a coal company, and of 50 shares in a steel company, and deposited the certificates for the shares with the defendant trust company for safe-keeping. The defendant trust company executed and delivered to the plaintiff loan company a document under seal by which they hold in their safe deposit vaults to the order of the loan company any dividends received in respect thereof, and guaranteed to the loan company that the certificates would be kept safely in deposit vaults and delivered upon demand under proper authority. The document also provided for the remuneration of the trust company. The certificates were put into the name of the trust company. It appeared that 375 of the shares had been acquired by the plaintiff loan company under an agreement with the Atlas Loan Co., who had an interest in the prospective profits to be derived from the sale of the shares. While the certificates were in possession of the defendant trust company both loan companies were ordered to be wound up under the Dominion Act, and the defendant trust company were appointed liquidators of the Atlas Loan Co., and the plaintiff trust company liquidators of the plaintiff loan company. After the commencement of the liquidations, the plaintiff trust company, as liquidators, demanded the certificates from the defendant trust company, but the latter refused to deliver them up, and this action was brought for damages for the detention: — Held, that the defendant trust company were merely bailees and not trustees; but, if they were to be regarded as trustees, the failure to hand over the certificates was not such a breach of trust but for which they ought fairly to be excused under 62 V. (2) c. 15, s. 1 (O.); owing to their dual character, they did not act with singleness of purpose, and therefore acted honestly and reasonable; and the direction of the Master in Ordinary, to whom was referred the winding-up of the Atlas Loan Co., that the whole 575 shares should be retained by the defendant trust company as liquidators, was made without jurisdiction and did not protect them as trustees. 2. The plaintiffs were entitled to damages for the detention (delivery having been made pending the action), based on estimates of what had been lost by the detention; and the measure of damages was the highest price of the shares represented by the certificates between the demand and the delivery. *Elgin Loan and Savings Co.* v. *National Trust Co.*, 24 Occ. N. 55, 2 O. W. R. 1159, 7 O. L. R. 1, affirmed in 5 O. W. R. 466, 10 O. L. R. 41.

Deprivation of Shares — *Remedy—President of Company.*]—A company which, along with its president, appropriates to itself shares of its capital to the prejudice of a shareholder, is bound to indemnify the shareholder against the injury caused to him. *Acer* v. *Percy*, 5 Q. P. R. 401.

Judgment Creditor—*Action, by against Shareholder — Transfer of Shares — Evidence.*]—Judgment creditors of an incorporated company, being unable to realize anything on their judgment, brought against H. as a shareholder, in which they failed, from inability to prove that he was owner of any shares. They then brought action against G., in which evidence was given, not produced in the former case, that the shares once held by G. had been transferred to H., but were not registered in the company's books:—Held, affirming the judgment in 33 N. S. Reps. 77, that the shares were duly transferred to H., though not registered, as it appeared that H. had acted for some time as president of and executed documents for the company, and the only way he could have held shares entitling him to do so was by transfer from G.:—Held, also, that, although there appeared to be a failure of justice from the result of the two actions, the inability of the plaintiffs to prove their case against H. in the first could not affect the rights of G. in the subsequent suit. The company in which G. held stock was incorporated in 1886 and empowered to build a certain line of railway. In 1890 an Act was passed authorizing additional works to be constructed, increasing the capital stock, appointing an entirely different set of directors, and giving the company larger powers. One clause repealed all Acts and parts of Acts inconsistent therewith. G. had transferred his shares before the latter Act came into force. The judgment against the company was recovered in 1895:—Held, that G. was never a shareholder of the company against which such judgment was obtained. Hamilton v. Grant, 20 Occ. N. 450, 30 S. C. R. 566. See also *Hamilton* v. *Holmes*, 33 N. S. Reps. 100 n.

Lien on — Amount due to company. *Walkerton Binder Twine Co.* v. *Higgins*, 1 O. W. R. 403.

Offer to Sell — Acceptance—Attempted withdrawal — Promissory note — Liability. *McDowell* v. *Macklem*, 4 O. W. R. 482.

Payment for Shares — *Equivalent for Cash—Written Contract.*]—M. and C. each agreed to take shares in a joint stock company, paying a portion of the price in cash and receiving receipts for the full amount, the balance to be paid for in future services. The company afterwards failed:—Held, affirming the judgment of the Court of Appeal, 27 A. R. 396, 20 Occ. N. 300, that, as there was no agreement in writing for the payment of the difference by money's worth instead of cash, under s. 27 of the Companies Act, M. and C. were liable to pay the balance of the price of the shares to the liquidator of the company. *Union Bank* v. *Morris*, *Union Bank* v. *Code*, 22 Occ. N. 45, 31 S. C. R. 594.

"Payment in Cash" — *Transfer of Business.*]—A company incorporated to take over a business carried on by the defendants in partnership, entered into possession, and in payment for his relative interest in the business each defendant received a corresponding number of shares at par value:—Held, that the payment for the shares was a "payment in cash" within the meaning of s. 50 of the Companies Act, and as the purchase price was fair, the shares were fully paid up. *Tanner* v. *Cowan*, 9 B. C. R. 301.

Payment—*Transfer of Business Assets—Debt Due Partnership — Set-off — Counterclaim—Accord and Satisfaction — Liability on Subscription for Shares—R. S. B. C. c. 44, ss. 50, 51.*]—On the formation of a joint stock company to take over a partnership business, each partner received a proportionate number of fully paid-up shares, at their par value, in satisfaction of his interest in the partnership assets:—Held, reversing the judgment in 9 B. C. R. 301, Davies, J., dubitante, that the transaction did not amount to payment in cash for shares subscribed by the partners, within the meaning of ss. 50 and 51 of the Companies Act, R. S. B. C. c. 44, and that the debt owing to the shareholders as the price of the partnership business could not be set-off nor counterclaimed by them against their individual liability upon their shares. Fothergill's Case, L. R. 8 Ch. 270, followed. *Turner* v. *Cowan*, 24 Occ. N. 115, 34 S. C. R. 160.

Power to Interfere in Ordinary Management.]—The shareholders in a company incorporated under the Companies Act, 1890, have no power to interfere in the ordinary management of the company by the trustees, who have the exclusive right of exercising corporate powers and of making by-laws. *Dunsmuir* v. *Colonist Printing and Publishing Co.*, 9 B. C. R. 290.

Preference Shares — *Interest — Dividends.*]—The Halifax Academy of Music, a body corporate, in pursuance of a resolution of shareholders to that effect, issued preferential stock, the same to be a first charge upon the property of the company and its earnings, and to bear "interest" at a stated rate, payable half-yearly. For a number of years there were not sufficient earnings to pay interest or dividends to either the preferred or common stockholders. Latterly, however, the earnings increased, and a contest arose between the holders of the preferential stock and the holders of the common stock, the latter contending that the former should not be paid interest or dividends for the years during which there were not sufficient earnings for the purpose:—Held, that the holders of the preferential stock are entitled to receive out of the earnings what is called cumulative interest covering the past years in which dividends or interest remained unpaid on the preferential stock before any dividends are paid on the common stock. *Crockett* v. *Academy of Music*, 22 Occ. N. 301.

Preference Shares — *Memorandum Incorporating Agreement by Reference—Special Voting Powers.*]—The provisions of the Companies Act, 1890, that the members and stockholders of a company incorporated under it shall be subject to the conditions and liabilities in the Act imposed and to none others, and that in the election of trustees each stockholder shall be entitled to as many votes as he owns shares of stock, do not render it ultra vires of a company to validly stipulate in its memorandum of association that a certain limited class of stockholders shall have the privilege of electing a majority of the trustees, and such stipulation may be contained in a document incorporated merely by reference in the memorandum of association. Per Drake and Martin, JJ.: — Preference stock means stock that has any advantage over other stock and is not confined to stock having a preference in regard to the payment of dividends. Per Hunter, C.J., and Martin, J.:—The preference stock mentioned in s. 1 of the Companies Act Amendment Act, 1891, means stock having a preference in regard to the payment of dividends and not merely superior voting powers. *Dunsmuir* v. *Colonist Printing and Publishing Co.*, 9 B. C. R. 275.

Reserve Fund — *Dissentient Minority — Director — Investment — Trustee—Purchase and Resale — Profits.*] — It is an elementary principle that a Court has no jurisdiction to interfere with the internal management of companies acting within their powers. The company must sue to redress a wrong done to it; but if a majority of its shares are controlled by those against whom relief is sought, the complaining shareholders may sue in their own names, but must shew that the acts complained of are either fraudulent or ultra vires. A company formed by letters patent under Canadian Act 27 & 28 V. c. 23, is not bound to divide all its profits on each occasion amongst its shareholders. It can legally reserve any portion thereof at its own discretion, and a Court has no jurisdiction to regulate it. Whether the undivided portion is retained to credit of profit and loss or carried to credit of a reserve, it may lawfully in the absence of any express power, be invested on such securities as the directors may select, subject to the control of a general meeting, but not restricted to such investments as trustees are authorized to make. It is not ultra vires for a company to invest in the name of a sole trustee. He is strictly accountable, but the dissentient shareholders are not entitled to an injunction against the directors and the company in respect of such investment so long as it appears to be bona fide. Where a director purchased property without mandate from the company and under such circumstances as did not make him a trustee thereof for the

company, and thereafter resold the same to the company at a profit:—Held, that whether or not the company was entitled to a rescission of the contract of resale, it was not entitled to affirm it and at the same time treat the director as trustee of the profit made. In re Cape Breton Co., 26 Ch. D. 221, 29 Ch. D. 795, approved. Judgment in 21 Occ. N. 16, 27 A. R. 540, varied. *Burland* v. *Earle*, [1902] A. C. 83.

Subscription — *Allotment — Failure to Organize Company — License — Insurance Act.*]—To constitute a binding contract to take shares in a company, when such contract is constituted by application and allotment, there must be an application by the intending shareholder, an allotment by the directors of the company of the shares applied for, and a communication by the directors to the applicant of the fact of the allotment having been made. The subscription for stock amounts to nothing more than an offer, and requires to be completed by an allotment of stock to the subscribers. The company in question here never was organized; it had no business existence; it never had stock to allot; it never had directors; and therefore it never could make an allotment:—Held, also, that, as no license was obtained by the company from the Minister of Finance within two years from the passing of the Act incorporating the company, such Act expired and ceased to be in force on the 13th June, 1900, and the company ceased to exist. The Insurance Act, R. S. C. c. 124, s. 24. *Hodgins* v. *O'Hara*, 22 Occ. N. 29, 133.

Subscription — *Condition — Notice of Allotment—Contributory.*]—Where an applicant had agreed to take shares in a company conditional on his receiving certain moneys which would enable him to pay for them:—Held, that he had the right to withdraw his application, as he did, not having received any formal notice of allotment, by informing the company of his inability, owing to non-receipt of the moneys, to pay for the shares, and that he was not liable as a contributory. *In re Publishers' Syndicate, Mallory's Case*, 22 Occ. N. 162, 3 O. L. R. 552, 1 O. W. R. 142.

Subscription—*Conditions not Fulfilled—Representation of Agent of Company—Materiality—Untruth.*]—Action brought by incorporated body to recover $500, the amount of 5 shares of plaintiff's capital stock for which the defendant subscribed on 20th April, 1892. Defendant set up that he was induced to become a subscriber for the shares by the representations of plaintiff's agent, that Mr. G. A. Cox and Mr. H. A. Massey had each subscribed or promised to subscribe for $10,000 of stock, upon the condition that subscriptions for $50,000 were obtained on or before 1st January, 1893; that defendant's subscription was required in order to assist in making up what was still required of the $50,000, and that his subscription would not be binding unless the $50,000, including the subscription of Messrs. Cox and Massey, were fully subscribed on or before 1st January, 1893. It was proved that neither Mr. Cox nor Mr. Massey had subscribed or promised to subscribe for $10,000 each, either conditionally or unconditionally, nor did they do so at any time after defendant's subscription, nor was $50,000 subscribed on or before 1st January, 1893:—Held, that the representations were proved to have been made; that, by reason of them, defendant was induced to subscribe for the stock "as a sort of escrow; it was not to be effective nor operative unless the $50,000 was obtained within the limited period of time." The circumstances of this case seem to bring it within the rule laid down in Wallis v. Littell, 11 C. B. N. S. 369, *Ontario Ladies' College* v. *Kendry*, 5 O. W. R. 605, 10 O. L. R. 324.

Subscription—*Contract by Deed—Delivery — "Issue" — "Allotment" — Calls — Resolutions—"Offer" — Preference Shares.*]—Held, reversing the judgment of Lount, J., 2 O. L. R. 390, 21 Occ. N. 500, that the defendant's undertaking to take shares in the plaintiff company, when issued and allotted, being by deed, for valuable consideration, and being delivered to an agent of the company, was not revocable as a mere offer would be, and that the resolutions of the company and the letters to the defendant were a sufficient "issue" and "allotment" of the shares. Xenos v. Wickham, L. R. 2 H. L. 296, followed; Nasmith v. Manning, 5 A. R. 126, 5 S. C. R. 417, distinguished:—Held, also, that (provision having been made therefor in the memorandum and articles of association,) the preference shares of the company were lawfully created. *Nelson Coke and Gas Co.* v. *Pellatt*, 22 Occ. N. 382, 4 O. L. R. 481, 1 O. W. R. 595.

Subscription—*Mining Company—Shares—Failure of Consideration—Abandonment of Enterprise — Promissory Notes — Effect of Renewals.*]—Action on bill of exchange for $3,046.85 drawn by plaintiffs and accepted by defendant. Defendant pleaded an entire failure of consideration, and counterclaimed for $3,000 paid by him to plaintiffs on 17th September, 1899, to take up a promissory note which had been made by him to plaintiffs, upon the ground that the consideration had entirely failed: — Held, plea good defence. Plaintiff argued that the effect of two renewals was to estop the defendant from the defence of want of consideration in the original note:—Held, if an original note is voidable for failure of consideration no amount of renewals will cure the defect, unless some new consideration is introduced, and that a mere compliance with defendant's request to renew does not constitute such consideration:—Held defendant entitled to recover back his $3,000 paid on other note. *Bullion Mining Co.* v. *Cartwright*, 5 O. W. R. 522, 6 O. W. R. 505, 10 O. L. R. 438.

Subscription—Misrepresentation— Agent—Settlement of action—Threats. *McCallum* v. *Sun Savings and Loan Co.*, 1 O. W. R. 226.

Subscription — *Principal and Agent — Authority of Agent—Conditional Agreement.*]—S. signed a subscription for shares in a company to be formed and a promissory note for the first payment, both of which documents he delivered to the promoter of the company, to which they were transferred after incorporation. In an action for payment of calls, S. swore that the stock was to be given to him in part payment for the goodwill of his business, which the company were to take over. The promoter testified that the shares subscribed for were to be in addition to those to be received for the goodwill:—Held, that, though S. could, before incorporation, constitute the promoter his agent to procure the

allotment of shares for him and give his note in payment, yet the possession by the promoter did not relieve the company from the duty of inquiring into the extent of his authority, and, whichever of the two statements at the trial was true the promoter could not bind S. by an unconditional application. *Ottawa Dairy Co.* v. *Sorley*, 24 Occ. N. 202, 34 S. C. R. 508.

Subscription—*Prospectus—Unreasonable Delay—Departure—Res Judicata.*] — On the 28th January, 1899, the defendant and others subscribed for a certain number of shares of the stock of a projected company, the purpose of which was to build an hotel. The prospectus stated that it was intended to apply for a charter forthwith, and to commence building as soon as $40,000 of the stock had been subscribed, and that the buildings were estimated to cost about $45,000, and to be ready for opening at the beginning of the summer season of 1899. The company, however, was not formed, nor was anything done towards getting the hotel ready for occupation by the time mentioned. Prior to the 24th October, 1899, only $28,700 had been subscribed, but additional subscriptions obtained on that date and shortly afterwards brought the total up to $40,150. On the 24th November, 1899, letters patent of incorporation were issued, About the 1st July, 1900, the hotel was completed, and cost about $15,000 more than originally contemplated:—Held, that, as the undertaking had not been proceeded with within a reasonable time from its inception, and as the defendant had not at any time after the 1st October, 1899, agreed to be bound by his subscription, or approved of then proceeding with the erection of the hotel, or that it should cost the sum it was afterwards erected for, he could not now be held bound to pay for the shares. Semble, that a judgment in an undefended action brought by the defendant against the company, declaring that the defendant was not a shareholder, was not a defence to this action, brought by other subscribers to compel the defendant to pay for the shares he had subscribed. Change in the law as to who become shareholders in a company incorporated by letters patent (R. S. O. 1897 c. 191 s. 9). *Patterson* v. *Turner*, 22 Occ. N. 163, 3 O. L. R. 373, 1 O. W. R. 82.

Transfer—*Company By-law—Refusal to Register — Mandamus — Ontario Joint Stock Companies Act.*]—Motion for mandamus to compel the Trusts and Guarantee Co., Limited, as transfer agents and registrars of the Imperial Starch Co., Limited, to rectify the register of the Imperial Starch Co., Limited, and to enter and record the transfer of 2 shares of the preference stock of the Imperial Starch Co., Limited, from William M. Leacy to the applicant:—Held, while by s. 28 of the Act the directors may refuse to allow the entry to be made of any transfer of shares of stock in any such book whereof the whole amount has not been paid in, but their power does not extend to fully paid up shares. Order for the transfer of the 2 shares to the applicant. *Re Benson and Imperial Starch Co.*, 5 O. W. R. 591, 10 O. L. R. 22.

Transfer—*Refusal to Register—Temporary Closing of Transfer Books—Mandamus—Absence of Statutory Authority.*]—Motion to compel the trust company to record a transfer to Panton of 4 shares of common stock in the steel company. The transfer was in order and would have been recorded by the secretary of the trust company but for the instructions they received from the secretary of the steel company on the 21st July not to do so until after 30th July. Order made as asked. *Re Panton and Cramp Steel Co. and National Trust Co.*, 4 O. W. R. 109, 25 Occ. N. 42, 9 O. L. R. 3.

Transfer—*Certificate—Lien — By-laws.*] —A provision in a certificate of ownership of paid up shares issued by a company incorporated by special Act, that "the articles of the company are part and parcel of this contract," is not sufficient to make applicable to a purchaser in good faith of the shares a by-law of the company purporting to give to the company a lien on all shares held by any shareholder for "any and all amounts that may be owing by the shareholder or his assigns to the company," and the purchaser is, upon compliance with the necessary formalities, entitled to be registered as transferee. Order of Ferguson, J., 3 O. W. R. 156, affirmed. *In re McKain and Canadian Birkbeck Investment and Savings Co.*, 24 Occ. N. 128, 7 O. L. R. 241, 3 O. W. R. 335.

Transfer—*Irregularity — Interest of Infants—Remedy — Restitution of Benefit.*] — Shares of stock in a joint stock company, belonging to a person deceased, and in which stock his minor children, after his death, were entitled to a share, were irregularly transferred to the widow individually, without any authorization having been obtained for the transfer. The widow, however, used the shares in good faith, and to the best advantage of the minors, in settling debts of the estate, which was virtually insolvent:—Held, that the children having benefited to the full value of the shares, or more, and having made no offer of restitution of such benefit, had no claim against the transferor, or against the company itself, to recover the shares or their value: arts. 1011, 1139, 1144, C. C. *Acer* v. *Percy*, Q. R. 24 S. C. 378.

Transfer—Refusal to register — Mandamus. *Re Dominion Oil Co.*, 2 O. W. R. 826.

Transfer — *Subscription — Payment to Director — Winding-up — Contributories.*] — Certain persons assumed to buy shares of a company and received certificates therefor. They signed powers of attorney authorizing an agent of the company "to receive from the vendors a transfer" of shares and to sign an acceptance. No transfers were made, but the powers of attorney were pasted in the transfer book. Several months afterwards a director filled in opposite the names of the appointees transfers of shares as from himself, and procured the agent as their attorney to accept the transfers, for which the agent was paid a commission out of the company's funds:—Held, in winding-up proceedings, that the transfers were invalid and the director was a contributory in respect of the shares which he purported to transfer. The payment of the commission to the agent was bad, and the director was liable to refund it. Shortly after the incorporation of the company, at a meeting of the provisional directors, who were then the only shareholders, a resolution was passed authorizing the payment to one of the provisional directors, afterwards a director, of $300 out of capital, for alleged services. It did not appear that any service had been rendered

by him. The minutes of this meeting were confirmed at a subsequent shareholders' meeting. At the time no profits had been made and nothing paid on account of the stock. No by-law was passed. The payment was subsequently made:—Held, that the director was bound to refund. *In re Publishers' Syndicate, Paton's Case*, 5 O. L. R. 392, 2 O. W. R. 65.

VII. Transfer of Assets.

Effect of.]—A transfer of the assets of one joint stock company to another does not merge the two companies into one. *Maple Leaf Rubber Co.* v. *Brodie*, Q. R. 18 S. C. 352.

VIII. Winding-up.

Action against Company — *Leave of Court.*]—An action brought against a company in course of winding-up, without the permission of a Judge will be dismissed upon exception to the form. *Soucy* v. *Electric Printing Co.*, 5 Q. P. R. 105.

Action against Company — *Leave of Court.*]—An action brought against a bank in liquidation, without the previous authorization of the Court, will be dismissed upon exception to the form. *Marcotte* v. *Turcot*, 4 Q. P. R. 342.

Action against Company — *Rights of Shareholders—Contestation in Winding-up—Litispendence — Fraud and Negligence of Officers — Validity of Warehouse Receipts — Principal and Agent—Liability of Both.*] — By by-law of a cold storage company, the president, vice-president, and secretary-treasurer had power to sign all negotiable instruments, One of the officers of the company, thus expressly authorized, signed and issued fraudulently a number of warehouse receipts previously signed by the other officer of the company, who had to be a party to them. There were no goods in storage to represent these receipts:—Held, that a shareholder of a company, from the day in which it is put in liquidation, must be considered a creditor, on a contestation of a claim made against the company, and he is entitled to demand, by direct action, what he might have demanded on a contestation of a claim against the company. 2. Litispendence cannot be pleaded, to such direct action, on the ground that a contestation of the claim has been filed in the hands of the liquidator, where the contestation was filed subsequent to the institution of the direct action. 3. Whenever the very act of the agent is authorized by the terms of the power, that is to say, whenever, by comparing the act done by the agent with the terms of the power intrusted to him, the act is in itself warranted by the terms used, such act is binding on the principal as to all persons dealing in good faith with the agent. The apparent authority is the real one. Consequently, warehouse receipts of a cold storage company, signed fraudulently by one and negligently by another of the company's officers expressly authorized to sign such receipts, are valid as between the company and third persons acting in good faith. 4. The liability of the company being that resulting from an offence, the fact that other persons may be responsible does not diminish the liability of the company, which is jointly and severally liable with the others responsible for such offence. *Ward* v. *Montreal Cold Storage Co.*, Q. R. 26 S. C. 310.

Action by Liquidator — *Dismissal — Leave to Appeal.*]—The liquidator of a company in liquidation, whose action has been dismissed, may with the leave of a Judge, appeal from that judgment to the Court of Review. *Montreal Coal and Towing Co.* v. *Standard Life Assurance Co.*, 6 Q. P. R. 243.

Action by Liquidator — *Motion for Leave — Notice to Proposed Defendant.*]—A petition whereby the liquidator of a company asks to be allowed to sue one of the debtors thereof, need not be served upon the debtor, before its presentation to the Court or Judge. *Comic Opera Co. of Montreal* v. *Desaulniers*, 7 Q. P. R. 83.

Action for Calls—*Counterclaim for Rescission—Leave to Proceed Refused—Leave to Appeal.*]—Previous to an order for the winding-up of the company under the Dominion Winding-up Act, an action had been brought by the company against a shareholder for unpaid calls, and the shareholder had delivered a defence and counterclaim praying that his application for shares should be cancelled on the ground of misrepresentation and of false and fraudulent statements in the prospectus: —Held, that the shareholder could have in the winding-up proceedings all the relief that he claimed by his defence and counterclaim; and his application for leave to proceed in the action notwithstanding the winding-up order, was refused, but leave to apply again was reserved. Dictum of Strong, C.J., in In re Hess Manufacturing Co., 23 S. C. R. 644, at pp. 665-6, explained. Leave to appeal from the order of a Judge in Court affirming the dismissal by the referee of the application for leave to proceed, was refused. *In re Pakenham Pork Packing Co.*, 24 Occ. N. 18, 6 O. L. R. 582, 2 O. W. R. 951, 983, 4 O. W. R. 22.

Agreement between Liquidator and Claimant—*Creditors—Setting Aside—Mala Fides—Meetings of Creditors.*]—An arrangement entered into between the liquidator of a company in liquidation and a claimant under s. 61 of R. S. C. c. 129, and authorized by the Court, is binding on the creditors of the company, and others interested; it can only be attacked on the ground of mala fides. The purpose of 62 & 63 V. c. 43, which permits meetings of and consultations of creditors in certain cases, is not to repeal or modify s. 61, but to amplify it. *Ward* v. *Mullin*, Q. R. 14 K. B. 49.

Appointment of Liquidator—Manager of business of principal creditor—Notice to shareholders—Sale of assets—Completion—Removal of liquidator. *Re Guelph Linseed Oil Co.*, 2 O. W. R. 1151.

Calls—*Action for—Petition by Liquidator to Continue Action — Opposition to.*] — A shareholder, sued for calls by a company which has gone into liquidation after action brought, cannot oppose the petition of the liquidator for permission to prosecute the action in the name of the company, by alleging that the obligation of the defendant to con-

tribute to the assets of the company can only be worked out by virtue of a fresh call made by the liquidator, which must be based upon the amount necessary to discharge the debts of the company and the costs of liquidation, which would render useless the former calls, but the shareholder will be permitted to plead these grounds in the action continued by the liquidator. *Victoria Mutual Fire Ins. Co.* v. *Derome*, Q. R. 21 S. C. 319.

Claim for Money Lent—*Power to Borrow—Delegation of Powers—Manager—Seal of Company.*] — The vice-president and the manager of a loan and savings company instructed a broker to buy shares of the company's stock "to keep it up." He did so, paying a ten per cent. margin upon the purchase with the funds of the company paid to him by cheque, and the balance by a loan obtained on the shares bought, which were transferred to the lender. This was without the knowledge or sanction of the board of directors. Just before proceedings were taken to wind up the company the manager signed his name as manager and affixed the seal of the company to a writing addressed to the lender acknowledging the indebtedness of the company to the lender:—Held, that the manager and vice-president had no power by delegation or otherwise to borrow money for the company, and that the affixing of the seal to the document referred to was an unauthorized act of the manager; and, therefore, the claim of the lender to prove as a creditor of the company for the amount advanced upon the stock could not be allowed. *In re Farmers' L. & S. Co.—Ex p. Home S. & L. Co.*, 21 Occ. N. 383.

Claims of Creditors — *Contestation — Particulars—Time.*]—In a contestation of the claim of a creditor against an insolvent company in liquidation, it is too late for the contestant to demand particulars a month after the filing of the contestation of the claim. *In re Montreal Cold Storage and Freezing Co., Mullin's Claim*, 4 Q. P. R. 340.

Claims of Creditors — *Delay in Presenting—Excuse — Merits — Leave to Renew Application—Statute.*]—In the winding-up of a life insurance company, the liquidator's list of claimants was filed in the Master's office on 5th June, 1900, and a proper advertisement was published requiring claims to be delivered to the liquidator on or before the 7th May, 1900. On the 19th April, 1901, the claimant applied to the Master to amend the list of claimants by increasing the amount for which he was entitled to rank:—Held, that the claimant coming in after the time allowed for filing claims, was bound to shew upon affidavit some prima facie case of merit, and to explain the reasons for his delay in coming in with his claim. The claims of creditors should not be shut out so long as there remains unadministered a portion of the fund applicable for their payment. Even where an application is dismissed for want of an affidavit shewing merits and explaining delay, the dismissal may well be without prejudice to a further application upon proper material; but in this case the rights of the claimant had been entirely cut off by an enactment of the Legislature, to which a retrospective effect had been given, and it would, therefore, be of no assistance to the claimant to permit him to renew his application. *In re Merchants' Life Association of Toronto, Hoover's Claim*, 22 Occ. N. 21.

Claims of Creditors — *Lien on Goods Sold—Right of Liquidator—Conditional Sales Act—Bills of Sale Act.*]—The claimants sold the company a machine upon an order signed by the company, the conditions of which were that the company should pay a part of the price in cash and the balance in instalments, with interest on such instalments payable with the last of them, and that the title should not pass to the company until the moneys payable by them under the order, as well as under any other orders which might be given by the company to the claimants, should be paid. At the time of the commencement of the winding-up of the company, one instalment, the interest, and a further sum for goods ordered after the first order, remained unpaid. The liquidator came into possession of the machine, and sold it to H., subject to an alleged lien in favour of the claimants for the amount of the unpaid instalment only:—Held, that the rights of the claimants under the contract still existed, and were not affected by the Bills of Sale and Chattel Mortgage Act, nor by the Act respecting Conditional Sales of Chattels, nor by the liquidator's sale to H., and they were entitled to recover the full amount due under the terms of the order out of the estate. *In re Canadian Camera and Optical Co., A. R. Williams Co.'s Claim*, 22 Occ. N. 677, 2 O. L. R. 677.

Claims of Creditors—*Secured Creditors — Withdrawal.*] — Creditors holding fully secured claims and content to rely thereon, without seeking to share in the distribution of the other assets, cannot be compelled to file their claims in the winding-up proceedings under the Dominion Winding-up Act, R. S. C. c. 129, and have them adjudicated upon therein; and where such creditors without any intention to submit to such adjudication, had filed with the liquidator affidavits proving their claims, leave was given them to withdraw such claims, leave also being given to one of such creditors, who had an unsecured debt, to file a claim limited thereto. *In re Brampton Gas Co.*, 22 Occ. N. 370, 4 O. L. R. 509, 1 O. W. R. 543.

Claims of Creditors—*Set-off.*]—Against a claim of a person upon the assets of a company in liquidation, based upon a lease, the company cannot set off damages which it alleges it has suffered by reason of the claimant; and allegations of such damages will be struck out upon demurrer. *In re Montreal Cold Storage and Freezing Co., Mullin's Claim*, 4 Q. P. R. 341.

Compromise of Claim by Liquidator —Approval of referee—Application by debenture holders for leave to appeal as a class—Previous appointment of solicitors — Special purpose — Costs. *Re Farmers' Loan and Savings Co.*, 2 O. W. R. 854, 3 O. W. R. 837.

Contestation of Claims—*Security.*] — The security required by the Winding-up Act, R. S. C. c. 129, applies only to contestations of claims filed or admitted by the dividend sheet, and not to a contestation of the whole dividend sheet. *In re Union Brewery and Hyde*, 6 Q. P. R. 395.

Contributory—Agreement by solicitor to pay for shares by services—Trustee—Dismissal of solicitor—Discharge from liability. *Re Union Fire Ins. Co., Caston's and Cornell's Cases*, 6 O. W. R. 430.

Contributory—*Calls—Increase of Burden on Shareholders.*]—Section 49 of the Winding-up Act provides that no calls shall compel payment before maturity thereof, and that the extent of the liability of any contributory shall not be increased by anything in the section contained:—Held, that, under the above section, the liquidator of a company in liquidation cannot, with or without the authorization of the Court, make calls of such a nature as to make the obligations of the contributory more onerous than provided by the charter incorporating the company. *In re Victoria and Montreal Fire Ins. Co. and Brown and Hyde*, Q. R. 26 S. C. 282.

Contributory — *Consideration for Shares —Appeal—Reversal of Judgments Below.*]—H. and others, interested as creditors and otherwise in a struggling firm, agreed to purchase the latter's assets and form a company to carry on its business, and they severally subscribed for stock in the proposed company to an amount representing the value of the business after receiving financial aid which they undertook to furnish. A power of attorney was given to one of the parties to purchase the assets, which was done, payment being made by the discount of a note for $2,000 made by H., and indorsed by another of the parties. The company having been formed, the assets were transferred, and the note was retired by a note of the company for $4,000, indorsed by H., which he afterwards had to pay. H. also, or the company in Buffalo of which he was manager, advanced money to a considerable amount for the company, which eventually went into liquidation. After the company was formed, in pursuance of the original agreement between the parties, stock was issued to each of them as fully paid up according to the amounts for which they respectively subscribed, and in the winding-up proceedings they were respectively placed on the list of contributories for the total amount of said stock. The ruling of a referee in this respect was affirmed by a Judge of the High Court (3 O. W. R. 190), and by the Court of Appeal (4 O. W. R. 379, sub nom. Re Baden Machinery Manufacturing Co.):—Held, reversing the judgment of the Court of Appeal, Davies and Nesbitt, JJ., dissenting, that, as all the proceedings were in good faith, and there was no misrepresentation of material facts, and as H. and S. had paid full value for their shares, the agreement by which they received them as fully paid up was valid, and the order making them contributories should be rescinded:—Held, per Davies and Nesbitt, JJ., that, as H. and S. did not pay cash or its equivalent for any portion of the shares as such, the order should stand:—Held, also, that it is the duty of the Supreme Court, if satisfied that the judgment in appeal is erroneous, to reverse it even when it represents the concurring view of three or any number of successive Courts before whom the case has been heard. *Hood* v. *Eden*, 25 Occ. N. 115, 36 S. C. R. 476.

Contributories — *Defence—Organization of Company.*]—In proceedings to put an alleged shareholder on the list of contributories and to obtain payment of the balance of stock subscribed by him, he is not entitled to plead that conditions precedent to the organization of the company were not fulfilled, and that the company never validly existed. Common v. McArthur, 29 S. C. R. 239, followed. *In re Victoria Montreal Fire Ins. Co.*, 6 Q. P. R. 302.

Contributory — Payment for shares — Conditional agreement—Condition subsequent. *Re Wiarton Beet Sugar Co., Jarvis's Case*, 5 O. W. R. 542, 637.

Contributory — Payment for shares — Consideration—President of company—Liability for shrinkage in assets. *Re North Bay Supply Co.*, 6 O. W. R. 85.

Contributories — Shares—Payment — Evidence of. *Re Baden Machinery Manufacturing Co.*, 3 O. W. R. 190, 4 O. W. R. 379.

Contributories—Subscriptions for shares —Payment—Transfer of property—Defective organization of company. *Re Wakefield Mica Co.*, 4 O. W. R. 535, 5 O. W. R. 94.

Contributories—Subscription for shares —Payments on—Appropriation — Statute — Making shareholder incorporator of a new company—Powers of Dominion Parliament—Acquiescence. *Re Atlas Loan Co., Green's Case*, 3 O. W. R. 604.

Contributory — Shares—Allotment: *Re Publishers' Syndicate, Hart's Case*, 1 O. W. R. 508.

Contributory — Shareholder — Bonus shares — Liability on. *Re Wiarton Beet Sugar Co., Kydd's Case*, 6 O. W. R. 491, 590.

Contributory — Shareholder—Subscription—Transfer—"Entry duly made"—Allotment—Books of company — Liability. *Re Sprouted Food Co., Hudson's Case*, 6 O. W. R. 514.

Contributory — *Allotment — By-law — "Otherwise Ordain"—Winding-up.*] — Hill signed application for 1 share of The Provincial Grocers Limited. On receipt of the application the secretary of the company placed Hill's name on the "shareholders' list" of the company, notified him of the receipt of his application and drew on him for $10, the first payment, which he paid:—Held, all these acts must be regarded as evidence that the directors, instead of passing a by-law, had "otherwise ordained" the allotment of the 1 share of stock to Hill, and the respondent was therefore placed on the list of contributories in the winding-up of the company, to the amount of $90. *Re Provincial Grocers Limited, Hill's Case*, 6 O. W. R. 606, 10 O. L. R. 501.

Contributory — *Shares Issued as Fully Paid — Company Winding-up.*]—Appeal by Alexander McNeil from a portion of an order of J. A. McAndrew, Official Referee, made in proceedings for the winding-up of the company, setting the appellant upon the list of contributories for $1,675, a balance due upon 238 shares; and an appeal by the liquidator of the company from a portion of the same order, which allowed a set-off of $1,500 for advances made by McNeil for the benefit of the company, pro tanto, against the $1,675:—Held, McNeil had no defence to the application of the liquidator to put him on the list of contributories for the amount actually unpaid in respect of the shares:—Held, the right of set-off did not exist, on the broad ground of absence of mutuality between the

claim of the liquidator against McNeil and McNeil's claim as a creditor of the company. Liquidator's appeal allowed with costs. *Re Wiarton Beet Sugar Manufacturing Co., McNeil's Case.* 5 O. W. R. 637, 10 O. L. R. 219.

Contributory—Shares issued as paid—Jurisdiction of Master to inquire as to actual payment — Book-keeping entries — Credit of company's own moneys — Audit — Estoppel. *Re Harris, Campbell, and Boyden Furniture Co. of Ottawa, Douglas's Case,* 5 O. W. R. 514, 649.

Contributory—Subscription — Covenant under seal — Attempted withdrawal—Allotment—Notice—Conduct of company. *Re Provincial Grocers Limited, Calderwood's Case,* 6 O. W. R. 744, 10 O. L. R. 705.

Contributory — Subscription for shares—Extrinsic evidence—Placing shares—Commission—Payment for shares—Contract — Consideration—Transfer of assets: *Re Co-operative Cycle and Motor Co.,* 1 O. W. R. 778.

Costs of Company Appearing on Petition.]—*Re Wiarton Beet Sugar Co.,* 3 O. W. R. 393.

Costs of Second Petition.]—*Re Algoma Commercial Co., Re Algoma Steel Co., Re Lake Superior Power Co.,* 3 O. W. R. 140.

Creditors' Claim — Banking company — Liquidators' accounts — Guarantee premiums paid by liquidator. *Re Central Bank of Canada,* 6 O. W. R. 372-3.

Creditors' Claims—*Breach of Contract—Damages.*]—On payment of a subscription fee of $10.50 to a publishing company, certificates were issued by the company to the subscribers, guaranteeing to such purchasers the privilege for five years of purchasing all books, magazines, periodicals, and other printed matter, at the prices quoted in the company's catalogues and bulletins, but subject to ordinary trade fluctuations, and undertaking to act for such subscribers as agents for the purchase, at lowest possible prices, of the books, etc., not contained in such catalogue. The certificates were not transferable and were only available to subscribers for their personal and family use and benefit. Before the expiry of the above period, an order was obtained for the winding-up of the company, whereupon certain subscribers claimed to rank on the assets as creditors in respect of damages alleged to have been sustained by them through the company's failure to supply them with books, etc., during the residue of the term:—Held, that only nominal damages were recoverable, for beyond this the damages were of too speculative or conjectural a nature to be maintained; nor could any part of the subscriptions be recovered back on the ground of it being unearned. Decision of Falconbridge, C.J., 1 O. W. R. 725, reversed. *In re Publishers' Syndicate,* 24 Occ. N. 122, 7 O. L. R. 223, 3 O. W. R. 114.

Creditors' Claims — *Loan Company — Priorities—Debenture Holders.*]—Appeal by the Elgin Loan Co. from the disallowance by the Master in Ordinary of their claim, in the proceedings to wind up the Atlas Loan Co., to rank upon the estate of the latter in respect of a debenture of that Co. for $55,000, dated 31st May, 1902, payable to the Elgin Loan Co., or order, or 2nd January, 1907, with interest at 5 per cent. per annum, payable half-yearly, the whole being collaterally secured by 375 shares of the capital stock of the Dominion Loan Co. Finding of the Master reversed, and a reference back, with directions to allow the claim of the Elgin Loan Co. to the extent of the amount of the loan and interest upon it, and with leave to the Elgin Loan Co., if they so desired, to amend the proof by making an alternative claim in respect of the moneys on deposit with the Atlas Loan Co., and the Elgin Loan Co. must value their security and give credit accordingly. *Re Atlas Loan Co., Elgin Loan Co.'s Claim,* 3 O. W. R. 794, 5 O. W. R. 24, 9 O. L. R. 250.

Creditors' Claims — *Shareholders Contributing to Reserve Fund.*]—By s. 17, s.-s. 6, of the Loan Corporations Act, R. S. O. 1897 c. 205, "it shall be lawful for any such corporation to constitute and maintain a reserve fund out of the earnings or other income of the corporation not required for the present liabilities of the corporation." By a by-law of the above named company it was provided that "a reserve fund shall be maintained consisting of the sums already set apart and forming such fund, together with such sums as may be contributed and added thereto, or as the directors shall, from time to time, deduct or retain from the undivided profits, and together with the profits and increase of such sum." An amount equal to 26 per cent. of the amount of the capital stock of the company having been previously set apart as a reserve fund, the shareholders of the company were, in 1901, invited by the directors to make it up to 100 per cent. by contributions to the reserve fund. No further by-law was passed. Many of the shareholders paid to the company sums which were credited to the reserve fund, and upon which they received interest at dividend rates:—Held, that in the winding-up of the company the creditors who had so contributed were not entitled to rank as creditors upon the assets of the company in respect of the sums so contributed. *In re Atlas Loan Co. (Claims on Reserve Fund),* 24 Occ. N. 321, 3 O. W. R. 604, 688, 794, 5 O. W. R. 452, 7 O. L. R. 706, 9 O. L. R. 468.

Creditors' Claims—Salaries of directors—Resolution of board not confirmed by shareholders. *Re Ontario Express Co., Directors' Claims,* 6 O. W. R. 431.

Creditors' Claims—Valuing security — Guaranty. *Re Patent Cloth Board Co., Ex parte Bank of Ottawa and Worthington,* 3 O. W. R. 373, 595.

Creditor — *Compromise with Liquidator—Account—Jurisdiction of Master.*] — An appeal by a bank from an order of the Master in Ordinary, in proceedings under the Winding-up Act, directing the bank to furnish the liquidator with an account of all moneys received from the proceeds of the insurance moneys referred to in an agreement between the bank and the liquidator, and an account of all expenditures, and directing the bank

to credit and allow the liquidator the amount of the counsel fees taxed in the bills of costs in certain actions brought for the recovery of insurance moneys. The agreement provided that the bank should pay over to the liquidator ten per cent. of the net proceeds from all insurance policies; that the liquidator was not to question the validity of the assignment of the policies to the bank; and that the liquidator was to instruct counsel to appear for the bank and as formally representing the bank, but in the interest of the creditors, and assist to the fullest extent possible the recovery of the claims:—Held, that the agreement was a mere compromise between two persons at arms' length. The bank was simply an outsider compromising with the liquidator, and upon the facts nothing had occurred to confer any jurisdiction upon the Master. *In re John Eaton Co.*, 21 Occ. N. 586.

Creditors Opposing Petition—*Neglect to Enter Appearance—Costs.*]—Held, that creditors and debenture holders who neglected to enter an appearance to a winding-up petition, as required by Rule 56 of the Winding-up Rules passed by the Judges on the 1st October, 1896, but who appeared by the counsel on the return of the petition, which was dismissed with costs, were not entitled to costs. The fact that their counsel was heard without objection by the petitioner's counsel makes no difference. *In re Albion Ironworks Co.*, 10 B. C. R. 351.

Debenture-holders — *Mortgage — Receiver.*]—In a suit to enforce a mortgage to secure debentures issued by the defendant company, a receiver was appointed. Subsequently a winding-up order was made against the company, and official liquidators were appointed. The liquidators disputed the validity of the mortgage and the extent of the property covered by it:—Held, that the receiver should not be discharged. An order appointing a receiver on behalf of debenture-holders secured by the mortgage was varied to be limited to property described in the mortgage. *Bank of Montreal* v. *Maritime Sulphide Fibre Co.*, 22 Occ. N. 37, 2 N. B. Eq. Reps. 328.

Discretion—*Assignment for the Benefit of Creditors.*]—When an assignment for the benefit of its creditors has been made by a company, a creditor of the company is not entitled as of course to a winding-up order. A discretion to grant or refuse the order exists notwithstanding the making of the assignment. Wakefield Rattan Co. v. Hamilton Whip Co., 24 O. R. 107, and Re Maple Leaf Dairy Co., 2 O. L. R. 590, approved. Re William Lamb Manufacturing Co., 32 O. R. 243, considered. Where an assignment for the benefit of its creditors had been made by a company, and its assets had been sold with the approval of the great majority of its creditors and shareholders, an application to wind up the company made by a creditor and shareholder who had taken part in all the proceedings, and had himself tried to purchase the assets, was refused. Judgment of Teetzel, J., 2 O. W. R. 834, 1031, affirmed. *In re Strathy Wire Fence Co.*, 24 Occ. N. 307, 8 O. L. R. 186, 3 O. W. R. 889.

Distress for Rent — *Sale—Leave of Court.*]—A distress for rent is not avoided by proceedings taken under the Winding-up Act, R. S. C. c. 129, to put a company into liquidation, if the distress be made before the winding-up order. Quære, whether a sale may be made under the distress without the leave of the Court. *In re Colwell* (*E. C.*) *Candy Co.*, 35 N. B. Reps. 613.

Distribution of Surplus—*Shareholders — By-laws — Resolutions.*]—A municipal water company, incorporated under the Ontario Joint Stock Companies Act, sold their undertaking and franchise to the municipality, and passed a resolution providing for payment at par value to the shareholders of the stock allotted to them in proportion to the amounts paid on their respective shares and for payment of the liabilities and the costs of winding-up, &c., and directing that the surplus should be distributed amongst the members according to their interest. By by-law of the company, holders of second preference shares were to be paid dividends at 6 per cent., and for a period of five years were not to participate further in the profits of the company. In case of default in payment of any dividend, the deficiency was to be paid out of the net profits of succeeding years, and no dividend was to be paid on the ordinary stock until such deficiency should be fully paid. Second preference shareholders also had the right, under the by-law, upon foregoing their secured dividend of 6 per cent., to surrender their shares and receive the par value thereof, or a corresponding number of ordinary shares, in which case they would have the same rights and privileges as the ordinary shareholders; but none of them exercised this option. The by-law also provided that, in the event of the company being wound up, if any surplus of the capital assets of the company was to be returned to shareholders, the holders of second preference shares were to be paid the full amount of their shares and all dividends before the return of the capital of any ordinary shares, "and, subject thereto and to the first preference stock, the holders of the ordinary shares shall be entitled to such surplus of the capital assets."—Held, that the second preference shareholders were not entitled to share in the surplus assets:—Held, also, that the surplus was divisible among the ordinary shareholders in proportion to the amount of their shares, not to the amounts paid on their shares. Birch v. Cropper, 14 App. Cas. 525, followed. *Morrow* v. *Peterborough Water Co.*, 22 Occ. N. 326, 4 O. L. R. 324, 1 O. W. R. 512.

Execution — *Opposition — Costs.*] — A party attempting to execute a judgment against the property of a company in liquidation will be adjudged to pay the costs incurred by an opposition made to such execution by the liquidator. *Great North-Western Telegraph Co.* v. *Le Monde Journal Co.*, 5 Q. P. R. 379.

Filing Exception to the Form—*Authorization of Court.*]—An exception to the form filed by a company in liquidation without the authorization of the Court or Judge will be dismissed with costs. *Desjardins* v. *Laurie Engine Co.*, 7 Q. P. R. 228.

Final Order—*Appealable Order — Order Dissolving Company—Order Rescinding.*] — On the 24th March, 1902, a County Court Judge made an order, upon an affidavit of

one of the liquidators, declaring that the association should be and was dissolved. On the 21st June, 1902, upon the application of a certain dissatisfied shareholder, an order was made by the Judge revoking his former order, and also another order which had been made by him on the 7th April, 1902, that no action should be proceeded with against the association except by leave of the Court:—Held, that the order of the 21st June, 1902, was an appealable order, for, even if the appeal to the Court of Appeal given by s. 27 of the Winding-up Act was to be restricted in its construction to appeals from final orders, yet the order of the 21st June, 1902, might be properly described as a final order, since it put an end to the order of dissolution theretofore made:—Held, also, Maclennan, J.A., dissentiente, that the County Court Judge had no authority to make an order such as the one of the 21st June, 1902, inasmuch as he had no other material before him when making the order than he had when making that of the 24th March, and there was no reason for saying that he had been misled in making the former order or that any fact had been suppressed; and that, therefore, the proper way to have attacked the order of the 24th March was by appeal, and not by application to the Judge to rescind it after it had been acted upon and become effective. *In re Equitable Savings, Loan, and Building Association*, 23 Occ. N. 182, 6 O. L. R. 26, 1 O W. R. 571, 2 O. W. R. 366.

Final Order — —*Appeal—Security — Waiver.*]—A winding-up order is a final order. The respondent in an appeal from a winding-up order, after the time limited by s.-s. 3 of s. 27 of the Companies Winding-up Act, 1898, for furnishing security had expired, demanded security for the costs of the appeal; Held, that the respondent had waived his right to have the appeal dismissed on the ground that the security was not originally furnished in time. *In re Florida Mining Co.*, 22 Occ. N. 244, 8 B. C. R. 388.

Intervention of Creditor—*Costs.*] — The creditor of a bank in liquidation may intervene in an action begun by the liquidator against one of the debtors of such bank, even where such creditor does no more than support, for the same reasons, the position taken by the liquidator, and alleges no new facts, leaving it to the trial Court to mulct the intervenant in costs if his intervention has been inopportunely made. *Community of Sisters of Charity of Providence* v. *Bastien*, Q. R. 11 K. B. 64.

Lien of Bank on Assets—Discounts—Collateral securities — Agreement—Advances. *Re P. R. Cumming Manufacturing Co., Bank of Ottawa's Claim*, 6 O. W. R. 578.

Lien of Former Solicitor on Documents—Delivery to liquidator "without prejudice"—Payment for services — Preference over ordinary creditors. *Re Boston Wood Rim Co.*, 5 O. W. R. 149.

Liquidator—*Action Against—Leave.*]—An action cannot be brought against the liquidators of a company without leave of the Court. *Robillard* v. *Blanchet*, Q. R. 19 S. C. 383.

Liquidator — *Appointment—Notice.*] — The appointment of a liquidator for a company will be set aside if some one interested succeeds in shewing that such appointment has been made without notice to the creditors, contributories, and shareholders of the company. *Stimson* v. *North-West Cattle Co.*, 5 Q. P. R. 181.

Liquidator—*Bond of—Money Received as Assignee—Appeal—Finality of Certificate.*] —After the assignee for the benefit of creditors of an incorporated company had sold part of the assets and received the proceeds, he was appointed liquidator under the Winding-up Act and gave security by a bond which recited all the proceedings and orders, and was conditioned to be void if the liquidator should duly account for what he should receive or become liable to pay as liquidator:—Held, that the funds and property in the hands of the assignee became vested in him as liquidator upon his appointment as such, and that the sureties were responsible for his subsequent misappropriation thereof. The bond provided that the certificate of the Master in Ordinary of the amount for which the liquidator was liable should be sufficient evidence of liability as against the sureties, and should form a valid and binding charge against them:—Held, that the sureties had the right to appeal from the certificate in accordance with the usual practice of the Court. *In re Army and Navy Clothing Co. of Toronto*, 22 Occ. N. 11, 3 O. L. R. 37.

Liquidator — *Claim Accruing before Winding-up — Bank—Use of Name—Amendment.*] — Under the Dominion Winding-up Act, 1886, ss. 15 and 31, a company in liquidation retains its corporate powers, including the power to sue, although such powers must be exercised through the liquidator under the authority of the Court. The liquidator must sue in his own name or in that of the company, according to the nature of the action; in his own name where he acts as representative of creditors and contributories; in that of the company to recover either its debts or its property. Where liquidators sued in their own name to recover a debt due to the company:—Held, that the error was one of form, which the Court had power to amend under ss. 516 and 521, C. C. P. The defendant having admitted the debt and pleaded set-off, and not having excepted to the form of the action, leave to amend should have been given in the sound exercise of judicial discretion. Judgment in Q. R. 12 K. B. 120, affirming judgment in Q. R. 19 S. C. 556, reversed. *Kent* v. *Community of Sisters of Charity of Providence*, [1903] A. C. 220.

Liquidators — *Partnership — Action against Interrogatories.*] — A company in liquidation owed $642.74 for business taxes to the corporation of the City of Montreal, who sued the liquidators, G. and C., for recovery of that amount. G. and C. were made parties, not as joint liquidators, but as carrying on business together as liquidators under the firm name of G. & C. Upon default of the liquidators to answer interrogatories, the Superior Court ordered the interrogatories to be taken pro confessis and gave judgment in favour of the plaintiffs. The defendants appealed:—Held, that a liquidator appointed for a company in liquidation possessing only the powers of a judicial sequestrator, has no status to represent in an action the members of the company, who still have

the free exercise of their rights, and must sue or defend themselves before the courts. 2. Besides, in this case, the joining of the liquidators as members of a partnership of liquidators was irregular and illegal. 3. The service upon the liquidators by serving one of them at their place of business was also irregular and illegal. 4. A partnership of liquidators is a distinct entity; its members are joint liquidators as individuals and not as partners; and therefore the firm cannot be required to answer interrogatories in the name of the company of which they are liquidators. 5. The interrogatories served upon the liquidators could not affect the rights of the members of the company and could not be regarded as proof of default, because the admission which resulted from default of an answer could not be made by the liquidators, and exceeded their powers. *City of Montreal* v. *Cagnon*, Q. R. 25 S. C. 178, 6 Q. P. R. 197.

Liquidator—*Powers of—Amount in Controversy.*]—The Judge may allow the liquidator of an insolvent company to exercise his powers under the Winding-up Act without further authorization, in all cases where the amount involved is under $100. *In re Victoria-Montreal Fire Ins. Co.*, 4 Q. P. R. 315.

Leave to Proceed with Action—*Judgment against Company.*] — The fact that prior to a winding-up order judgments against the company being wound up were registered, will not deprive a mortgagee or a debenture holder of his right to obtain leave to proceed with an action to enforce his security. *In re Giant Mining Co.*, 10 B. C. R. 327.

Leave to Bring Action—*Secured Creditors—Proving Claims.*]—A secured creditor has a right to apply for and obtain leave to bring an action to enforce his security, but it is not optional for him to either prove his claim in a winding-up or else proceed with an action to enforce it, and if he does commence an action it is still compulsory on him to proceed before the liquidator under ss. 63 et seq. of the Act. *In re Lenora Mount Sicker Copper Mining Co.*, 23 Occ. N. 162, 9 B. C. R. 471.

Mechanics' Liens — *Priority—Jurisdiction to Order—Notice.*] — The holders of mechanics' liens filed against mineral claims owned by a company, which was subsequently ordered to be wound up, recovered judgment thereon in a County Court on the day on which the winding-up order was made. In the list of creditors made up by the liquidator the lien claimants did not appear as secured creditors, but as judgment creditors. The winding-up order was made on the petition of H., a surveyor, who held the field notes of the survey made by him, and who afterwards proposed that he advance the moneys necessary to obtain Crown grants of the claims, and retain a lien on them until he was paid; the liquidator applied to the Court for leave to accept the proposal, and an order was made, without notice to the lien holders, giving H. a first charge on the claims for his debt and the amount advanced by him; afterwards, on H.'s application, an order was made, on notice to the liquidator, but without notice to the lien-holders, that the claims be sold to pay his charge. The lien-holders did not appeal from either of the last orders, but applied for leave to enforce their security, and that they be declared to have priority over H.:—Held, that the order giving H. priority over the lien-holders was made without jurisdiction, and the lien-holders were not bound by it. *In re Ibex Mining and Development Co. of Slocan*, 23 Occ. N. 301, 9 B. C. R. 557.

Meeting of Creditors — Winding-up Act, R. S. C. c. 129, s. 19—Notices—Form of—Time for issuing—Objections—Waiver—Stay of proceedings—Costs. *Re Sun Lithographing Co.*, 5 O. W. R. 509, 510.

Money in Hands of Liquidator—Right of creditors to compel retention of, until claims disposed of, as against liquidator's costs. *Re Sun Lithographing Co.*, 6 O. W. R. 358.

Notice to Contributories — *Requisites of.*]—A notice that the Court will proceed to fix the list of contributories on a certain day at the court house, without indicating the hour at and the room in which such operation will take place, is insufficient, and the same should be in the form usually followed for notices of proceedings before the Superior Court. *In re Citizens Ins. Co.*, 6 Q. P. R. 275.

Order for — *Discretion to Refuse—Absence of Assets—Examination of Officers—Time for.*]—The Court has a discretion to grant or withhold a winding-up order under s. 9 of R. S. C. c. 129. Re Maple Leaf Dairy Co., 2 O. L. R. 590, followed. A company will not be compulsorily wound up at the instance of unsecured creditors, where it is shewn that nothing can be gained by a winding-up, as, for example, where there would not be any assets to pay liquidation expenses. On the hearing of a winding-up petition which was dismissed, the petitioner did not avail himself of an opportunity to examine the officers of the company:—Held, on appeal, that it was too late then to grant an inquiry. *In re Okell and Morris Fruit Preserving Co.*, 9 B. C. R. 153.

Order for — "*Just and Equitable*"—*Shareholder's Petition — Contributory.*]—An order for compulsory winding-up may be made under s. 5 of the Companies Winding-up Act, 1898 (B.C.), notwithstanding the winding-up is opposed by the company. In winding-up proceedings instituted by a shareholder it appeared that shares had been unlawfully issued at a discount and at different percentages of their face value to different purchasers; that the substratum was gone and that the company was unable to carry on business; that there was a question as to the liability of the company to the principal shareholder, who had always been in practical control of the company:—Held, that it was just and equitable that the company should be wound up. *In re Florida Mining Co.*, 22 Occ. N. 273, 9 B. C. R. 108.

Order for Sale of Assets—*Appeal from —Leave.*]—An order authorizing the liquidator of a company in liquidation under the provisions of the Winding-up Act to sell the assets of such company, under certain conditions, is not an order subject to appeal under s. 74 of the Acts. Leave to appeal refused. *In re Montreal Cold Storage and Freezing Co.*, 3 Q. P. R. 371.

Petition—Affidavits—Insufficient facts—Leave to supplement. *Re Redpath Motor Vehicle Co.*, 4 O. W. R. 515.

Petition — *Appearance — Costs — Waiver.*]—A shareholder in the company applied for a winding-up order; the petition, which was dismissed with costs, was opposed by the company, and also by certain debenture holders and creditors, who appeared by separate counsel. Rule 56 of the Winding-up Rules, passed by the Judges on the 1st October, 1896, provided that "no contributory or creditor shall be entitled to attend any proceedings before the Court, unless he is entered in a book called the 'appearance book.'" The debenture holders and creditors had not entered an appearance:—Held, that the Rule applied to proceedings before the petition had been dealt with, as well as to proceedings subsequent to a winding-up order, and so the creditors who had not entered an appearance were not entitled to costs. The fact that their counsel was heard, without objection by the petitioner's counsel, made no difference. *In re Albion Ironworks Co.*, 24 Occ. N. 300.

Petition by Shareholder—*Insolvency.*]—Petition filed under s. 8 of R. S. C. c. 129, as amended in 1899 by 62 & 63 V. c. 43, s. 4, by certain shareholders for a winding-up order, on the ground that the company were insolvent, the act shewing the insolvency being alleged to be the exhibiting by the company of a statement shewing their inability to meet their liabilities, the doing of which is by s. 5 (c) of the Act made an act of insolvency:—Held, that the inability to meet liabilities means liabilities to creditors as distinguished from liabilities to shareholders. *In re United Canneries of British Columbia, Limited*, 23 Occ. N. 254.

Petition by Shareholder — *Liabilities—Statement—Balance Sheet.*]—By s. 5 (c) of the Winding-up Act (Dominion) a company is deemed insolvent "if it exhibits a statement shewing its inability to meet its liabilities:" — Held, that the inability to meet liabilities means liabilities to creditors as distinguished from liabilities to shareholders. On the hearing of a petition based on such a statement the statement must be accepted as correct. Remarks as to company balance sheets. *In re United Canneries of British Columbia, Limited*, 9 B. C. R. 528.

Petition—*Insolvency—Consent of Company.*]—To enable a company to be wound up under the Winding-up Act, R. S. C. c. 129, it is not sufficient for the company to appear by counsel and admit insolvency and consent to be wound up, but the fact of such insolvency must be disclosed on the material on which the petition is based. *In re Grundy Stove Co.*, 24 Occ. N. 132, 7 O. L. R. 252, 3 O. W. R. 175.

Petition—*Insufficient Allegations — Evidence—Affidavits — Amendment — Terms.*]—Petition for the winding-up of the company, under the Dominion Winding-up Act, R. S. C. c. 129. The petition alleged that the company were unable to pay their debts as they became due, within the meaning of s. 5 (a) of the Act, but gave no evidence of demand in writing and neglect by the company to pay within 60 days thereafter, as required by s. 6:—Held, that s. 6 specifies the only way of proving a case under clause (a) of s. 5, and the petition must be dismissed, unless amended, and additional evidence offered, within 14 days. *In re Ewart Carriage Works, Limited*, 24 Occ. N. 374, 8 O. L. R. 527, 4 O. W. R. 149.

Petition for Order—*Previous Demand—Service of Writ of Summons—Notice of Application.*]—Service of the specially indorsed writ of summons in an action against the company to recover the amount of a creditor's claim is not a sufficient demand in writing, within the meaning of s. 6 of the Winding-up Act, R. S. C. c. 129, to serve as the foundation for a petition by the creditor for a winding-up order:—Semble, that, as s. 8 of the Act requires the petitioner to give four days' notice of his application, effect could not be given to a ground of which the company had not that notice. *In re Abbott-Mitchell Iron and Steel Co.*, 21 Occ. N. 438, 2 O. L. R. 143.

Petition for Order—*Service of—Time.*]—By s. 8 of the Winding-up Act, R. S. C. c. 129, "a creditor . . . may, after four days' notice of the application to the company, apply by petition . . . for a winding-up order:"—Held, that the petition was properly lodged when notice of the application was served on the 4th for the 8th November. *In re Arnold Chemical Co.*, 21 Occ. N. 594, 2 O. L. R. 671.

Petition for Order—*Voluntary Assignment—Compulsory Order — Appeal from—Notice to Liquidator—Security for Costs—Waiver.*]—The Court will not interfere with a voluntary winding-up of a company by its shareholders and order a compulsory liquidation unless it is shewn that the rights of the petitioner will be prejudiced by the voluntary winding-up. Service on the liquidator of a notice of appeal on behalf of the company from a compulsory winding-up order is not necessary. A respondent by applying to increase the amount of security for costs waives his right to object that the security was not originally furnished in time. *In re Oro Fino Mines, Limited*, 7 B. C. R. 388.

Petition for Order—*Voluntary Assignment—Discretion.*]—Where the insolvency of the company is admitted, the Court has no discretion under s. 9 of the Winding-up Act, R. S. C. c. 129, to refuse to grant a winding-up order on the petition of a creditor who has a substantial interest in the estate, although the company has made a voluntary assignment for the benefit of its creditors, and most of them are willing that the winding-up should be under such assignment. Wakefield Rattan Co. v. Hamilton Whip Co., 24 O. R. 107, not followed. *In re William Lamb Manufacturing Co. of Ottawa*, 21 Occ. N. 35, 32 O. R. 243.

Petition for Order—*Voluntary Assignment—Discretion.*]—The Court has a discretion to grant or withhold a winding-up order under s. 9 of R. S. C. c. 129. Re William Lamb Manufacturing Co. of Ottawa, 32 O. R. 243, dissented from. Where the assets of the company were small and the creditors had almost unanimously entered upon a voluntary liquidation under the Ontario Assignments Act, a petition for a compulsory winding-up order was refused. *In re Maple Leaf Dairy Co.*, 21 Occ. N. 596, 2 O. L. R. 590.

Petition — *Notice — Time — Proof of Facts.*]—Under s. 8 of the Winding-up Act (R. S. C. c. 129), which directs that a creditor may, after four days' notice of the application to the company, apply by petition for a winding-up order, a notice given on the 1st of the month for a hearing on the 5th is sufficient. The facts alleged in the petition may be proved on the hearing, and the petition need not be sworn to or verified by affidavit. *In re Maritime Wrapper Co.*, 35 N. B. Reps. 682.

Petition — Second petition—Duty to inform Court of first—Order—Conduct of proceedings—Costs. *Re Enterprise Hosiery Co.*, 4 O. W. R. 56.

Petition—*Several Petitions—Conduct of Proceedings—Costs.*]—When there were two petitions for an order for the winding-up of a company, the order was made under both petitions, but the conduct of the proceedings was given to the later petitioner, a creditor for money paid, in preference to the earlier one, who was shewn to be an employee of and in close touch with the company, and the belief was expressed that he would not take the same interest in the prosecution of the winding-up as the other. The costs of both petitioners and of the company were ordered to be paid out of the estate. *In re Estates Limited*, 24 Occ. N. 400, 8 O. L. R. 564, 4 O. W. R. 199.

Preferred Claim—"Clerk or other person in employ"—Sales agent. *Re American Tire Co., Dingman's Case*, 2 O. W. R. 29.

Preferred Claim for Costs—Fi. fa. in sheriff's hands before winding-up—Instructions not to seize. *Re Saw Bill Lake Gold Mining Co.*, 2 O. W. R. 1143.

Preferred Creditor—Claim for salary—Managing director. *Re Ritchie-Hearn Co., Ritchie's Claim*, 6 O. W. R. 474.

Purchase by Inspector—*Fiduciary Capacity—Liquidator—Referee—Sale — Jurisdiction.*]—An inspector appointed in a liquidation under the Winding-up Act, R. S. C. c. 29, cannot be allowed to purchase property of the insolvent. Such a sale set aside, and an account of profits ordered. It rests with the liquidator in such a winding-up to dispose of the estate with the sanction of the Court; but the Court cannot dispose of the estate without the sanction of the liquidator. *In re Canada Woollen Mills, Limited*, 24 Occ. N. 396, 4 O. W. R. 265, 5 O. W. R. 220, 455, 8 O. L. R. 581, 9 O. L. R. 367.

Registry Act—*Crown Debt — Priority.*]—The Elmsdale Company was being wound up under the provisions of the Dominion statute. The Crown made a claim for unpaid freight due for transportation upon the Intercolonial Railway. Before the winding-up order was granted, judgments were rendered against the company and recorded. Under the provisions of the Nova Scotia Registry Act, a judgment duly recorded binds the lands of the debtor as effectually as a mortgage. A question arose as to whether the Crown was entitled to be paid in priority to the judgment creditors:—Held, that the claim of the Crown must prevail. The case was not distinguishable from The Queen v. Bank of Nova Scotia, 11 S. C. R. 1; Almon v. Paley, Russ. Eq. Dec. 6, referred to. *In re Elmsdale Co.*, 24 Occ. N. 341.

Remuneration of Liquidator.]—The liquidator of a company was allowed $4,800 as remuneration for his services in the winding-up of the company, in the course of which he received and disbursed more than $200,000. *In re Yarmouth S. S. Co.*, 24 Occ. N. 184.

Remuneration of Liquidator.]—Fixing allowance — Special circumstances. *Re Farmers' Loan and Savings Co.*, 2 O. W. R. 854, 3 O. W. R. 837.

Security for Costs of Contestation.]—A claimant in a winding-up proceeding who demands security for costs from a contesting creditor, should make it appear that he is liable to lose the costs which he will incur in the contestation. *In re Montreal Cold Storage and Freezing Co.*, 4 Q. P. R. 294.

Security Taken Bona Fide — *Inquiry as to Regularity of Proceedings—Liquidator Suing in His Own Name — Liability for Costs.*]—A person who bonâ fide takes a security in the ordinary course of business from an incorporated company, is not bound to inquire into the regularity of the directors' proceedings leading up to the giving of the security; he is entitled to assume that everything has been done regularly. In this respect a shareholder stands on the same footing as a stranger. Where an action is brought by the liquidator of a company in liquidation, in his own name, he is personally liable for costs; the fact that he obtained leave from the Court to sue will not relieve him of his liability in this respect. *Jackson v. Cannon*, 23 Occ. N. 300, 10 B. C. R. 73.

Seizure of Goods in Province of Quebec — *Leave of Courts of Province wherein Winding-up Pending.*] — The liquidator of an extra-provincial company, which is being wound up in another province, can by petition ask that the seizure of the goods of the company in this province be quashed, as made without leave of the Courts of that province. *Phillips v. Canada Cork Co.*, 7 Q. P. R. 223.

Service of Writ of Summons—*Corporate Character—Law Stamps—Alias Writ.*]—Service upon a company in liquidation is validly made at the office which it occupied, upon its secretary, who has continued to act as such in spite of the liquidation, and still has in his possession some of the books of the company. 2. The corporate character of a company continues notwithstanding that it has gone into liquidation. 3. It is not necessary to put law stamps upon the return of an alias writ of summons. *Soucy v. Compagnie d'Imprimerie Industrielle*, 5 Q. P. R. 195.

Staying Proceedings in Another Province — *Setting aside Sale of Foreign Land—Summary Proceedings.*] — There is jurisdiction under s. 13 of the Dominion Winding-up Act, R. S. C. c. 129, to restrain proceedings in any action, suit, or proceeding against the company, even in actions or suits

beyond the ordinary territorial jurisdiction of the Court; and the enforcing of an execution is a proceeding within this section; and therefore there was jurisdiction for the Court in this province to make an order staying proceedings under an execution in the hands of the sheriff of the county of Victoria, in the province of New Brunswick, as had been done in this case. But the sheriff having, notwithstanding, proceeded with the sale under the execution against lands of the company, and executed a deed of the same to the purchaser:—Held, that there was no jurisdiction in the Court under the Winding-up Act to make an order summarily declaring the sale void, such a case not coming within the classes of cases which, under the Act, may be dealt with in a summary manner by a Judge in the winding-up proceedings. *In re Tobique Gypsum Co.*, 23 Occ. N. 303, 6 O. L. R. 515, 2 O. W. R. 868.

Subscription for Shares—Transfer of shares by old subscriber to new—Relief—Illegal payment to director. *Re Publishers' Syndicate, Paton's Case*, 2 O. W. R. 65, 5 O. L. R. 392.

Terms of Order—Execution Creditor—Priorities. *Re Prescott Elevator Co.*, 1 O. W. R. 161.

Unpaid Vendor of Goods—*Taking Possession—Liquidator.*]—A creditor of a company in liquidation, who has sold to the company on credit, several months before they were put into liquidation, goods which were shipped at the expense of the company, and were afterwards left in the custom house until the liquidator took possession of them, cannot replevy these goods against the liquidator in the thirty days which follow this taking of possession. *In re William Drysdale Co.*, 3 Q. P. R. 353.

Voluntary Winding-up — *Meeting of Shareholders—Notice of—Powers of Attorney—Appointment of Liquidator.*]—A notice sent by post to all the shareholders of a company summoning them to a special general meeting with the object of placing the company, which is not insolvent, in voluntary liquidation, and accompanied by powers of attorney by which the shareholders may authorize their representation at such meeting, is sufficient, and if a resolution is passed authorizing the placing of the company in liquidation, there is no necessity for a further notice to the shareholders of the presentation of the petition to the Court. 2. The intention to name a certain person as liquidator sufficiently appears by the mentioning of his name upon the blank forms of power of attorney sent in order that anyone interested may not allege that he is taken by surprise if such person is subsequently appointed liquidator. *In re North-West Cattle Co.*, 5 Q. P. R. 30.

IX. Other Cases.

Authority to Make Promissory Notes—Formation of company — Date of letters patent. *Baldwin Iron and Steel Works (Limited)* v. *Dominion Carbide Co.*, 2 O. W. R. 6, 170.

Cancellation of Letters Patent—*Action by Attorney-General—Order in Council Pendente Lite—Injunction—Crown — Extra-judicial Opinion.*] — An action having been brought by the Attorney-General against an incorporated company for a declaration that they were carrying on an illegal business and for forfeiture of their charter, the Attorney-General, while the action was pending, summoned the defendants before him to shew cause why their charter should not be revoked by order in council:—Held, that, whether the right of cancellation of letters patent of incorporation be now only statutory (see R. S. O. 1897 c. 191, s. 99), and merely a power, not a duty, or whether the prerogative right still subsists, the bringing of an action does not clothe the Court with jurisdiction to restrain the exercise of the power. The Court has no jurisdiction, at the suit of a subject, to restrain the Crown or its officers acting as its agents or servants or discharging discretionary functions committed to them by the Sovereign. It is not proper for a Judge to express an extra-judicial opinion as to the mode in which the discretion of the Attorney-General should be exercised. *Attorney-General for Ontario* v. *Toronto Junction Recreation Club*, 24 Occ. N. 373, 8 O. L. R. 440, 3 O. W. R. 387, 4 O. W. R. 72.

Diversion of Funds—Payment of liabilities of business assumed by company—Agreement with partnership — Confirmation by shareholders — By-laws—Withdrawal of partners—Notice—Power of company to acquire assets—Account of profits—Resolution of directors. *Wade* v. *Pakenham*, 2 O. W. R. 1183, 3 O. W. R. 47, 5 O. W. R. 736.

Electric Light Company—Nuisance—Vibration — Injunction — Damages. *Hopkin* v. *Hamilton Electric Light and Cataract Power Co.*, 4 O. L. R. 258, 1 O. W. R. 486.

Electric Lighting Companies—*Statutory Powers—Concurrent Exercise in same Territory—Distance between Wires.*]—Where the Legislature has given to two companies similar powers, to be exercised over the same territory, the Court must necessarily conclude that the Legislature has intended to give the companies current powers; in such a case the Court, submitting to the legislative authority, should not intervene between the different companies unless and until one of them has infringed the rights acquired by the other. 2. In the case of two companies carrying on the business of electric lighting over the same territory, it seems that according to experts a distance of three feet between their wires is a sufficient distance to prevent any immediate danger. *Jacques Cartier Water and Power Co.* v. *Quebec R. W. Light and Power Co.*, Q. R. 11 K. B. 511.

Foreign Company—*Powers of President—Power of Attorney.*]—The president of an incorporated company may institute and prosecute suits for the corporation, and appoint attorneys ad litem therefor, without express delegation of power or a resolution of the board of directors, and a power of attorney signed by the president of a foreign company, under its seal, is sufficient in law. *Standard Trust Co.* v. *South Shore R. W. Co.*, 5 Q. P. R. 257.

Formation—*Transfer of Property by Incorporators—Prior Agreement — Payment—*

Promoters—Profit.]—The owner of a patent in April, 1898, induced the defendants to take an interest in it with a view to introducing the patented article into public use. They subsequently decided to form a company. An actual assignment to the defendants was executed in June, 1898, pending the issue of the letters of incorporation, the expense of which the defendants undertook to bear; and by agreement of even date they agreed to sell to the company, when incorporated, the patent and all improvements, in consideration of the company paying them $5,000, and crediting $4,500, in respect to 500 shares subscribed or to be subscribed by them. In August, 1898, after incorporation of the company, an instrument was accordingly executed by the defendants, and the company adopted and confirmed the agreement above mentioned, and the patent was assigned to the company, and the $5,000 paid:—Held, that the defendants were entitled to retain the $5,000 as against the company, as they did not become promoters until after they had become entitled by agreement to interests in the patent, which were afterwards and before incorporation actually transferred to them. Semble, that, even if the defendants had acquired their interests without consideration, that would be of no consequence to the company unless acquired for them. Judgment of Boyd, C., 2 O. W. R. 151, affirmed. *Highway Advertising Co.* v. *Ellis*, 24 Occ. N. 208, 7 O. L. R. 504, 3 O. W. R. 505.

Indorsement of Promissory Note—Transfer to bank—Lawful holder—By-law—Transfer of debt—Powers of directors—Solicitor. *First Natchez Bank* v. *Coleman*, 2 O. W. R. 358.

Letters Patent — Supplementary letters—Increase in capital stock—Non-compliance with s. 20 of Companies Act — Meeting of shareholders—Absence of notice of purpose of meeting—Revocation of letters patent—Action by Attorney-General — Irregularities—Companies Act, s. 96—Purchase of shares—Refusal to transfer — Stock certificates—Production—Assignment—Mandamus. *Meyers* v. *Lucknow Elevator Co.*, 6 O. W. R. 291.

Managing Director — *Powers—Breach of Trust — Pleading — Charges of Fraud—Failure—Costs.*] — The defendant promoted the formation of the plaintiff company for the manufacture of pulp, upon the understanding that slab wood from his saw mill should be used as fuel and pulp wood. The defendant was made managing director, and without orders, but with the knowledge of all the directors except P., erected, at a cost of about $17,000 to the company, a fuel house and conveyors thereto from his saw mill for the conveyance of mill-wood. The expenditure was necessary if the company were to use mill-wood. The defendant supplied the company with mill-wood under an agreement that it should be paid for on the basis of its relative value to round wood for pulp and coal for fuel. The wood was invoiced by the defendant at $2 per thousand of mill cut, on account of which he paid himself $52,391.30, leaving a balance due of $10,589.57. The mill-wood was of a poor quality. No practical test was made of its relative value. In the absence of any other than an approximate estimate, the Court held it should be charged at $1.90 per cord for pulp wood and 90 cents per cord for fuel wood, on which basis the defendant had overpaid himself $2,432.92. The defendant resigned his position as managing director at the end of ten months, and the company refused to use mill-wood. The company sought to charge the defendant with the cost of the fuel house and conveyors, which were no longer of use, as an unauthorized and improper expenditure, and made for the defendant's benefit. The defendant had always been willing to have the price of the mill-wood determined by an actual test. Charges of fraud against the defendant were preferred in a number of sections of the bill, which were unsupported at the hearing:—Held, that the defendant should not be charged with the cost of the fuel house and conveyors; that the decree in the plaintiffs' favour for the balance due by the defendant on overpayment should be without costs; and that the defendant should have the costs of the sections of the bill alleging fraud. *Cushing Sulphite Co.* v. *Cushing*, 24 Occ. N. 243, 2 N. B. Eq. Reps. 539.

Powers of Officers—*Power of Attorney—Seal—Signatures.*]—A power of attorney given in the name of the company and under its common seal, by the managing officers of the company, and also signed by the secretary, is valid and is prima facie the act of the company. *In re Brook* (*James A.*) *Co.*, 7 Q. P. R. 206.

Returns to Provincial Treasurer — *Taxation—Default — Penalty — Navigation Company — Agents—Pleading—Amendment.*] —In an action against two defendants, described as incorporated companies, for the recovery of penalties for non-compliance with the requirements of art. 1149, R. S. Q., the plaintiff restricted his demand to the penalties for 300 days between two stated periods. The action was dismissed in the first Court, as to the first defendant, on exception to the form based on the ground that no such corporation as that described in the writ existed. The other defendants had not pleaded, and the plaintiff subsequently caused an amended declaration to be served on the attorneys, alleging that the defendant first mentioned was an unincorporated company, and claiming the same amount of penalties for a different period of 300 days, and as to which the prescription enacted by art. 2615, R. S. Q., had accrued at the date of the service of the amended declaration unless prescription had been interrupted by the service in the original action: — Held, affirming, but for different reasons, the judgment in Q. R. 22 S. C. 510, that prescription under art. 2615 was not interrupted by the service of process in the original action inasmuch as the period for which the penalty was claimed therein was not the same as the period claimed for in the amended declaration, and, moreover, the latter claim included a period for which the plaintiff had abandoned his claim in the original action. Further, the original action being brought against the defendant as the agent of an incorporated company, whereas the amended declaration alleged that the defendant was the agent of an unincorporated company, such amendment should not have been allowed, inasmuch as it changed the nature of the demand within the meaning of art. 522, C. C. P. *Lambe* v. *Donaldson Steamship Line and Navigation Co.*, Q. R. 23 S. C. 469.

Right to Acquire Business — Provisions of charter — Powers of company — Injunction—Shareholder—Acquiescence— Goodwill. *Ryckman* v. *Toronto Type Foundry Co.*, 3 O. W. R. 434, 522.

Sale of Gas Works to Municipality —*Arbitration as to Price—Franchise—Ten Per Cent. Addition.*]—By 54 V. c. 107 (O.) the company was protected against compulsory parting with its works and property to the city until May, 1911; but by an agreement made in 1896 it was provided that, upon the city giving one year's notice, it should have the option of purchasing and acquiring all the works, plant, appliances, and property of the company, used for light, heat, and power purposes, both gas and electric, at a price to be fixed by arbitration; and that, upon the acquisition by the city of the works, plant, and property, the company should cease to carry on its business, the city having exercised its option:—Held, affirming the decision of Lount, J., 3 O. L. R. 637, 1 O. W. R. 194, that, in ascertaining the price to be paid by the city, the arbitrators were right in allowing nothing for the value of the earning power or franchise of the company; and in refusing to add ten per cent. to the price as upon an expropriation under R. S. O. 1887 c. 164, s. 99. *In re City of Kingston and Kingston Light, Heat, and Power Co.*, 23 Occ. N. 151, 5 O. L. R. 348, 2 O. W. R. 55, 3 O. W. R. 769.

Sale of Goods for Use of Company about to be Formed—Action for price—Goods charged to manager of company personally—Liability. *Vulcan Iron Works* v. *Leary* (Man.), 1 W. L. R. 453.

Toronto Gas Company — *Increase of Capital—Statutory Restrictions — Payments to Directors—Dividends — Reserve Fund — Investment in Business—Plant and Buildings Renewal Fund—Reduction in Price of Gas—Audit by Municipality—Charges for Depreciation or Loss—Construction of Statute.*]—Upon a consideration of the provisions of 50 V. c. 85 (O.), an Act to further extend the powers of the Consumers' Gas Company of Toronto:—Held, that the defendants were not bound to keep the reserve fund, as an actual separate sum of money, apart from their other property, and invested in the securities mentioned in s. 4, but were at liberty to use it in their business, as they did from year to year, without objection by the plaintiffs' auditors; and were not bound to carry to the credit of the fund its share of the increase in the value of the defendant's property which it had helped to acquire while invested in the business. 2. That charges for decrease in the value of gas mains, for iron gas lamps which became useless, and for gas meters destroyed, were not charges for renewal or repair, but for depreciation and loss, and did not come within s. 6 so as to be chargeable to the plant and buildings renewal fund. 3. That under s. 6 the defendants were entitled to continue to contribute to the plant and renewal fund the five per cent. authorized, even although it should not appear necessary to do so for the purposes for which the fund was to be used. These sections were construed in Johnston v. Consumers' Gas Co., 27 O. R. 9, upon a special case, but the decision was reversed (23 A. R. 566, [1898] A. C. 477), although not on the question of construction:—Held, that the Court was not bound by the views expressed in that case. *City of Toronto* v. *Consumers' Gas Co. of Toronto*, 23 Occ. N. 197, 5 O. L. R. 494, 2 O. W. R. 171.

Wages—*Liability of Director—"Labourer or Servant"—Foreman of Works.*]—A person engaged to perform manual work, at a daily wage, and who is actually occupied in doing such work, is a "labourer," within the meaning of 2 Edw. VII. c. 15, s. 71 (D.), although, being a workman of superior capacity, he is also intrusted with the supervision of other workmen, and, to that extent, fills the position of a "boss," or foreman. *Fee* v. *Turner*, Q. R. 13 K. B. 435; *Turner* v. *Fee*, 24 Occ. N. 402.

COMPENSATION.

See CROWN — MUNICIPAL CORPORATIONS — RAILWAY—SET-OFF.

COMPOSITION.

See BANKRUPTCY AND INSOLVENCY.

COMPOUNDING.

See CRIMINAL LAW—PENALTIES.

CONCEALMENT OF BIRTH.

See CRIMINAL LAW.

CONCILIATION.

Action for Agricultural Service — *Summary Procedure — Motion—Preliminary Exception—Time for Filing.*]—There is no necessity for a preliminary citation to conciliation in the case of an action by a farmer to recover the price of a service by his bull. 2. An action of that kind may properly be the subject of a summary proceeding. 3. A motion for default of conciliation is in the nature of a preliminary exception. An exception of this sort must be filed within three days after the entry of the cause. *Charbonneau* v. *Alarie*, 5 Q. P. R. 89.

CONCUBINAGE.

See GIFT.

CONDITIONAL SALES.

See SALE OF GOODS.

CONFESSION.

See CRIMINAL LAW.

CONSEIL JUDICIAIRE.

Proceedings by—*Disavowal — Common Interest.*]—A conseil judiciaire has no right to take, in the name of him to whom he has been named conseil, judicial proceedings, even when such conseil has a personal interest in such proceedings. *Beauchamp* v. *Gourde*, Q. R. 20 S. C. 260.

CONSERVATORY ATTACHMENT.

Affidavits for — *Grounds of Belief — Donation—Debt — Demand.*] — An affidavit for conservatory attachment, founded upon belief, must state the grounds of such belief. 2. Where a conservatory attachment is based upon a donation, the affidavit, and not only the declaration, must shew that the debt is due and exigible, and that the deed of donation has been registered, and must also state that a demand of payment has been made of the moneys claimed in virtue of such donation. *Lefebvre* v. *Castonguay*, 4 Q. P. R. 431.

CONSIGNOR AND CONSIGNEE.

See CARRIERS.

CONSOLIDATION OF ACTIONS.

Actions against Estate — *Representatives — Privilege — Rights of Creditors.*] — The Court may, proprio motu, unite two default cases against the same estate, and order its representatives to be personally present at the trial, when the claims are, on their face, considerable, and a privilege might attach thereto to the detriment of the other creditors. *Meunier* v. *St. Jean*, 7 Q. P. R. 62.

Actions for Salary—*Same Defendant—Different Contracts of Hiring.*] — Several actions for salary against the same defendant based on different contracts of hiring, in which different amounts are claimed, can not be united for trial. *Kelly* v. *Canadian Pacific R. W. Co.*, 7 Q. P. R. 11.

Damages from Same Accident.] — When several plaintiffs sue for damages alleged to have been caused by the same defendant and arising out of the same accident, such causes may be united for the purposes of proof, except as to the amount of damages suffered by each claimant respectively. *Cantin* v. *Royal Electric Co.*, 5 Q. P. R. 327.

Different Plaintiffs—Same defendant—Common subject—Inconsistent claims—Stay of one action—Setting down for trial. *Fulmer* v. *City of Windsor, Baugham* v. *City of Windsor*, 5 O. W. R. 589, 772.

Discretion—*Appeal—Leave.*] — Consolidation of cases is left to the discretion of the Judge, and appellate Courts will not interfere with the exercise of such discretion unless in a case of manifest injury or error. Leave to appeal refused. *North American Life Assurance Co.* v. *Lamothe*, 7 Q. P. R. 177.

Identity of Parties—Identity of issues—Stay of proceedings—Consent to be bound by judgment in earlier action. *City of Hamilton* v. *Hamilton Street R. W. Co.*, 4 O. W. R. 47, 207, 311, 411, 5 O. W. R. 151, 6 O. W. R. 206, 375. See also 207.

Identity of Parties — Similarity of issues—Counterclaim. *City of Toronto* v. *Toronto R. W. Co.*, 2 O. W. R. 225, 3 O. W. R. 204, 298, 4 O. W. R. 221, 330, 345, 446, 5 O. W. R. 14, 64, 130, 403, 415, 6 O. W. R. 574, 677, 871.

Motion for—*Separate Proceedings.*] — In order to obtain consolidation of several actions a motion must be made in each of them; a single motion will be rejected. *Falardeau* v. *City of Montreal*, 6 Q. P. R. 360.

Selection of Test Actions.] — Forty-four actions were brought by different persons against the defendants for damages caused by the death of relatives in an explosion extending over a large area of the defendants' coal mine, and the plaintiffs applied to consolidate these actions with twenty-nine other actions, one of which had been chosen as a test action. On account of the workmen who were killed not all being of the same class, and also on account of the different conditions in the different parts of the mine where deaths occurred, the defendants contended that the action would not be a fair test of all the others:—Held, that the defendants should have the right to select four actions as test actions for those of the same class. *Ellyn* v. *Crow's Nest Pass Coal Co.*, 24 Occ. N. 102, 10 B. C. R. 221.

Test Actions—*Plaintiffs in Some Actions Outside Jurisdictions—Security for Costs — Waiver.*]—Twenty-nine actions by different plaintiffs were commenced against the defendants at one time, and subsequently forty-four similar actions were commenced. One action, known as the Leadbeater action, was ordered to be tried as a test action for the twenty-nine, and afterwards by consent four actions out of the forty-four were consolidated by order of the full Court with the Leadbeater action, and ordered to be tried as test actions for the whole seventy-three. In the Leadbeater action and in one of the four remaining test actions the plaintiffs resided in the jurisdiction, and in the other three they resided outside the jurisdiction:—Held, reserving the decision of Irving, J., that the plaintiffs outside the jurisdiction should not be required to give security for costs. *Sills* v. *Crow's Nest Pass Coal Co.*, 24 Occ. N. 105, 10 B. C. R. 224.

Trial by Jury.]—Joinder of two cases where the parties have made option for jury trial will not be granted. *Schwab* v. *Montreal Light, Heat, and Power Co.*, 6 Q. P. R. 50.

See EXECUTION—EXECUTORS AND ADMINISTRATORS.

CONSPIRACY.

Combination—*Injury to Business—Restraint of Trade—Rights of Individuals.*]—This action was brought against a number of individual persons, partnership firms, and

corporations, to recover damages for an alleged conspiracy against the plaintiff, and for an injunction restraining "the defendants and each of them from continuing to boycott the plaintiff and from continuing to conspire to injure his business, trade, and credit:"—Held, that there was no conspiracy to do any act, or for any object, or to use any means, illegal if done or pursued or used by an individual. The combination was not unlawful by reason of its being a combination of several, because it was in the exercise of defendants' own rights of trading in competition with the plaintiff and the "McIntyre block people" and for the protection of those rights. The plaintiff had no absolute right to trade free from competition or free from the right of the defendants to combine to compete effectively with him or the "McIntyre block people" by the use of means not unlawful in themselves. The combination and the pursuit of its objects, therefore, did not affect any legal right of the plaintiff or operate to do him a legal injury. *Gibbins* v. *Metcalfe*, 23 Occ. N. 308, 1 W. L. R. 139.

See BILLS OF EXCHANGE AND PROMISSORY NOTES—CRIMINAL LAW.

CONSTABLE

See ASSAULT — MALICIOUS PROSECUTION — MUNICIPAL CORPORATION.

CONSTITUTIONAL LAW.

Administration of Justice — *Interprovincial Jurisdiction — Residence—Foreign Judgment.*]—No province can pass laws to operate outside its own territory; and no tribunal established by a province can extend its process beyond the province so as to subject persons or property elsewhere to its decisions; and consequently a judgment obtained in one province by service of process out of the jurisdiction against a domiciled resident of another province, who has not in any way attorned to the jurisdiction, has no extra-territorial validity, even though regularly obtained under the procedure of the former province. Aliter, where the rule or judgment in such other province has been obtained upon the non-resident's own application. *Deacon* v. *Chadwick*, 21 Occ. N. 204, 1 O. L. R. 346.

Aliens—*Naturalization—British Columbia Provincial Elections Act—Powers of Provincial Legislature—B. N. A. Act.*]—Section 91, s.s. 25, of the British North America Act reserves to the exclusive jurisdiction of the Dominion Parliament the subject of naturalization—that is, the right to determine how it shall be constituted. The Provincial Legislature has the right to determine, under s. 92, s.s. 1, what privileges as distinguished from necessary consequences, shall be attached to it. Accordingly, the British Columbia Provincial Elections Act (1897, c. 67), s. 8, which provides that no Japanese, whether naturalized or not, shall be entitled to vote, is not ultra vires. Judgment in 21 Occ. N. 424, 8 B. C. R. 76, reversed. *Cunningham* v. *Tomey Homma*, [1903] A. C. 151.

Appeal to Supreme Court of Canada —*Statute Giving Right of Appeal.*]—A motion was made to quash an appeal from the Court of Review, on the ground that the Act 54 & 55 V. c. 25, authorizing such appeals, was ultra vires, s. 101 of the B. N. A. Act only providing for the establishment of a Court of appeal for the Dominion for the better administration of the laws of Canada, and that the right of appeal was a civil right with which the Parliament of Canada could not interfere:—Held, refusing the motion, that the power to establish a Court of appeal for the Dominion was not so restricted; that the reference to the "better administration of the laws of Canada" in s. 101 of the B. N. A. Act had regard to the establishment of federal Courts other than a general Court of appeal; and that 54 & 55 V. c. 25 was intra vires. The appeal was then heard on the merits and dismissed, following the decision in a previous appeal: 30 S. C. R. 598, 21 Occ. N. 5. *L'Association St. Jean Baptiste de Montreal* v. *Brault*, 21 Occ. N. 253, 31 S. C. R. 172.

Coal Mines Regulation Act, B.C. — *Employment of Chinamen—Rule Prohibiting —Naturalization and Aliens.*]—Rule 34 of s. 82 of the Coal Mines Regulation Act as enacted by the Legislature in 1903, which prohibits Chinamen from employment below ground and also in certain other positions in and around coal mines, is in that respect ultra vires. Union Colliery Co. v. Bryden. [1899] A. C. 580, applied and distinguished from Cunningham v. Tomey Homma, [1903] A. C. 151. Per Irving, J.—The calling of the enactment in question a rule or regulation cannot affect its constitutionality, nor can the enactment derive any greater validity by reason of its insertion in the middle of a rule which in other respects may be intra vires. *In re Coal Mines Regulation Act*, 24 Occ. N. 342, 10 B. C. R. 408.

Customs Legislation—*Conflict with Imperial Enactment—Duty upon Foreign-built Ship—Construction of Statutes—Crown—Interest—Tort—Servant of Crown.*]—The Parliament of Canada has legislative authority to impose a customs duty upon a foreign-built ship to be paid upon application by her in Canada for registration as a British ship. 2. The provision in item 409 of the Customs Tariff Act of 1897, which purports to impose a duty upon a foreign-built ship upon application by her for a Canadian register, is not a clear and unambiguous imposition of the duty, such as would support the right of the Crown to exact the payment of such duty. 3. Interest can only be recovered against the Crown by contract or under statute. 4. In the absence of statutory provision, the Crown is not liable to answer for the wrongful act of its officer or servant. *Algoma Central R. W. Co.* v. *The King*, 22 Occ. N. 85, 7 Ex. C. R. 239.

Deportation of Immigrants—*Constitutional Law—Powers of Dominion Parliament —Alien Labour Act.*]—Certain immigrant was employed by one the Pere Marquette Railway Company at St. Thomas. Attorney-General of Canada ordered him to be "Returned to the country whence he came:"—Held, Anglin, J., that the Alien Labour Act, s. 6 of 60 & 61 Vic. c. 11 (D.) as amended by 1 Edw. VII. c. 13, s. 3, was ultra vires. *Re Gilhula, Re Cain*, 6 O. W. R. 124, 10 O. L. R. 469. Reversed, [1906] A. C.

Dominion and Provincial Lands — *Military Reserve—Litigation Between Dominion and Province — Public Inquiry — Evidence.*]—Held, on the facts, that it was shewn that Deadman's Island was a military reserve, called into existence by properly constituted authority, and therefore, that it belongs to the Dominion and not to the province. Litigation between the Dominion and a province respecting the right to administer certain public property should not be conducted in the same way as a suit between subjects, but should rather be regarded as a public inquiry, in which it is incumbent on all the Crown officers to come forward with all the evidence in their possession, and any properly authenticated documents bearing on the issues should be admitted in evidence. *Attorney-General* v. *Ludgate*, 11 B. C. R. 258.

Dominion Civil Servants — *Judgment Debtors—Salaries — Payment of Judgments Out of, by Instalments—Ultra Vires—Discretion.*]—K., M., and W., were officers of the government of Canada and were in receipt of annual salaries amounting to $1,800, $400 and $700 respectively. K., upon being examined before the Judge of a County Court, was, under 59 V. c. 28, s. 53, ordered to pay the amount of the judgment against him by instalments at the rate of $5 per month. M. and W., being examined before the Judge of another County Court, were, under the same section, ordered to pay the amounts of the judgments against them by instalments at the rate of $5 and $10 per month respectively:—Held, Landry, J., dissenting, that the provisions of 59 V. c. 28, s. 53 (N.B.), authorizing the Judge or other officer before whom the examination is held, upon it being made to appear to him that the judgment debtor is unable to pay the whole of the debt in one sum, but is able to pay the same by instalments, to make on order that the debtor shall pay the amount of the judgment debt by instalments, in so far as it is sought to apply the same to salary or income derived from office or employment under the Government of Canada, is ultra vires of the Provincial Legislature, and therefore, that orders against K., M., and W., should be quashed. 2. That in the cases of M. and W., there being no evidence or charge of fraudulent conduct on their part, the circumstances shewed such an improper exercise of discretion on the part of the Judge that the orders made by him should be quashed on that ground as well. *Ex p. Killam, Ex p. McLeod, Ex p. Wilkins*, 34 N B. Reps. 530.

Elections Act, British Columbia — *Right to Vote—Naturalized Foreigner—Leave to Appeal.*]—The judgment in 7 B. C. R. 368, 21 Occ. N. 62, in which it was held that s. 8 of the Provincial Elections Act, which purports to prohibit the registration of Japanese as provincial voters, is ultra vires, was affirmed. Leave to appeal to the Judicial Committee of the Privy Council was granted, the Court being of the opinion that, if it were now before the Privy Council, leave would be granted. *In re Tomey Homma*, 21 Occ. N. 424, 8 B. C. R. 76.

Exemptions from Taxation — *Land Subsidies of the Canadian Pacific Railway—Extension of the Boundaries of Manitoba—Statutes — Contract — Grant in Præsenti — Cause of Action—Jurisdiction—Waiver.*] — The land subsidy of the Canadian Pacific Railway Company authorized by 44 V. c. 1 (D.) is not a grant in præsenti, and, consequently, the period of 20 years of exemption from taxation of such lands provided by clause 16 of the contract for the construction of the Canadian Pacific Railway begins from the date of the actual letters patent of grant from the Crown, from time to time, after they have been earned, selected, surveyed, allotted, and accepted by the Canadian Pacific Railway Company. The exemption was from taxation "by the Dominion, or any province hereafter to be established, or any municipal corporation therein:"—Held, that when, in 1881, a portion of the North-West Territories in which this exemption attached was added to Manitoba, the latter was a province "thereafter established," and such added territory continued to be subject to the said exemption from taxation. The limitation in respect of legislation affecting the territory so added to Manitoba, by virtue of the Dominion Act 44 V. c. 14, upon the terms and conditions assented to by the Manitoba Acts 44 V. (3rd sess.) cc. 1 and 6, are constitutional limitations of the powers of the legislature of Manitoba in respect to such added territory, and embrace the previous legislation of the Parliament of Canada relating to the Canadian Pacific Railway and the land subsidy in aid of this construction. Taxation of any kind attempted to be laid upon any part of such land subsidy by the North-West Council, the North-West Legislative Assembly, or any municipal or school corporation therein, is Dominion taxation within the meaning of clause 16 of the Canadian Pacific Railway contract providing for exemption from taxation. Per Taschereau, C.J.C.:—In the case of the Springdale School District, as the whole cause of action arose in the North-West Territories, the Court of King's Bench for Manitoba had no jurisdiction to entertain the action or to render the judgment appealed from in that case, and such want of jurisdiction could not be waived. Judgment in 14 Man. L. R. 382, 23 Occ. N. 159, varied. *Rural Municipality of North Cypress* v. *Canadian Pacific R. W. Co., Rural Municipality of Argyle* v. *Canadian Pacific R. W. Co., Springdale School District* v. *Canadian Pacific R. W. Co.*, 25 Occ. N. 102, 35 S. C. R. 550.

Expenses of Criminal Justice — *Powers of Provincial Legislatures—Imposing on Municipalities Expenses of Criminal Justice—57 V. c. 19, s. 1 (N.B.)—Intra Vires.*] — See *McLeod* v. *Municipality of Kings, Morison* v. *Municipality of Kings*, 35 N. B. Reps. 163.

Ferry—*Creation and License—Jura Regalia—Dominion or Province — Public Harbour—River Improvements.*]—The right to create and license a ferry, having been one of the jura regalia or royalties which belonged to the Provinces at the union, so continued after Confederation, as declared by s. 109 of the B. N. A. Act; and therefore the lease of a ferry between the town of Sault Ste. Marie, in the Province of Ontario, and the town of Sault Ste. Marie, in the State of Michigan, granted by the Dominion Government in 1897, was invalid. The exclusive legislative authority over ferries given to the Dominion Parliament by s.-s. 13 of s. 91 does not carry with it any right to grant ferries. Even if the St. Mary's river at the point in question were a public harbour which passed under s. 108 to the Dominion, this would

not give the Dominion Government the right to grant an exclusive ferry privilege. But it is not a public harbour; something more is necessary to convert an open river front into a public harbour than the erection along it of four or five wharves projecting beyond the shallows of the shore. The existence of improvements in the river bed in front of the town, belonging to the Dominion Government, afforded no reason for the entire control of the ferry across the river being held to be in the Dominion Government. The Dominion Parliament or Government have a right to regulate such ferries as the ferry in question, for the purpose of preventing them from interfering with public harbours and river improvements of the Dominion. *Perry* v. *Clergue*, 23 Occ. N. 91, 5 O. L. R. 357, 2 O. W. R. 89.

Ferry—*Exclusive Privilege — North-West Territories Legislative Assembly—Municipal Institutions — Property and Civil Rights—Delegation of Powers — License — Tolls — Highway — By-law—Private Ferry.*]—The Legislative Assembly of the Territories has power to pass an Ordinance providing for the issue of an exclusive license to ferry over a navigable river and for the imposition of tolls. Such power is conferred upon the Assembly by one, if not both, of the following provisions of the Dominion Order in Council of 20th June, 1893—made under the authority of the North-West Territories Act—which authorizes the passing of Ordinances in relation to:—3. Municipal Institutions in the Territories—subject to any legislation by the Parliament of Canada as heretofore or hereafter enacted. (See B. N. A. Act, s. 92, s-s. 8.)—8. Property and civil rights in the Territories—subject to any legislation by the Parliament of Canada on these subjects. (See B. N. A. Act, s. 92, s-s. 16.)—The power of the Legislative Assembly to delegate its powers discussed. The question of the extent of the jurisdiction of the Legislative Assembly over surveyed highways, the control of which has been given by Parliament to the Legislative Assembly, discussed. A municipality having by Ordinance been given, with respect to a certain portion of a navigable river, all the powers of the various officers named in the Territorial Ordinance respecting ferries:—Held, that it was not necessary for the municipality to exercise its powers by by-law: and that an agreement with, and a license to, the licensee, both under the corporate seal of the municipality, were sufficient. The plaintiff held an exclusive license for a ferry. Another ferry was operated within the plaintiff's territory by an unincorporated association of persons, which issued tickets to its members to the amount of their respective "shares" in the association:—Held, that this latter ferry was not a private ferry, and that the plaintiff's right was thereby infringed. *Humberstone* v. *Dinner*, 2 Terr. L. R. 106. Affirmed, 26 S. C. R. 252, 16 Occ. N. 238.

Fraudulent Entry of Horses at Exhibitions.] — The Act to Prevent the Fraudulent Entry of Horses at Exhibitions, R. S. O. 1897 c. 254, is within the powers of the Ontario Legislature. A conviction of the defendant for an offence against that Act, with an adjudication of a fine and imprisonment in default of payment, was affirmed. *Rex* v. *Horning*, 24 Occ. N. 348, 8 O. L. R. 215, 3 O. W. R. 740.

Ferries Act — *Interprovincial and International Ferries—Establishment or Creation —License—Franchise — Exclusive Right.*]—An Act respecting Ferries, R. S. C. c. 97, as amended by 51 V. c. 23, is intra vires of the Parliament of Canada. The Parliament of Canada has authority to, or to authorize the Governor-General in council to, establish or create ferries between a province and any British or foreign country, or between two provinces. The Governor-General in council, if authorized by Parliament, may confer, by license or otherwise, an exclusive right to any such ferry. *In re Jurisdiction as to Ferries*, 25 Occ. N. 106; *In re International and Interprovincial Ferries*, 36 S. C. R. 206.

Fisheries Act — *Powers of Dominion Parliament — Exclusive Rights of Fishery over Provincial Property—Ultra Vires—License Fees—Illegality—Damages.*] — In an action for damages for an alleged invasion of the plaintiff's rights by the defendant (both being licensees under the Fisheries Act, R. S. C. c. 95, s. 4, authorized to use trap nets having leaders of 10 fathoms, for the purpose of taking deep sea fish other than salmon, in the public waters of St. Margaret's Bay, in the province of Nova Scotia), in setting his net within the distance prohibited by the general fishery regulations of Nova Scotia, under penalty provided by the Act, it was held, following Attorney-General of Canada v. Attorney-General of Ontario, [1898] A. C. 701, that the Act, so far as it empowered the granting of exclusive rights of fishery over provincial property, was ultra vires: and the fact that the plaintiff had a leader of 25 fathoms length attached to his trap, whereas he had only paid license fees in respect to one of 10 fathoms, was not an illegality relevant to the plaintiff's case, and was too remote to prevent recovery of damages. *Young* v. *Harnish*, 37 N. S. Reps. 213.

Foreign Companies Ordinance, 1903, N.W.T.—Intra vires — Manufacturing company incorporated under Dominion Companies Act—Application of territorial Ordinance —Carrying on business in Territories without registration—Conviction. *Rex* v. *Massey-Harris Co.* (N.W.T.), 1 W. L. R. 45.

Foreshore of Harbour—*Dominion and Provincial Rights—Terms of Union—Public Right of Way—Canadian Pacific Railway—Right of Occupation—Act of Incorporation —B. N. A. Act.*]—Held, in an action for a declaration that the public has a right of access to the waters of Vancouver harbour through certain streets at the time of the construction of the Canadian Pacific Railway were public highways extending to low water mark, and that the public right of passage over them existed at the time of the admission of British Columbia into Canada, but that these public rights have been extinguished or suspended by reason of the construction of the railway. The foreshore of Vancouver harbour is under the jurisdiction of the Parliament of Canada, either as having formed part of the harbour at the time of the union of British Columbia with the Dominion, or by reason of the jurisdiction of the Dominion attaching at the union. The Parliament of Canada has power to appropriate provincial public lands for the purposes of a railway connecting two or more provinces. The Act respecting the Canadian

Pacific Railway, 44 V. c. 1, should not be construed in the same way as an ordinary Act of incorporation of an ordinary railway company, but it should be interpreted in a broad spirit, and bearing in mind the objects sought to be accomplished. Per Hunter, C. J.:—The British North America Act assigns public harbours to the Dominion, not so much qua property or land as qua harbours; the jurisdiction of the Dominion is latent and attaches to any inlet or harbour so soon as it becomes a public harbour, and is not confined to such harbours as existed at the time of union. *Attorney-General ex rel. City of Vancouver* v. *Canadian Pacific R. W. Co.*, 11 B. C. R. 289, 1 W. L. R. 299.

House of Commons—*Representation of Provinces—B. N. A. Act, 1867, s. 51—Aggregate Population of Canada.*]—In determining the number of representatives to which Ontario, Nova Scotia, and New Brunswick are respectively entitled after each decennial census, the words "aggregate population of Canada" in s.-s. 4 of s. 51 of the B. N. A. Act, 1867, mean the whole population of Canada, including that of provinces which have been admitted subsequent to the passing of the Act. Prince Edward Island on admission to the union became subject to the provisions of s. 51, and its representation is liable to be readjusted thereunder after each census. *In re Representation in House of Commons*, 23 Occ. N. 209, 33 S. C. R. 475, 594.

Incorporation of Company—"*Works for the General Benefit of Canada*"—*Preamble—Expropriation of Land.*]—A company was incorporated by a Dominion statute, which recited that "it is desirable for the general advantage of Canada that a company should be incorporated for the purpose of utilizing the natural water supply of the Niagara and Welland rivers, with the object of promoting manufacturing industries and inducing the establishment of manufactories in Canada, and other businesses," and that the contemplated works would interfere with the navigation of the Welland river. The Act then expressly authorized the construction of certain works and the expropriation of land for such purposes, incorporating certain sections of the Railway Act of Canada; and also authorized the company to enter into certain contracts extending beyond the limits of the province. The Act was subsequently amended by the Dominion Parliament, and recognized by the Legislature of Ontario:—Held, that the preamble shewed by implication the intention of Parliament to give the power to deal with public property of the Dominion and to expropriate private property in the province, and the reason for doing so; and was a parliamentary declaration that the formation of the company for the purposes mentioned was for "the general advantage of Canada." *In re Ontario Power Co. of Niagara Falls and Henson*, 23 Occ. N. 227, 6 O. L. R. 11, 2 O. W. R. 419.

Incorporation of Railway Company by Provincial Statute—*Work for General Advantage of Canada — Declaration of, by Dominion Statute—Application of Provincial Crown Franchises Regulation Act.*] — The defendants were originally incorporated in 1897 by a Provincial Act. In 1898, by a Dominion Act, their objects were declared to be works for the general advantage of Canada and thereafter to be subject to the legislative authority of the Parliament of Canada and the provisions of the Railway Act:—Held, setting aside an order allowing the Provincial Attorney-General to bring an action at the instance of a relator under the Crown Franchises Regulation Act, that the said Act did not apply to the company. *Attorney-General for British Columbia* v. *Vancouver, Victoria, and Eastern R. W. and Navigation Co.*, 9 B. C. R. 338.

Indian Lands — *Surrender—Proprietary Right—Power of Disposition—B. N. A. Act, s. 91—Leave to Appeal.*]—Lands in Ontario surrendered by the Indians by the treaty of 1873, belong in full beneficial interest to the Crown as representing the province, subject only to certain privileges of the Indians reserved by the treaty. The Crown can only dispose thereof on the advice of the Ministers and under the seal of the province. St. Catharines Milling Co. v. The Queen, 14 App. Cas. 46, followed. The Dominion Government having purported, without the consent of the province, to appropriate part of the surrendered lands under its own seal as a reserve for the Indians in accordance with the said treaty:—Held, that this was ultra vires the Dominion, which had, by s. 91 of the British North America Act, exclusive legislative authority over the lands in question, but had no proprietary rights therein. The consent of the province having been subsequently provided for by a statutory agreement between the two governments, the special leave to appeal granted upon the representation of the general public importance of the question involved would probably have been rescinded if a petition to that effect had been made. Judgment in 32 S. C. R. 1 affirmed. *Ontario Mining Co.* v. *Seybold*, [1903] A. C. 73.

Interest — *Rate of—Mortgage—Redemption—British Company Lending Money in Canada—Contract — Application of Law of Canada — Tender of Mortgage Money — Agents in Canada—Bill of Exchange.*]—In an action to compel the defendants, mortgagees in Great Britain, to accept the principal money and interest due on a ten-year mortgage, which had run for six and one-half years, under the provision of R. S. C. c. 127, s. 7, in which it was contended that that section was ultra vires of the Dominion Parliament, and that the tender was not made to the proper agents:—Held, that the section was intra vires of the Dominion Parliament, and it was not restricted in its application to such mortgages as are mentioned in s. 3 of the Act, but applies to every mortgage on real estate executed after the 1st July, 1880, where the money secured "is not under the terms of the mortgage payable till a time more than five years after the date of the mortgage." 2. That the words of s. 25 of R. S. O. 1897 c. 205, are wide enough to apply to mortgages executed prior to the passing of that Act. 3. That the defendants' Imperial Act of incorporation gave them the right to lend money in Canada in the same way as an individual could do, but gave them no higher or other rights. 4. That the loan being made, the property situated, and the mortgage giving the option of payment, in Canada, the law of Canada must govern in relation to the contract and its

incidents. 5. That the agency of the persons to whom the tender was made was established and that the tender of a bill of exchange was sufficient under the terms of the mortgage. *Bradburn* v. *Edinburgh Life Assurance Co.*, 23 Occ. N. 199, 5 O. L. R. 657, 2 O. W. R. 253.

Legislative Assembly — *Powers of Speaker — Precincts of House — Expulsion from.*]—The public have access to the legislative chambers and precincts of the House of Assembly, as a matter of privilege only, under license either tacit or express, which can be revoked whenever necessary in the interest of order and decorum. The power of the Speaker and officers of the House to preserve order may be exercised during the intervals of adjournment between sessions as well as when the House is sitting. A staircase leading from the street entrance up to the corridor of the House is a part of the precincts of the House, and a member of the public who conducts himself thereon so as to interfere with the discharge by members of their public duties may lawfully be removed. Judgment in 36 N. S. Reps. 211, (ante Assault, 1) reversed, and a new trial ordered. *Payson* v. *Hubert*, 24 Occ. N. 168, 34 S. C. R. 400.

Legislative Assembly—*Power to Punish for Contempt—Court of Record — Limited Jurisdiction—Warrant—Seal.*]—A Provincial House of Assembly is not a general court of record, but only one for the purposes specified in R. S. N. S., 5th ser., c. 30. 2. A warrant under the hand and seal of the Speaker of the Nova Scotia House of Assembly, reciting that T. was by resolution of the House adjudged guilty of a contempt thereof, committed in the face of the House, and was adjudged to be committed to gaol, commanded the Sergeant-at-Arms to convey T. to gaol and the gaoler to receive him:—Held, that the commitment was not under the Act; that the House can only proceed for contempt in the way pointed out by the Act and not by a general warrant. 3. Assuming that the House had the right to punish for a contempt committed in its face while acting as a court of record inquiring into a libel, the warrant should shew that the House was sitting as a court of record, which it did not shew. Van Sandatt v. Turner, 6 Q. B. 783, followed. If the House was a court of record, the warrant was bad because not under seal and not running in the name of Her Majesty. 5. Even if the House had power to commit for contempt in excess of that specially conferred by the statute, it could not commit to the common gaol, but only to the custody of an officer of the House. *In re Thomas*, 21 Occ. N. 503.

Liquor License Act of British Columbia—Brewer license under Dominion Inland Revenue Act—Sale of beer without provincial license—Conviction—Validity. *Rex* v. *Neiderstadt* (B.C.), 2 W. L. R. 272.

Liquor Act of Manitoba—*Powers of Provincial Legislature.*]—The Manitoba Liquor Act of 1900, for the suppression of the liquor traffic in that province, is within the powers of the Provincial Legislature, its subject being and having been dealt with as a matter of a merely local nature in the province, within the meaning of the British North America Act, 1867, s. 92, s.-s. 16, notwithstanding that in its practical working it must interfere with Dominion revenue, and indirectly at least with business operations outside the province. Attorney-General for Ontario v. Attorney-General for the Dominion, [1896] A. C. 348, followed. Judgment in 21 Occ. N. 212, 13 Man. L. R. 239, reversed. *Attorney-General of Manitoba* v. *Manitoba License Holders' Association*, [1902] A. C. 73.

Liquor License Act, Nova Scotia—*Provision Requiring Wholesale Licenses—Intra Vires—Sale without License—Action for Price.*]—In an action to recover the price of a quantity of liquor sold by the plaintiff to J., payment for which was guaranteed by the defendant M., it appeared that at the time of the sale the plaintiff carried on business in Truro, where no licenses for the sale of liquor were issued. By the Liquor License Act of 1895, s. 56, no person shall sell by wholesale or by retail any liquors without having first obtained a license. It was contended on behalf of the plaintiff that this section was ultra vires the Provincial Legislature, so far as it related to wholesale licenses: — Held, that the Legislature had power to enact laws requiring dealers in intoxicating liquors, whether wholesale or retail, to take out licenses, and that this not having been done in the present case, the sale was illegal and the plaintiff could not recover. *Brown* v. *Moore*, 33 N. S. Reps. 381.

Liquor License Act of Ontario, s. 10—Selling liquor on vessels—Territorial limits of province—Treaties — Offence committed upon great lakes—Jurisdiction—Admiralty—International law—Municipal law—Foreign vessel—British North America Act—Electoral divisions of province—Conviction—Jurisdiction of police magistrate—Place where offence committed—Unlawfully allowing liquor to be sold—Master of ship—"Occupant"—"House, shop, room, or other place"—Amendment of conviction — Costs. *Rex* v. *Meikleham*, 6 O. W. R. 945, 11 O. L. R. 306.

Liquor Act of Ontario, 1902—*Intra Vires—Voting on by Electors—Delegation of Legislative Power—Corrupt Practices—Appointment of Judge to Conduct Trial.*]—The subject matter of the Ontario Liquor Act, 1902, is one with regard to which the Legislature is competent to enact a law or laws. Attorney-General for Ontario v. Attorney-General for the Dominion, [1896] A. 348, and Attorney-General of Manitoba v. Manitoba License Holders' Association, [1902] A. C. 73, followed. The Legislature, in enacting the Liquor Act, did not exceed, or fail to properly exercise its powers. Legislation which provides a law, but leaves the time and manner of its taking effect to be determined by the electors, is not a delegation of legislative power to them. Russell v. The Queen, 7 App. Cas. 829, The Queen v. Burah, 3 App. Cas. 889, and City of Fredericton v. The Queen, 3 S. C. R. 505, followed. By s. 91 (4), providing that the President of the High Court shall designate a County or District Judge to conduct the trial of persons accused of corrupt practices at the taking of the vote under part I., the Legislature did not assume the power of appointing

Judges, and did not exceed its powers in providing that a County or District Judge designated should exercise jurisdiction outside of his own county or district; and a Judge so designated may try the accused without a jury. *Rex* v. *Carlisle*, 23 Occ. N. 321, 6 O. L. R. 718, 2 O. W. R. 905.

Liquor License Act, Ontario—*Keeping Liquor for Sale—Club—R. S. O. c. 245, s. 53—Intra Vires.*]—See *Regina* v. *Lightburne*, 21 Occ. N. 241.

Loan Corporations Act—*Intra Vires—Penalty — Prohibition—Conviction.*] — Appeal by defendants, under s.-s. 4 of s. 117 of the Loan Corporations Act, R. S. O. 1897 c. 205, from their conviction by the police magistrate for the city of Toronto, of the offence of having, acting as agents for the Preferred Mercantile Company of Boston (incorporated), entered into a contract contrary to the provisions of s. 117:—Held, confirming the conviction that there was no right of appeal. *Rex* v. *Pierce*, 25 Occ. N. 70, 4 O. W. R. 411, 5 O. W. R. 464, 9 O. L. R. 374.

Liquor Act of Ontario, 1902—*Referendum—Power of Legislature—Trial of Offenders — Constitution of Court—"To Conduct the Trial"—County Judge — Issue of Summons—Adjournment for Sentence.*]—On a motion to quash a conviction for attempting to put a paper other than a ballot paper authorized by law into a ballot box, contrary to the provisions of s. 191 of the Ontario Election Act and s. 91 of the Liquor Act, 1902:—Held, that the reference by the Legislature of such a question as that mentioned in s. 2 of the Liquor Act, 1902, to the vote of electors, instead of the Legislature itself deciding it, is unusual, but well within the powers of the Legislature:—Held, also, that the intention of the Legislature under s.-s. 4 of s. 91 was to create a tribunal with authority to try certain specific offences; that the Court so created had power under the words "to conduct the trial" to bring the party charged before the Court, try him for the offence, and sentence him if found guilty; that the County Judge appointed to conduct the trial does not act as a County Judge, but as a Court specially created; that it was intended that he should act out of his own county in holding the actual trial; that he may issue his summons in his own county or elsewhere; and has power, after finding the accused guilty, to adjourn the Court to a subsequent day for the purpose of passing sentence. Section 191 of R. S. O. 1897 c. 9 is wide enough not only to meet the case of an offending returning officer or deputy returning officer, but that of any other person. *Rex* v. *Walsh*, 23 Occ. N. 186, 5 O. L. R. 527, 2 O. W. R. 222, 3 O. W. R. 31.

Lottery — *Contract — Illegal Consideration.*] — The Provincial Legislatures have no jurisdiction to permit the operation of lotteries forbidden by the criminal statutes of Canada. A contract in connection with a scheme for the operation of a lottery forbidden by the criminal statutes of Canada is unlawful, and cannot be enforced in a court of justice. The illegality which vitiates such a contract cannot be waived or condoned by the conduct or pleas of the party against whom it is asserted, and it is the duty of the Courts, ex mero motu, to notice the nullity of such contracts at any stage of the case and without pleadings. Per Girouard, J., dissenting. In Canada, before the Criminal Code, 1892, lotteries were mere offences or contraventions, and not crimes, and consequently the Act of the Quebec Legislature is constitutional. *L'Association St. Jean Baptiste de Montreal* v. *Brault*, 21 Occ. N. 5, 30 S. C. R. 598.

Magistrates' Courts — *Jurisdiction — Delegation of Powers — Powers of Police Magistrate — Summary Trials — Criminal Code, s. 785.*]—Section 785 of the Criminal Code confers on the police and stipendiary magistrates in the province of Ontario, in case of a person charged with having committed an offence for which he may be tried at a court of the general sessions of the peace, power to try the offence summarily with the consent of the party charged. The Criminal Code Amendment Act, 1900, extended the power to police and stipendiary magistrates of cities and incorporated towns in every other part of Canada:—Held, that the Court would take notice of the offences that might be tried at the court of general sessions of the peace, and that the police magistrate of a city in New Brunswick had power to try such offences, though there was no court of general sessions of the peace in that province. An Act of the provincial legislature which creates each and every stipendiary or police magistrate a Court, with all the powers and jurisdictions which any Act of the Parliament of Canada has conferred, or may confer, or which any Act of Parliament purports to confer upon any stipendiary or police magistrate within the province, is not a delegation of the powers conferred exclusively on the provincial legislature by the British North America Act, 1867, and is intra vires the provincial legislature. *Ex p. Vancini*, 36 N. B. Reps. 456. (Affirmed by Supreme Court of Canada).

Masters and Servants Ordinance—*B. N. A. Act—Constitution of Courts—Appointment of Judges — Property and Civil Rights—Justices of the Peace—Conviction —N. W. T. Act—Orders in Council.*]—The Masters and Servants Ordinances, R. O. 1888 c. 36, enacted that it should be lawful for any justice of the peace, on complaint . . . by any . . . servant of . . . nonpayment of wages . . . by his master . . . to order such master to pay such complainant one month's wages in addition to the amount of wages then actually due him . . . together with the costs of prosecution, the same to be levied by distress . . . and in default of sufficient distress, to be imprisoned . . .—Held, Rouleau, J., dissenting, and Scott, J., expressing no opinion—against the contention that the provision was ultra vires of the Territorial Legislature on the grounds that it assumed (1) to impose a penalty with imprisonment to enforce it, and (2) to provide for the appointment of judicial officers—that the provision was within the powers conferred upon the Territorial Legislature by the orders in council promulgated under the N. W. T. Act, R. S. C. c. 50, s. 13, of 11th May, 1877, and 26th June, 1883. — The former order in council gave power to pass Ordinances in relation to: 6. The administration of justice, including the constitution, organization, and maintenance

of Territorial Courts of civil jurisdiction. 7. The imposition of punishment by fine, penalty, or imprisonment for enforcing any Territorial Ordinances. 8. Property and civil rights in the Territories, subject to any legislation by the Parliament of Canada on these subjects. The latter order in council contained clauses in the same words. Per Wetmore and McGuire, J.J.: The provision in question of the Masters and Servants Ordinance did not purport to constitute a criminal offence, but was designed to give enlarged rights, and a more effective and speedy remedy with respect to a civil contract; the remedy by imprisonment is a competent exercise of the power to legislate under the above cited paragraphs of the order in council, and paragraph 6 does not exclude the power of appointing judicial officers. The Dominion Statute 54 & 55 V. c. 22, s. 6, substituting a new section for s. 13 of the N. W. T. Act, R. S. C. c. 50, is more restrictive than the terms of paragraph 6 of the order in council, paragraph 10 of the section reading as follows: "10. The administration of justice in the Territories, including the constitution, organization, and maintenance of Territorial Courts of civil jurisdiction, including procedure therein, but not including the power of appointing any judicial officers." Per Richardson, Wetmore, and McGuire, J.J.: The legislature having power to pass the provision in question of the Masters and Servants Ordinance at the time it was passed, the provision did not cease to be valid by reason of the subsequent restriction placed upon the power of the legislature. *Gower* v. *Joyner*, 2 Terr. L. R. 387.

Militia Act—*Expense of Calling Out Militia — Imposition on Municipality — Harbour—Preservation of Peace in.*]—Sub-sections 5 and 6 of s. 34 of the Militia Act of Canada, R. S. C. c. 41, by which the cost of militia corps called out in aid of the civil power, is imposed on the municipality in which their services are required, are intra vires of the Parliament of Canada. 2. The harbour of Montreal being within the municipality of the city of Montreal, the city is liable for the cost of militia corps called out for the preservation of peace in the harbour, although the harbour commissioners and the federal government are vested with certain rights in such harbour. *Gordon* v. *City of Montreal*, Q. R. 24 S. C. 465.

Monopoly—*Powers of Provincial Legislature—Municipal Corporation — By-law — Statute Validating—Electric Light Company.*]—See *Hull Electric Co.* v. *Ottawa Electric Co.*, [1902] A. C. 237.

Municipal Corporations—*By-law Licensing Insurance Agents.*]—The Ordinance incorporating the city of Calgary (No. 33 of 1893, s. 117, s.-s. 41), empowering the city to pass by-laws "for controlling, regulating, and licensing . . . insurance companies, offices, and agents . . . and collecting license fees for the same:"—Held, that the provision was intra vires of the Legislative Assembly of the Territories. *English* v. *O'Neill*, 4 Terr. L. R. 74.

Municipal Corporations—*Shops—Early Closing By-law — Shops Regulation Act — Winnipeg Charter — Discrimination — Oppression—Powers of Provincial Legislature—Interference with Trade and Commerce.*]—Rule nisi to quash the conviction of the defendant for breach of a by-law of the city of Winnipeg requiring all shops with certain exceptions to be closed after 6 o'clock p.m., except on certain days. The by-law in question was passed in July, 1900, under the Shops Regulation Act, R. S. M. 1892 c. 140, (c. 156 of R. S. M. 1902, which came into force on 6th March, 1903.) In March, 1902, the Winnipeg charter being c. 77 of the statutes of that year, came into force, and the new Municipal Act, c. 116 of R. S. M. 1902, contains a clause (2*a*), providing that the city of Winnipeg is not included in the expression "municipality," when the same occurs in the Act:—Held, without deciding whether the present Shops Regulation Act applies to the city or not, that the joint effect of s. 931 of the Winnipeg charter, and s. 527 of the Municipal Act, and of s.-s. 14 and 16 of the Interpretation Act, R. S. M. 1902 c. 89, is to retain and keep in force the by-law in question:—Held, also, that, as the by-law in question was in strict accordance with the powers conferred by the legislature in the Act under which it was passed, its provisions could not be held to be unreasonable, uncertain, or oppressive, so as to render it invalid or unenforcible. Bryden v. Union Colliery Co., [1899] A. C. 580, Re Boylan, 15 O. R. 13, and Simmons v. Mallings, 13 Times L. R. 447, followed:—Held, also, that the provisions of the Shops Regulation Act are intra vires of the provincial legislature, under s. 92 of the British North America Act, 1867, as dealing with a matter of a merely local and private nature in the province, and not interfering with the regulation of trade and commerce, assigned to the Dominion Parliament by s. 91, to as great an extent as the legislation in question in *Attorney-General for Ontario* v. *Attorney-General for Canada*, [1896] A. C. 348, and *Attorney-General for Manitoba* v. *Manitoba License Holders' Association*, [1902] A. C. 77. *Stark* v. *Schuster*, 24 Occ. N. 187, 14 Man. L. R. 672.

Power Company—*Construction of Statute—Legislative Jurisdiction—Parliament of Canada—Local Works and Undertakings—Recital in Preamble—Enactment Clause—General Advantage of Canada — Subject Matter—Presumption—Practice — Motion to Refer Case for Further Evidence.*]—In construing an Act of the Parliament of Canada, there is a presumption in law that the jurisdiction has not been exceeded. Where the subject matter of legislation by the Parliament of Canada, although situate wholly within a province, is obviously beyond the powers of the local legislature, there is no necessity for an enacting clause specially declaring the works to be for the general advantage of Canada or for the advantage of two or more of the provinces. Semble, per Davies, J. (Idington, J., contra), that a recital in the preamble to a special private Act enacted by the Parliament of Canada, is not such a declaration as that contemplated by s.-s. 10 (c) of s. 92 of the British North America Act, 1867, in order to bring the subject matter of the legislation within the jurisdiction of Parliament. Judgment of the Court of Appeal, 8 O. L. R. 88, 3 O. W. R. 865, 24 Occ. N. 332, affirmed. A motion, made while the case was standing for judgment, to have the case remitted back to the

Court below for the purpose of the adduction of newly discovered evidence as to the refusal of Parliament to make the above mentioned declaration, was refused with costs. *Hewson* v. *Ontario Power Co. of Niagara Falls*, 25 Occ. N. 137, 36 S. C. R. 596.

Powers of Provincial Legislature — Act to prevent profanation of Lord's Day—Work—Necessity—Conveying travellers. *Re Lord's Day Act of Ontario*, 1 O. W. R. 312, 2 O. W. R. 672.

Prairie Fire Ordinance — Powers of territorial legislature — Intra vires — Canadian Pacific Railway—Conviction—Evidence as to cause of fire. *Rex* v. *Canadian Pacific Co.* (N.W.T.), 1 W. L. R. 89.

Prohibition of Trading Stamps — *Municipal By-law—Statutes—Construction.*] The Quebec statute 3 Edw. VII. c. 39 is within the powers of the legislature, and gives to every municipal council in the province power to pass by-laws to prohibit the giving, selling, exchanging, distributing, or receiving trading stamps, coupons, or other like things, and prohibiting every person from giving, selling, or exchanging them; such matter being one concerning property and civil rights in the province. 2. A statute, however obscure its terms, should not be treated as void—a meaning must be found for it and applied. *Wilder* v. *City of Quebec*, Q. R. 25 S. C. 128.

Railway Company—*Negligence—Agreements for Exemption from Liability—Power of Parliament to Prohibit.*]—Upon a reference by the Governor-General in council:—Held, that an Act of the Parliament of Canada (4 Edw. VII. c. 31), providing that no railway company within its jurisdiction shall be relieved from liability for damages for personal injury to any employee by reason of any notice, condition, or declaration issued by the company, or by any insurance or provident association of railway employees, or of rules or by-laws of the company or association, or of privity of interest or relation between the company and association or contribution by the company to funds of the association, or of any benefit, compensation, or indemnity to which the employee or his personal representatives may become entitled to or obtain from such association, or of any express or implied acknowledgment, acquittance, or release obtained from the association prior to such injury, purporting to relieve the company from liability, is intra vires of Parliament. *In re Jurisdiction of Parliament as to Contracts of Railway Companies*, 25 Occ. N. 105; *In re Railway Amendment Act*, 36 S. C. R. 136.

Railways—*Prohibited Contract — Consolidated Railway Act, 1897.*]—Judgment in Q. R. 8 Q. B. 555 affirmed. *Macdonald* v. *Riordan*, 30 S. C. R. 619.

Registration of Lis Pendens — *Imperial Acts in Force in Yukon Territory—2 & 3 V. c. 11 (Imp.)—R. S. C. c. 50—Transfer of Land—Fraud—Land Titles Act, 1894 — Pleading — Rules of Court — Yukon Ordinances, 1902, c. 17 — Rules 113, 115, 117 — Estoppel.*]—The provisions of the Imperial Act 2 & 3 V. c. 11, in respect to the registration of notices of lis pendens and for the protection of bona fide purchasers pendente lite, are of purely local character, and do not extend their application to the Yukon Territory by the introduction of the English law generally as it existed on the 15th July, 1870, under s. 11 of the North-West Territories Act, R. S. C. c. 50. Under the provisions of the Land Titles Act, 1894, s. 126, a bona fide purchaser from the registered owner of land, subject to the operation of that statute, is not bound nor affected by notice of lis pendens which has been improperly filed and noted upon the folio of the register containing the certificate of title as an incumbrance or charge upon the land. The exception as to fraud referred to in s. 126 of the Act means actual fraudulent transactions in which the purchaser has participated, and does not include constructive or equitable frauds. Assets Co. v. Mere Roihi, 21 Times L. R. 311, referred to and approved. In an action to set aside a conveyance as made in fraud of creditors, the defendant, desiring to meet the action by setting up that there was no debt due, and, consequently, that no such fraud could exist, must allege these objections in his pleadings. In the present case the defendant, having failed to plead such defence, was allowed to amend on terms. Taschereau, C.J.C., dissenting. *Syndicat Lyonnais du Klondyke* v. *McGrade*, 25 Occ. N. 126, 36 S. C. R. 251.

Representation of Provinces in House of Commons — *British North America Act, s. 51—Readjustment of Representation—Construction—"Aggregate Population of Canada."*] — Section 51 of the British North America Act, 1867, directs after each decennial census a readjustment of the representation in the Dominion House of Commons of the four provinces constituted by that Act. It provides as the rule of readjustment that Quebec shall have the fixed number of 65 representatives, and that each of the other provinces shall have that number which bears the same proportion to its population as 65 bears to that of Quebec. But its s.-s. 4 prohibits a reduction of the number of the representatives in the case of any province, unless the proportion which the number of its population bore to the number of the aggregate population of Canada at the last preceding readjustment is ascertained at the then latest census to have been diminished by one-twentieth part or upwards:—Held, on a case submitted to the Supreme Court of Canada as to whether New Brunswick was protected from reduction of its members, that on the true construction of s.-s. 4 the expression "aggregate population of Canada" relates to the whole of Canada as constituted by the Act, and therefore includes, not merely the four provinces constituted by proclamation issued under s. 3, but also all the provinces subsequently incorporated and admitted into the Union by order in council under s. 146:—Held, also, with regard to the province of Prince Edward Island, which had under s. 146 been admitted into the Union by order in council directing that it should have six members, its representation to be readjusted from time to time under the provisions of the Act of 1867, that s.-s. 4, on its true construction, did not protect that number from reduction until an increase thereof had been previously effected. Judgment in In re Representation in House of Commons, 23 Occ. N. 209, 33 S. C. R. 475, 594, affirmed. *Attorney-General for Prince*

Edward Island v. *Attorney-General for Canada; Attorney-General for New Brunswick* v. *Attorney-General for Canada*, [1905] A. C. 37.

Seamen's Act — *Intra Vires — Foreign Ship—Harbouring Deserters — Conviction — Consent of Consular Officer.*]—The Seamen's Act (R. S. C. c. 74) is not ultra vires the Canadian Parliament; and a conviction under s. 104 for harbouring seamen, knowing them to be deserters, engaged to serve on a foreign ship, then in a Canadian port, made against a resident of Canada on the information of person also a resident, the party charged or the informant not being in any way connected with the foreign ship, is good. It is not necessary that the prosecutor should obtain the consent of the consular officer representing the nationality of the ship under s. 129. *Rex* v. *Martin*, 36 N. B. Reps. 448.

Statute Authorizing Monopoly — *Municipal Corporation—Resolution — By-law —Contracts with Electric Companies.*] —On the 4th April, 1887, the council of the city of H. had, by a simple resolution, permitted the grantors of the appellant company to erect in that city poles for the purpose of electric lighting, under the same restrictions and rules as in the city of O., and under the control of the committee of roads as regards the position of the poles. By virtue of this resolution the grantors placed poles and wires in the city and furnished electric light to the city and citizens. On the 7th May, 1894, by by-law, the city of H. accorded to the grantor of the respondent company for 35 years the exclusive privilege of building and operating an electric railway, and of establishing in the city a system of heating and lighting, either by electricity or natural gas or otherwise. It was stipulated that the city granted these exclusive rights in so far as they possessed them and had the right to grant them. This by-law was confirmed by statute 58 V. c. 69 (Q.), the Act of incorporation of the respondent company, which enumerated, among the privileges granted, the exclusive right of furnishing and distributing electric light to the city, to its inhabitants and all industries or manufactures which were or should be established there:—Held, that the statute in question, relating to a purely local undertaking, was within the competence of the legislature, in spite of the fact that it had the effect of excluding for a limited time the competition of rival undertakings. 2. That by the by-law of the 7th May, 1894, the city had not revoked the permission which it had granted by the former resolution, and had not delegated the power of revoking it, and that the respondent company could exercise the powers authorized by the resolution, until revoked by the city. Judgment in Q. R. 10 K. B. 35 affirmed. *Hull Electric Co.* v. *Ottawa Electric Co.*, Q. R. 12 K. B. 549, (Privy Council).

Sunday Observance—*Powers of Provincial Legislatures — Police Regulations.*] — Section 1 of 62 V. c. 11, whereby the sale of real or personal property or the exercise of any worldly business or work on Sunday is prohibited, is within the authority of the Legislature of New Brunswick. Therefore, where G. was convicted under the above section of selling cigars on Sunday a rule nisi for a certiorari to bring up the conviction was discharged. The fact that the Parliament of Canada can make the doing of such an act on Sunday a crime, and prohibit it under the general criminal law, does not necessarily shew that a local legislature has no jurisdiction to deal with it under its powers to make regulations of a police or municipal nature. A subject matter of legislation, though falling within some of the classes intrusted to the federal Parliament by s. 91 of the British North America Act, may likewise, when looked at from another point of view, come within some of the classes, over which, by s. 92 of the same Act, the Provincial Legislatures have exclusive jurisdiction. *Ex p. Green*, 35 N. B. Reps. 137.

Sunday Observance—*Powers of Provincial Legislature—Theatres—Prohibition of—Interference with Criminal Law—Municipal By-law.*]—Under the provisions of cl. 16 of s. 92 of the B. N. A. Act, the provincial legislature had power to enact cl. 5 of s. 123 of the charter of the city of Montreal, 37 V. c. 51, and to confer, as it has done, upon the council the power to pass by-law No. 103 of the council of the city; and such by-law does not exceed the powers conferred upon the council. 2. Neither the statute nor the by-law has the effect of modifying or abrogating the criminal law. 3. The statute and by-law are limited to the city of Montreal. 4. The imposition of imprisonment provided for by the by-law, under the authority of s. 124 of the statute, is legal. 5. Under the provisions of cl. 15 of s. 92 of the B. N. A. Act, and of cl. 8 of the same section, the provincial legislature could, as it has done by ss. 123 and 124 of the above statute, delegate to the council of the city of Montreal the power to pass a by-law prohibiting the opening of theatres on Sunday under penalty of imprisonment. 6. The opening of theatres on Sunday is prohibited by the statute, and is a contravention of the by-law. *McLaughlin* v. *Recorder's Court of the City of Montreal*, 4 Q. P. R. 304.

Sunday Observance—*Reference to Supreme Court — Legislative Jurisdiction.*] — The statute 54 & 55 V. c. 25, s. 4, does not empower the Governor-General in council to refer to the Supreme Court of Canada, for hearing and consideration, supposed or hypothetical legislation which the legislature of a province might enact in the future; Sedgewick, J., dissenting.—The said section provides that the Governor in council may refer "important questions of law or fact touching specified subjects," "or touching any other matter with reference to which he sees fit to exercise this power;"—Held, Sedgewick, J., dissenting, that such "other matter" must be ejusdem generis with the subjects specified. Legislation to prohibit on Sunday the performance of work and labour, transaction of business, engaging in sport for gain, or keeping open places of entertainment, is within the jurisdiction of the Parliament of Canada. Attorney-General for Ontario v. Hamilton Street R. W. Co., [1903] A. C. 524, followed. *In re Sunday Laws*, 25 Occ. N. 77, 35 S. C. R. 581.

Tax Titles—*Powers of Territorial Legislature—Tax Titles—Land Titles Act, 1894 —Redemption—Statute — Retro-activity.*]—The provisions of the N. W. T. Ordinance c. 2 of 1896, vesting titles of lands sold for taxes in the purchaser forthwith upon the

execution of the transfer thereof, free of all charges and incumbrances other than liens for existing taxes and Crown dues, are inconsistent with the provisions of the 54th, 59th, and 97th sections of the Land Titles Act, 1894, and, consequently, pro tanto, ultra vires of the legislature of the North-West Territories; Sedgewick, and Killam, JJ., contra. The second section of the N. W. T. Ordinance, c. 12 of 1901, providing for an extension of the time for redemption of lands sold for taxes, deals with procedure only, and is retrospective, and saves the rights of mortgagees prior to the tax sale so as to permit them to come in as interested persons and redeem the lands; Sedgewick and Killam, JJ., contra. The Ydun, 15 Times L. R. 361, referred to. In re Kerr, 5 Terr. L. R. 297, overruled. Per Sedgewick and Killam, JJ.: The provisions of s. 2 cannot operate retrospectively so as to affect cases in which the transfers had issued and the right of redemption was gone as in the present case. *North British Canadian Investment Co.* v. *Trustees of St. John School District No. 16, N. W. T.*, 35 S. C. R. 461.

Telegraph Companies—*Tax on—Application to Interprovincial Company—Action to Recover Tax—Parties—Collector of Revenue —Attorney-General—Intervention—Appeal — Formal Objections not Taken Below.*]—The statute of the legislature of Quebec imposing an annual tax of $2,000 upon every telegraph company having a paid-up capital exceeding $50,000, and maintaining a line of telegraph for the use of the public in the province, is intra vires of the legislature. 2. The appellant telegraph company, although incorporated by Parliament and carrying on an interprovincial line of telegraph, that is to say, in all the provinces of Canada, except British Columbia and Prince Edward Island, having a paid-up capital exceeding $50,000, must pay this annual tax of $2,000, inasmuch as it carries on business in the province of Quebec by reason of its there using a part of its lines for messages from one point to another within the province. 3. An action brought by a collector of revenue in that capacity for the recovery of this tax is to be regarded as brought under the direction of the Attorney-General, who is dominus litis, and therefore the intervention of the Attorney-General to sustain the constitutionality of the statute, is an unnecessary and useless proceeding, for which he could not, under the circumstances, be allowed costs. 4. The Court of Appeal will not take into consideration objections which have regard rather to the form than to the substance, if they have not been taken in the Court below. *Great North Western Telegraph Co.* v. *Fortier*, Q. R. 12 K. B. 405.

Telephone Company—*Work or Undertaking Connecting Provinces—British North America Act, 1867, ss. 91, 92, s.-s. 10 (a)— Dominion Act 43 V. c. 67—Ontario Act, 45 V. c. 71—Powers of Dominion Parliament— Powers of Local Legislature.*]—Held, that under their Dominion incorporating Act. 43 V. c. 67, the respondent telephone company were entitled, without the consent of the municipal corporation, to enter upon the streets and highways of the city of Toronto, and to construct conduits or lay cables thereunder, or to erect poles with wires affixed thereto upon or along such streets or highways. The scope of the respondents' business contemplated by the Act, and involving its extension beyond the limits of any one province, was within the express exception made by s. 92, s.-s. 10 (a), of the British North America Act, 1867, from the class of local works and undertakings assigned thereby to provincial legislatures. Accordingly, 43 V. c. 67 was within the exclusive competence of the Dominion Parliament, under s. 91. The Ontario Act 45 V. c. 71, passed to authorize the exercise of the above powers within the province, subject to the consent of the corporation, was held to be ultra vires, and could not by reason of having been passed on the application of the respondent company be validated as a legislative bargain. Judgment in 23 Occ. N. 277, 6 O. L. R. 335, affirmed. *City of Toronto* v. *Bell Telephone Co. of Canada*, [1905] A. C. 52.

Trading Stamps—*Powers of Provincial Legislatures — Municipal Corporations — By-law—Interference with Trade and Commerce.*]—The Act of the legislature of Quebec, 3 Edw. VII. c. 39, authorizing municipal councils of cities, towns, villages, and parishes, to pass by-laws prohibiting the use of "trading stamps," unless redeemable by the manufacturer or trader who issues them, does not infringe upon the exclusive power of the Parliament of Canada to make laws for the regulation of trade and commerce, nor upon the exclusive power of Parliament over criminal law, and is not unconstitutional, illegal, or ultra vires. *Wilder* v. *City of Montreal*, Q. R. 26 S. C. 504.

CONTAGIOUS DISEASES.

See PUBLIC HEALTH.

CONTEMPT OF COURT.

Breach of Injunction — Infringement of design for manufactured article—Similarity —Colourable imitation—Comparison by Judge — Wilful breach—Company—Sequestration— Relief on terms. *Buck Stove Co.* v. *Guelph Foundry Co.*, 6 O. W. R. 116.

Breach of Injunction—*Motion to Commit—Costs.*]—Where in a suit for a declaration that the plaintiff and defendant were partners, the defendant, in breach of an interim injunction order, collected debts due the firm, but which, subsequently to the service of a notice of motion for his commitment, he paid to the receiver in the suit, he was ordered to pay the costs of the motion. *Burden* v. *Howard*, 24 Occ. N. 242, 2 N. B. Eq. Reps. 531.

Breach of Injunction Improvidently Granted.]—Where an injunction is erroneously or improvidently granted, although only voidable, while it is in force nothing should be done in contravention of its reasonable import. McLeod v. Noble, 28 O. R. 528, distinguished. *Dunn* v. *Toronto Board of Education*, 24 Occ. N. 223, 7 O. L. R. 451, 3 O. W. R. 311, 393.

Disobedience of Order for Interim Alimony — Order for payment of money. *Galley* v. *Galley* (N.W.T.), 1 W. L. R. 155.

Disobedience of Subpoena—Failure to shew original when serving copy. *Woods* v. *Fader*, 6 O. W. R. 369, 10 O. L. R. 643.

Habeas Corpus — *Disobedience—Peace Officer—Return.*]—A peace officer upon whom a writ of habeas corpus has been served, directing him to produce a prisoner who is in his custody, is not guilty of contempt of Court in neglecting to produce the prisoner, when, in good faith and for reasons which he believes to be valid, he does not do so. 2. A return setting forth all these reasons is sufficient return to such a writ. *Greene* v. *Carpenter*, Q. R. 22 S. C. 104.

Husband and Wife — *Wife Leaving Conjugal Domicil — Disobedience to Judgment.*]—A wife who has been ordered by a judgment to return to the conjugal domicil, and who leaves it after having returned to it, cannot for so doing be imprisoned for contempt of Court. *Tessier dit Laplante* v. *Guay*, Q. R. 23 S. C. 75.

Interlocutory Judgment — *Appeal — Stay.*]—Proceedings for contempt of Court will not be stopped by reason of the fact that an appeal has been taken from an interlocutory judgment in the same case. *Merganthaler Linotype Co.* v. *Toronto Type Foundry Co.*, 7 Q. P. R. 76.

Motion to Commit—Breach of injunction—Master and servant—Interference with servants — Incitement to commit breach — Offer of money — Proof—Picketting—Vagueness of charges—Dismissal of motion—Cos's. *Canada Foundry Co.* v. *Emmett*, 2 O. W. R. 1032, 1102.

Motion to Commit—*Order on—Attachment — Apology — Variation of Order Pronounced—Appeal—Criminal Matter.*] — During the pendency of an action for libel, the defendant called a public meeting at which the subject matter of the action was discussed, and he also published articles in his newspaper commenting upon the libel. The plaintiff made application to punish the defendant for contempt. The Judge who heard the motion filed a memorandum of his reasons for granting it. He subsequently granted an order giving the plaintiff liberty to issue a writ of attachment, and he directed that the defendant should publish an apology in his newspaper. The defendant appealed, and on the appeal it was contended that the Judge had no jurisdiction to make the direction as to the apology; also that the order for the writ should not have departed in its terms from the memorandum filed by the Judge:—Held, that the appeal must be dismissed. The Court has no jurisdiction to rehear or alter the order after it has passed, provided it accurately expresses the intention of the Judge: Preston Banking Co. v. Allsup, [1895] 1 Ch. 141. The order as granted expressed the intention of the Judge. Besides, the proceeding was criminal, and there was no appeal open to the defendants: O'Shea v. O'Shea, 15 P. D. 59; Ellis v. The Queen, 22 S. C. R. 7. *Grant* v. *Grant*, 24 Occ. N. 139.

Motion to Stay Appeal by Defendants in Contempt — *Disobedience to Injunction—Unincorporated Association — Service—Costs.*]—On a motion by the plaintiff to stay a pending appeal by the defendants from an order dismissing an application to set aside service of the writ of summons on an individual for the defendant association, on the ground that the association was not an incorporated body or a partnership and could not be served as a body, the plaintiff alleging that the defendants were in contempt for disobedience of an injunction:—Held, following Metallic Roofing Co. of Canada v. Local Union No. 30, Amalgamated Sheet Metal Workers' International Assn., 23 Occ. N. 152, 5 O. L. R. 424, that the association was not a body capable of being sued or being served, and so was not capable of being enjoined or of committing a contempt, and that, as the very object of the appeal was to determine whether it could be sued and served with process, it could not be determined whether a contempt had been committed without hearing the appeal:—Held, also, that the rule is not universal that persons guilty of contempt can take no step in the action; a party, notwithstanding his contempt, is entitled to take the necessary steps to defend himself, and, as the defendants here were ordered to appear within ten days on pain of having judgment signed against them, they had the right to shew, if they could, that the service upon them was not permitted by the practice; and the motion was refused under the circumstances without costs. Fry v. Ernest, 9 Jur. N. S. 1151, and Ferguson v. County of Elgin, 15 P. R. 399, followed. *Small* v. *American Federation of Musicians*, 23 Occ. N. 188, 5 O. L. R. 456, 2 O. W. R. 26, 33, 99, 278, 310.

Newspaper Comment — *Conduct of Revising Officer.*]—The publication of newspaper articles reflecting on the conduct of a revising officer acting under the Election Act in such a way that they might have been made the subject of proceedings for libel, but not in the circumstances calculated to obstruct or interfere with the course of justice or the due administration of the law, does not constitute a contempt of Court punishable by summary proceedings. Skipworth's Case, L. R. 9 Q. B. at p. 233, Hunt v. Clarke, 58 L. J. Q. B. 490, and The Queen v. Payne, [1896] 1 Q. B. 577, followed. *In re Bonnar*, 23 Occ. N. 269; *Rex* v. *Bonnar*, 14 Man. L. R. 481.

Order for Costs and Apology—*Power of Judge to Vary—Appeal.*] — On motion for an attachment for contempt for the publication of newspaper articles touching a matter before the Court, and liable to interfere with the fair trial thereof, the Judge before whom the motion was made allowed it with costs, and concluded his judgment by saying that the defendant must, in addition to paying the costs, undertake not to publish or circulate anything calculated or liable to prejudice the course of justice in respect to the action, while pending, and that he must also publish in an early number of "The Truth," (a paper conducted by the defendant), an expression of regret for having published therein anything touching this action. The order taken out was in different terms, requiring the defendant to deposit with the prothonotary of the Court a statement, under his hand, stating his regret at having made such a publication, and undertaking not to publish further comments upon this suit, etc.:—Held, that, as the order was not drawn up at the time judgment was delivered, there was no necessity for following

the terms of the written decision, but that it could be varied in any way that seemed proper to the Judge; and that the case was one in which an appeal would not lie. *Grant* v. *Grant*, 36 N. S. Reps. 547.

Order for Imprisonment — *Appeal — Discretion.*]—Where the trial Judge has exercised his discretionary powers in a matter of procedure by ordering that a party who was in contempt of Court for refusing to produce effects unlawfully removed by her, should be imprisoned until the effects should be produced, the Court of King's Bench, or a Judge thereof, will not be disposed to allow an appeal from such exercise of discretion, and particularly where the course adopted by the Court below was apparently the only practical remedy available to enforce obedience to its orders. *St. Pierre* v. *Bélisle*, Q. R. 12 K. B. 279.

Pending Criminal Proceeding—*Information—Contemptuous Design.*] — The question whether a contempt has been committed is for the sole decision of the Court; and the fact that the contemnor denies any disrespectful or contemptuous design to reflect on proceedings pending before the Court, will not justify him if such comments appear to the Court to amount to a flagrant contempt. 2. Proceedings are pending in a criminal case from the time the information has been laid and so long as any proceedings can be taken. Where the jury have disagreed and a new trial has been ordered, the cause is pending until ended by a verdict or otherwise. *Rex* v. *Charlier*, Q. R. 12 K. B. 385.

Preliminary Inquiry by Magistrate—*Refusal of Witness to Answer—Relevancy of Question—Alteration of Document.*]—1. Under s. 585 of the Criminal Code a magistrate would not be justified in committing a witness to gaol for refusal to answer a question unless it were in some way relevant to the issue, as that section only applies when the refusal is made "without offering any just excuse," and the form of the warrant of commitment referred to in that section contains the words, "now refuses to answer certain questions concerning the premises now put to him." 2. If B. is charged with making an alteration of a document received from A., the question put to A. on his examination as a witness on the trial of B. as to the person from whom he, A. had received this document, would not be material if the document is produced; but, if it cannot be found, proof of its contents would have to be given, and that might involve, as a part of the claim, information as to the source from which A. had obtained the document, and it could not be held that the question was not in some way material. *In re Ayotte*, 15 Man. L. R. 156, 1 W. L. R. 79.

Publication of Newspaper Article — *Comment on Pending Election Petition—Prejudice—Petition not Prosecuted — Abuse of Forms of Court.*]—Motion to make absolute an order nisi to commit editor of newspaper for contempt of Court in publishing in the newspaper an article commenting on matters alleged to be in question upon a petition pending against respondent to avoid his election as member for North Renfrew in the Legislative Assembly of Ontario: — Held, such an application should only be granted where it clearly appears that the course of justice has been, or is likely to be, restricted or impaired to the prejudice of the applicant unless summary punishment is inflicted upon the offender. If an article is merely libellous, or if it is even strictly contempt of Court, but not of such a nature as to impede the course of justice, then the applicant must resort to what other remedies, if any, the law gives him, and cannot successfully invoke the summary, and as it has been called, arbitrary, remedy now sought. The proceedings on both sides were so manifestly a sham, and a user of the forms of the Court for some purpose other than of the real trial of the charges, that contempt of Court is not predicable of anything reflecting upon the parties to them. In scena non in fors res agitur, and whether the play is damned or applauded, is no concern of a Court of justice. Motion dismissed with costs on these grounds only. *Re North Renfrew Provincial Election, Re Macdonald*, 4 O. W. R. 244, 9 O. L. R. 79.

Refusal to Produce Effects — *Order for Imprisonment—Leave to Appeal.*]—Leave to appeal from an order condemning a party to a civil cause to imprisonment until he produces certain effects which he has refused to produce in obedience to the Court's order, will not be granted. *St. Pierre* v. *Bélisle*, 6 Q. P. R. 418.

See SHIP.

CONTINGENT INTEREST.

See RECEIVER.

CONTRACT.

I. BREACH, 300.
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I. BREACH.

Abandonment — *Quantum Meruit — Amendment.*]—The plaintiff agreed to build, for a fixed lump sum, a foundation for a building, the defendant supplying materials

on the ground. The plaintiff, owing to non-supply of lime, abandoned the work, though it was found on the evidence that the defendant had got what he bargained for, with some shortcoming, for which damages would compensate him: — Held, that although the plaintiff was not entitled to succeed on his claim under the original special contract, he was entitled to recover on a quantum meruit, and the pleadings were directed to be amended accordingly. *Burns* v. *Ussherwood*, 4 Terr. L. R. 389.

Appointment of Sequestrator — *Cancellation.*]—The Court has no power to appoint a sequestrator to carry out the work undertaken by a contractor, nor to authorize the owner to take possession of the works, the remedy of the owner being the cancellation of the contract. *Macdonald* v. *Hood*, 7 Q. P. R. 72.

Cause of Action, where Arising — *Sale of Goods—Place of Delivery—Superior Court—District.*]—In the absence of agreement to the contrary, goods sold should be delivered and the price paid at the domicil of the purchaser. 2. Default of delivery of the goods sold and of payment of the price constitutes a cause of action. 3. An action can only be begun before the Court of the place where the cause of action arose (if such Court is not that of the domicil of the defendant), when all the causes of action arose in the same place. *Lipschitz* v. *Rittner*, 4 Q. P. R. 311.

Condition Precedent as to Sub-letting — *Consent of Municipal Council — Pleading.*]—Where a contract with a municipal corporation provides that it shall not be sub-let without the consent of the corporation, it is incumbent on the contractor to obtain such consent before sub-letting, and if he fails to do so he cannot maintain an action against a proposed sub-contractor for not carrying on the portion of the work he agreed to do. In an action against the sub-contractor, the latter pleaded the want of assent by the council, whereupon the plaintiff replied that the assent was withheld "at the wrongful request and instigation of the defendant and in order wrongfully to benefit said defendant and enable him, if possible, to repudiate and abandon the contract." Issue was joined on this replication:—Held, that the only issue raised by the pleading was whether or not the defendant had wrongfully caused the consent to be withheld, and that the plaintiff had failed to prove his case on that issue. Judgment of the Court of Appeal, 27 A. R. 135, 20 Occ. N. 198, affirmed. *Ryan* v. *Willoughby*, 21 Occ. N. 2, 31 S. C. R. 33.

Company—*Contract before Incorporation — Agent—Authority—Consensus—Evidence.*]—In the absence of a new agreement made by a company after its incorporation, a contract made before its incorporation by a person purporting to contract for the company is not binding on the company, although the parties afterwards carry out some of the terms of the contract and act on the supposition that it is binding on the company. In re Sully, 33 Ch. D. 16, followed. A person who enters into a contract, expressly as agent for a principal, impliedly warrants his authority; and if he has in fact no such authority he may be sued under that implied contract, and is bound to make good to the other contracting party what that party has lost or failed to obtain by reason of the non-existence of the authority. Collen v. Wright, 8 E. & B. 647, followed. In an action on an oral contract, the evidence as to its terms being contradictory, and shewing that, if each of the parties to the contract gave in evidence a truthful statement of its terms according to his recollection, there was a misunderstanding between them as to whether a certain important provision (the existence of which was the whole basis of the action) formed part of it, the trial Judge declared himself unable to ascertain the truth, and, applying the principle laid down in Falck v. Williams, [1900] A. C. 176, that it is for the plaintiff in an action for breach of contract to shew that his construction is the right one—dismissed the action. *Coit* v. *Dowling*, 4 Terr. L. R. 464.

Construction — Delivery of wood to be carbonized — Claim for excessive delivery — Claim for services in unloading — Taxes — Supply of charcoal — Shortage — Damages — Waste of steam—Interest—Costs. *Rathbun Co. of Deseronto* v. *Standard Chemical Co. of Toronto*, 2 O. W. R. 36, 385, 3 O. W. R. 698, 724, 6 O. W. R. 660.

Damages — Allowances and deductions — Accounts—Interest. *Ottawa Electric Co.* v. *City of Ottawa*, 1 O. W. R. 508, 2 O. W. R. 596, 3 O. W. R. 65, 588, 796, 4 O. W. R. 190, 6 O. W. R. 930.

Damages—*Costs—Evidence — Discretionary Order by Judge at Trial—Interference by Court of Appeal.*] — The trial Court condemned the defendant to pay $122.50 damages for breach of contract for the sale of goods, but, in view of unnecessary expenses caused in consequence of exaggerated demands by the plaintiffs, which were rejected, they were ordered to bear half the costs. On an appeal by the defendant, the Court of King's Bench varied the trial Court judgment by adding $100 exemplary damages to the condemnation and giving full costs against the defendant:—Held, reversing the judgment appealed from, that, in the absence of any evidence of bad faith or wilful default on the part of the defendant, there was no justification for the addition of exemplary damages nor for interference with the judgment of the trial Court. *Coghlin* v. *Fonderie de Joliette*, 24 Occ. N. 110, 34 S. C. R. 153.

Damages—*Future Services.*]—The plaintiff agreed to give a course of lessons in the cutting work of a tailor to the defendant, who was to pay the plaintiff $100 by payments to be made at intervals during the course. The defendant took several lessons, but refused to continue them:—Held, that the plaintiff could recover from the defendant only the price of the lessons which he had actually given, and not the price of the whole course; his remedy in respect of the future lessons being for damages for the defendant's non-performance of his agreement. *Dulude* v. *Jutras*, Q. R. 18 S. C. 327.

Damages—*Profits—Mode of Estimating.*] — In an action for damages for breach of contract plaintiff gave evidence that he estimated his profit at from 15 to 20 per cent. on the total amount of the contract, or from $75 to $80, but on cross-examination he failed to give

any data by which the accuracy of his estimate could be tested, while the person who actually did the work gave evidence that his profit was about $35:—Held, that the burden was on the plaintiff to shew grounds which would justify the Court in adopting his estimate, and that, in the absence of such evidence the amount of damages allowed must be reduced from $70, at which it was fixed by the trial Judge, to $35; and that an allowance could not be made for the plaintiff's time, that being one of the elements forming the basis on which the profit is to be calculated, or for material provided for the purpose of carrying out such contract, except in so far as such material was shewn to be useless for any other purpose. The measure of damages is the profit which the plaintiff might reasonably look for. *Lowe* v. *Robb Engineering Co.*, 37 N. S. Reps. 326.

Damages — Time—Essence of Waiver: *McRae* v. *S. J. Wilson Co.*, 1 O. W. R. 380.

Exclusive Right of Sale of Machinery in Particular Territory—Breach by sale of similar machine—Substantial identity. *Tovell* v. *Delahay*, 3 O. W. R. 912.

Manufacture of Patented Articles—Defective design — Royalties—Novation — Damages—Reference. *Steep* v. *Goderich Engine Co.*, 3 O. W. R. 638, 5 O. W. R. 730.

Mining Claim — *Agreement for Sale — Construction — Enhanced Value.*]—By an agreement in writing, signed by both parties, B. offered to convey his interest in certain mining claims to N. for a price named, with a stipulation that if the claims proved on development to be valuable and a joint stock company was formed by N. or his associates, N. might allot or cause to be allotted to B. such amount of shares as he should deem meet. By a contemporaneous agreement, N. promised and agreed that a company should have a reasonable amount of the stock according to its value. No company was formed by N., and B. brought an action for a declaration that he was entitled to an undivided half interest in the claims, or that the agreement should be specifically performed:—Held, reversing the judgment of the Supreme Court of British Columbia, 8 B. C. L. R. 402, that the dual agreement above mentioned was for a transfer, at a nominal price, in trust to enable N. to capitalize the properties and form a company to work them, on such terms as to allotting stock to B. as the parties should mutually agree upon; and that on breach of said trust B. was entitled to a reconveyance of his interest in the claims and an account of moneys received or that should have been received, from the working thereof in the meantime. *Briggs* v. *Newswander*, 22 Occ. N. 227, 32 S. C. R. 405.

Non-payment of Note—Refusal to perform rescission. *Graham* v. *Bourque*, 1 O. W. R. 138, 358, 2 O. W. R. 927, 1182.

Sale of Mineral—*Place of Delivery — Warranty—Damages.*]—Under a contract the plaintiff was to deliver to the defendants "300 tons of phosphate, from 60 to 70 per cent.," at $6 per ton, to be shipped f.o.b. cars at a named railway station, whence it was to be conveyed by rail to the works of the defendants. In a large portion of the rock delivered there was a deficiency of seven per cent. of "apatite," which is pure phosphate, but the defendants received and used it at their works. In an action to recover the balance of the contract price:—Held, that the plaintiff must be held to have warranted that the rock would contain the percentage of apatite called for by the contract. 2. That the defendants, having received and used the rock, were liable for the value of the apatite which it contained, to be ascertained at the station for delivery, and not where it was used; and, there being no evidence of further loss, the damages sustained by the defendants were seven per cent. of the freight paid by them for forwarding the rock by rail to their works, to be deducted from the amount of the plaintiff's claim in the action. *Foxton* v. *Hamilton Steel and Iron Co.*, 21 Occ. N. 286, 1 O. L. R. 393.

Sawing Logs into Lumber—Damages—Costs. *Spencer* v. *Collins*, 6 O. W. R. 290.

Subsequent Letter—Satisfaction—Waiver—Evidence. *Heal* v. *Spramotor Co.*, 1 O. W. R. 175, 466.

Supply of Charcoal—Shortage—Damages—Indemnity—Relief over—Third party procedure—Appeal—Provisions of order directing issue—Parties — Company — Assignment of rights to, pending action—Adoption of contract—Acquiescence. *Deseronto Iron Co.* v. *Rathbun Co. of Deseronto*, 2 O. W. R. 414, 418, 3 O. W. R. 697, 4 O. W. R. 44, 6 O. W. R. 688.

Supply of Electric Current—Destruction of building—Impossibility of performance — Readiness to perform—Damages for breach. *Ontario Electric Light and Power Co.* v. *Baxter and Galloway Co.*, 5 O. L. R. 419, 2 O. W. R. 138.

Supply of Electrical Energy—Implied contract to take whole supply—Breach—Construction. *Ottawa Electric Co.* v. *Birks*, 2 O. W. R. 949.

Supply of Gas—*Shutting off—Non-payment — Other Premises.*]—Under 12 V. c. 183, s. 20, where a customer of the Montreal Gas Company has more than one building to which gas is being supplied, and he fails to pay for the gas supplied to any one of them, the gas company is entitled to cease supplying gas to all the buildings belonging to him. *Montreal Gas Co.* v. *Cadieux*, Q. R. 11 K. B. 93. (Reversed, 28 S. C. R. 382, but restored, [1899] A. C. 589.)

II. Building Contract.

Action for Balance of Contract Price—Counterclaim—Omission to do part of work—Failure to complete in workmanlike manner—Questions of fact—Set-off of costs—Scale of costs. *Dodds* v. *Morrison* (N.W.T.), 1 W. L. R. 164.

Architect's Certificate—Condition precedent to action—Counterclaim — Defective work—Acceptance—Delay—Waiver. *Waugh* v. *Grayson* (N.W.T.), 2 W. L. R. 330.

Architect's Certificate — *Finality—Action—Condition Precedent.*[— The written contract between the parties provided that the plaintiffs were to erect and complete a building for defendant according to certain drawings and specifications by a fixed date, and to the satisfaction of an architect named, to be certified by him under his hand forthwith after completion. It also provided for payment on the certificates of the architect of 85 per cent. on the work done from time to time, and that the balance unpaid on the completion of the work should become payable within one month after the architect should have certified. The architect gave two so-called final certificates, the first of which was in part as follows: "I hereby certify that D. Bros. are entitled to $416.36, in full for the above contract and extras, less $4.25, which amount may be held back till the items of work in the following list are done." It proceeded to specify the items covered by the $4.25, and added: "Note.—I consider the guarantee in specification will cover any leak in roof." The contractors had in the specification guaranteed the roof for five years against ordinary wear and tear. Annexed to and forming part of the certificate was a statement shewing that in arriving at the sum of $416.36 a deduction of $50 had been made for "bad floor, &c." The second and last certificate of the architect was as follows: "This is to shew that by certificate given by me on 23rd January, 1900, I certified that D. Bros. were entitled to $416.36, from which the amount of $4.25 was deducted to cover some small items left undone. These have now been attended to, and I therefore certify that D. Bros. are entitled to $416.36 in full of contract and extras:"—Held, that the two certificates should be read together, and being so read they shewed that in respect of the floor and roof the work had not been properly completed, and did not constitute a certificate that the contract work had been completed to the satisfaction of the architect; and such a certificate was a condition precedent to the plaintiff's right to recover. *Davidson* v. *Francis*, 22 Occ. N. 328, 14 Man. L. R. 141.

Architect's Certificate — *Liability of Owner — Delay in Completion — Penalty Clause—Waiver.*]—Where, under the terms of a building contract, the work is to be done under the direction and to the satisfaction of the architect, who is given authority to grant a final certificate, and the architect certifies to its completion:—Held, that, in the absence of fraud or collusion, the certificate of the architect is so far binding upon the proprietor that he cannot contend that the work was not done in accordance with the plans and specifications, and it is immaterial whether the proprietor had knowledge of his intention to grant it or that he consented to or forbade its being granted; if the certificate is untrue, the remedy is against the architect. A provision in a building contract that the architect's certificate should not lessen the contractor's total or final liability, was held, as a matter of construction, to apply not to the final certificate, but only to progress certificates. A provision in a building contract for liquidated damages for non-completion within the prescribed time, subject expressly to a further reasonable length of time for delays caused by changes in the plans and specifications, is not discharged by delays caused by such changes. Aliter, if no provision has been made for such extensions. Where the contract gives to the architect authority to settle all disputes, matters about which no dispute had been raised when he gave his final certificate are not concluded thereby. As a matter of construction it was held that the contract gave the architect no authority to grant extensions of time on account of changes in plans, except upon a dispute arising. Where the contractor is to "pay or allow to the proprietor" a certain sum as liquidated damages, it is not necessary that it should be retained from the contract price or fixed by the final certificate. Delay in the completion of the contract caused by the proprietor's neglect to complete work which . was necessary should first be done before the contractor could continue work under the contract, does not operate to discharge the contractor from the penalties unless notice of the contractor's work having reached the stage at which the proprietor should do his part of the work had been received by him. Neither the proprietor's entering into occupation of the building on completion of the work, insuring it, nor making payment on the contract price, after the time for completion, and after actual completion of the work, operates as a waiver of the penalty clause. Though perhaps on the giving of his final certificate the architect became functus officio, his estimate of the proper allowances to be made was accepted as reasonable and allowed by the Court, in reduction of the penalties payable for delay in completion. *McLeod* v. *Wilson*, 2 Terr. L. R. 312.

Balance — Counterclaim — Evidence. *Breakenridge* v. *Mason*, 1 O. W. R. 529.

Breach—Dismissal of contractor—Architect's notice of—Time—Sunday. *Anderson* v. *Chandler*, 1 O. W. R. 417, 2 O. W. R. 186.

Breach—Negligent work—Responsibility. *Hagar* v. *Hagar*, 1 O. W. R. 78.

Delay—*Extras—Penalty — Alterations — Written Order of Architect—Onus—Disputed Items — Appeal.*] — A building contract contained a provision that the work should be completed by the contractor by a specified date, with a penalty of $5 a day, as liquidated damages, for each day that the work should remain unfinished after that date. It was agreed, on the part of the defendant, that the contractor should be put in possession of the premises, and should be furnished with the lines and levels, by another fixed date, and that, for every day thereafter, he should be entitled to have two days added to the time for the completion of his contract. It was further agreed that the contractor should have no action for damages, or otherwise, against the defendant by reason of said delay:—Held, that the clause of the contract denying the plaintiff's right to an action for damages applied to the giving possession of the premises only, and not to the delay in furnishing lines and levels and that the plaintiff was entitled to recover for extra work resulting from the latter delay:—Held, also, that the delay in putting the plaintiff in possession of the premises, and in furnishing lines and levels, and delay caused by extra work which he was called upon to do, relieved the plaintiff from the obligation to complete his work by the date agreed, and

that the defendant was debarred from enforcing payment of the penalty. One of the clauses of the contract provided that, if alterations were required in the work, a fair and reasonable valuation of work added or omitted should be made by the architect, and that the sum payable to the plaintiff should be increased or diminished by such amount, provided that, where the amount was not agreed upon, the contractor should proceed with the work on the written order of the architect, and that the amount payable therefor should be fixed as further provided:—Held, that alterations under this clause only required a written order where the architect and contractor differed as to the valuation; that the furnishing of plans by the architect, shewing additional work, was a "written order" within the meaning of the contract; that the burden was upon the plaintiff of shewing that work claimed for as extra was ordered by the architect. In determining the amount to which the plaintiff was entitled for extra work the trial Judge had the assistance of an assessor, but the Court, on appeal, were not furnished with the assessor's report, or with the reasons for allowing the plaintiff different items claimed by him:—Held, that the Court could not adopt the views of the trial Judge and the assessor, as to disputed items, in these circumstances, but must consider the different items and the evidence bearing upon them, and that the amount allowed, being excessive, should be reduced. *Munro* v. *Town of Westville*, 36 N. S. Reps. 313.

Delay Caused by Other Contractors —Failure to notify architect and apply for extension of time—Penalty for delay—Provisions of contract. *Grey* v. *Stephens* (Man.), 1 W. L. R. 450.

Extras — *Certificate of Architect.*]—The certificate for additional work given by the architect of the owner after the completion of the work will avail, instead of the authorization in writing of the owner required by art. 1690, C. C. *Bayard* v. *Drouin*, Q. R. 22 S. C. 420.

Extras—*Oral Testimony — Tender.*] — F. had contracted with L. to build a warehouse and do certain repairs, by an agreement in writing, giving certain details of the work to be done, but unaccompanied by a plan. The contract price was $1,100. F. claimed $32.55 for extras which he maintained were authorized by L., but which L. denied. At the trial F. offered oral evidence in support of his claim for extras, and L. objected, setting up art. 1690:—Held, that art. 1690 of the Code must be interpreted strictly. (2) When it is a question of a contract unaccompanied by plans and definite specifications, but relating to building and repairing buildings, either erected or to be erected, described in a writing giving certain details of the work to be done, it is not a case for the application of art. 1690, and oral evidence may be adduced to prove the doing of work outside the contract, and the cost thereof, without the production of any writing authorizing them. Corriveau v. Roy, Q. R. 15 S. C. 90, followed. (3) A tender to avail should be made in the terms of art. 1163, C. C., and especially in legal tender, if it is a question of money, and including the amount of the costs, if made after action brought. *Ferland* v. *Laflamme*, Q. R. 27 S. C. 66.

Faulty Construction — Extra work — Specifications — Delay — Quantum meruit — Reference. *Metallic Roofing Co.* v. *City of Toronto*, 3 O. W. R. 646, 6 O. W. R. 656.

Findings of Referee — Appeal—Amendment—Reformation—Costs. *Goring* v. *Hawkins*, 5 O. W. R. 529.

Material Supplied not Covered by Contract—Damages —Arbitrator — Bias — Lien. *Piggott* v. *Toronto Rubber Shoe Mfg. Co.*, 1 O. W. R. 541.

Payment of Price — Time — Duplicate instruments—Discrepancy—Extras—Delay — Inferior work—Failure to supply money to pay workmen—Mechanics' liens—Judgment—Reference — Account — Secret commissions. *Bater* v. *Brown* (Man.), 2 W. L. R. 36.

Pretended Tender—*Estoppel—Quantum Meruit — Owner's Default—Penalty—Certificate of Architect.*]—Where a tender for the erection of a building is made and accepted, but without the intention on the part of either owner or contractor that the amount stated in the tender should be the contract price, the contractor is entitled to recover on a quantum meruit. The fact that the plaintiff's tender was made for the purpose of deceiving other tenderers did not estop the plaintiff from disputing its bona fides as against the defendant. Failure by the owner to supply material which the contract provides he shall supply, discharges a penal clause. Where a building contract provides for the certificate of an architect and no architect is appointed the provision is inoperative. *Degagne* v. *Chave*, 2 Terr. L. R. 210.

Question whether Certain Kinds of Work Included — Admissibility of oral evidence—Penalty for delay in completion—Effect of delay by opposite party. *Page* v. *Green*, 2 O. W. R. 137, 3 O. W. R. 494.

Specific Sum — *Destruction of Building before Completion—Quantum Meruit.*]—The defendant, who had taken a contract for the erection of a dwelling house at $4,050, accepted the plaintiff's tender to do the plumbing and tinsmithing work for $500; but before the completion of the plaintiff's contract, though after he had done work up to $488, the building was destroyed by fire. The defendant had received two sums of $1,500 on account of his contract, but he denied that any portion of it was for work done by the plaintiff. In an action by the plaintiff to recover the $488 on a quantum meruit:—Held, that where, as here, the contract is to do work for a specific sum, and this applies as well to original as to sub-contracts, there can be no recovery until the work is completed, unless the failure to do so is caused by the defendant's fault; and, as the plaintiff admitted the non-completion by suing on a quantum meruit, and there was nothing to shew any fault on the defendant's part, there could be no recovery. Appleby v. Meyers, L. R. 2 C. P. 660, followed. *King* v. *Low*, 22 Occ. N. 107, 3 O. L. R. 234.

III. Conditions.

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 the work was a relative 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 the 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. *Ludlam* v. *Wilson*, 21 Occ. N. 554, 2 O. L. R. 549.

Certificate — *Condition Precedent—Mechanic's Lien.*]—The plaintiff agreed with S. to do tunnelling in mineral claims in which S. and McL. were interested, and the agreement was contained in correspondence, part of which read: "I'll pay you on the completion of each 80 feet of tunnelling. All you need to do is to have McL. to certify that you have done the work." McL. did not give a certificate. In an action by the plaintiff to enforce a mechanic's lien:—Held, that the obtaining of the certificate was a condition precedent to the plaintiff's right to recover. *Leroy* v. *Smith*, 22 Occ. N. 72, 8 B. C. R. 293.

Default—*Application of Alternative Rate of Payment.*]—A contract between a newspaper proprietor and a customer, for 12,000 lines of advertising to be furnished within a year, based upon a price of four cents a line for advertising, if the conditions of the contract as to prompt payment, &c., be strictly complied with by the customer, and of fifteen cents per line in case of failure to comply with such conditions, is an alternative contract, and where the customer makes default to comply with the conditions, the other party is entitled to recover the higher alternative rate for the work actually done. Article 1076, C.C., does not apply to such case, the claim not being based upon the enforcement of a penalty but upon the application of a condition. *Berthiaume* v. *Kent*, Q. R. 11 K. B. 312.

Extras—*Authority of Agent — Setting aside Findings of Jury.*]—M. contracted to erect a building in Vancouver for the defendants, a Milwaukee company, the contract providing that no extras would be allowed unless their value was agreed upon and indorsed on the contract. S., who had intended to occupy the building for the purposes of a bottling company, of which he was a member, ordered extras, but no indorsement thereof was made on the contract. In an action by M. for the price of the extras, the jury found "that S., as authorized agent for the company, ordered the extras for it, and that it did either hold out or permit S. to hold himself out as its agent for the purpose of ordering extras:"—Held, that such indorsement on the contract was a condition precedent to the plaintiff's right to recover. *McKinnon* v. *Pabst Brewing Co.*, 22 Occ. N. 39, 8 B. C. R. 265.

Non-performance—Delivery of deed in escrow—Option—Trust. *Harris* v. *Bank of British North America*, 1 O. W. R. 76, 285.

Printed Conditions — *Party Signing in Ignorance.*]—A party to a contract is not bound by conditions, printed on the back thereof, of which he was ignorant, and to which his attention was not called before he signed the contract, although the contract bears on its face an acknowledgment by the signer that he has had communication of the conditions printed on the back and consents to be bound by them; but also bears on its face the statement that the other party to the contract will not be bound by it until it shall have been accepted by a duly authorized agent and notice in writing by registered letter sent to the signer's address, which was never done. *Royal Electric Company* v. *Dupéré*, Q. R. 17 S. C. 534.

IV. Construction.

Assignment or Sub-contract—Variation — Pleading — Amendment—New trial. *Bélanger* v. *Prevost*, 4 O. W. R. 1.

Breach — Dependent and independent covenants — Indemnity — Evidence—Costs. *Twyford* v. *York* (N.W.T.), 2 W. L. R. 348.

Conjunctive Conditions.]—Where two conditions are imposed in an agreement in a conjunctive manner, the fulfilment of the conditions is indivisible. 2. When it is certain that one of the two conjunctive conditions cannot be fulfilled within the time fixed by the agreement, the condition is then considered to have failed. *Chartrand* v. *Dessouard*, 6 Q. P. R. 131.

Covenant to Deliver Possession of Land—*Dominion Lands Act—Assignment or Transfer—Mistake—Rectification.*]—A covenant contained in an agreement for farming "on shares" to deliver possession of land in which the covenantor has homestead rights only, is not an assignment or transfer within the meaning of the Dominion Lands Act, R. S. C. c. 54, s. 42, as amended by 60 & 61 V. c. 29, s. 5. Rectification of contract for mistake discussed. *Spence* v. *Arnold*, 5 Terr. L. R. 176.

Custom of Trade—*Sale of Goods—Delivery.*]—The construction of a contract for the sale of goods cannot be affected by the introduction of evidence of local mercantile usage unless the terms of the contract are doubtful or ambiguous. *Dufresne* v. *Fee*, 25 Occ. N. 6, 35 S. C. R. 274.

Divisibility — *Completion.*]—By a contract to remove spans from a wrecked bridge in the St. Lawrence, the contractors agreed

"to remove both spans of the wrecked bridge and put them ashore, for the sum of $25,000, to be paid $5,000 as soon as one span is removed from the channel, and another $5,000 as soon as one span is put ashore, and the balance as soon as the work is completed. . . . it being understood and agreed that we push the work with all possible despatch, but if we fail to complete work this season we are to have the right to complete it next season:"—Held, reversing the judgment of the Court of Appeal (21st September, 1901), Taschereau and Davies, JJ., dissenting, that the contract was divisible, and the contractors, having removed one span from the channel and put it ashore, were entitled to the two payments of $5,000 each, notwithstanding that the whole work was not completed in the second season. *New York and Ottawa Co.* v. *Collins Bay Rafting and Forwarding Co.*, 22 Occ. N. 250, 32 S. C. R. 216.

Electric Light Companies—Agreement with municipal corporation—Privilege of occupying streets—Condition against amalgamation of companies—Forfeiture—Laches—Acquiescence. *City of Toronto* v. *Toronto Electric Light Co.*, *City of Toronto* v. *Incandescent Light Co. of Toronto and Toronto Electric Light Co.*, 3 O. W. R. 825, 6 O. W. R. 443, 10 O. L. R. 621.

Electric Lighting—*Action for Price—Statutory Regulation—Reading of Meter—Duplicate for Purchaser — Condition Precedent—Waiver.*]—The Dominion Acts, 1894, c. 13, s. 13, s.-s. 2, enacts that "Whenever a reading of a meter is taken by the contractors for the purpose of establishing a charge upon the purchaser, the contractor shall cause a duplicate of such reading to be left with the purchaser." In an action by the plaintiff company to recover the price of electric lighting and rent of meter:—Held, that the burden was upon the plaintiff to shew compliance with the Act, and that non-compliance was not excused by the fact that the person to whom the duplicate reading was required to be delivered might not be able to understand it. 2. That an offer to compromise, made on the part of the defendant, could not in any sense be treated as a waiver of the right conferred by the statute. 3. That the fact of previous bills having been paid could not be taken as dispensing with the requirement of the statute for more than the particular bills paid. *Cape Breton Electric Co.* v. *Slayter*, 36 N. S. Reps. 313.

Evidence to Aid — Reformation after breach. *Pritchard* v. *Fick*, 1 O. W. R. 815.

Farming on Shares—Account—Appeal—Findings—Costs. *Harrison* v. *Harrison*, 2 O. W. R. 397, 3 O. W. R. 247.

Implied Covenant — *Intention of Parties.*]—The plaintiff contracted with the defendant for 330 hours' dredging in the harbour of St. John, with a specific dredge and appliances, and for so much longer as the city might require, on giving notice at the expiration of that period, to be paid for at the rate of $400 per each 11 hours, subject to deductions and allowances agreed upon for time lost, (1) when the dredge was unable to work by reason of injury to the plant or machinery, and (2) where the work could not go on by reason of stormy weather. The water was too deep at high tides for the dredge to work, and there was, therefore, delay caused in this way. Both parties were aware at the time the contract was made that the high tides would interfere with the work, but there was no provision for any deduction or allowance on that account:—Held, that a verdict for the plaintiff, ordered on a construction of the contract that there was an implied covenant that the defendants should pay for the time lost by reason of the high tides, was erroneous, and should be set aside and a new trial granted. *Connolly* v. *City of St. John*, 36 N. B. Reps. 411, 35 S. C. R. 186.

Lease of Land or Hire of Goods—*Fixtures—Services.*]—A contract by which a person grants to another the use of an engine and boiler affixed to land, with, in addition, a place to deposit wood, is a lease of an immovable, even where the contract provides for payment of a lump sum for the use of the engine and boiler and the wages of the son of the lessor, whose services are leased by the same contract to the lessee. *Lanoie* v. *Sylvestre*, Q. R. 24 S. C. 233.

Municipal Works — *Specifications — "From" and "to" Streets—Plan.*] — The words "from" and "to" streets mentioned in specifications for the construction of works undertaken by an agreement in writing, as shewn on a plan annexed to and declared to form part of the contract, are not necessarily exclusive. Where the agreement provided that the works should be constructed "along Notre-Dame street from Berri street to Lacroix street as shewn on the said plan," these words mean, "as far as the plan shews along Notre-Dame street, but not exceeding the most distant side of Lacroix street." *City of Montreal* v. *Canadian Pacific R. W. Co.*, 33 S. C. R. 396.

Option—*Refusal.*]—A contract stipulating that the first party shall have the hauling of all ore shipped up to 15,000 tons, and not less than 10,000 as required by the second party, does not bind the second party to supply more than 10,000 tons. *Haggerty* v. *Lenora Mount Sicker Copper Mining Co.*, 22 Occ. N. 106, 9 B. C. R. 6.

Printed and Written Clauses.] — A lessee of a building entered into a contract with an electric light company for the supply by them to him of light for the building. The contract, drawn on a printed form used by the company, contained a provision that it was "to continue in force for not less than 36 consecutive calendar months, from date of first burning, and thereafter until cancelled (in writing) by one of the parties hereto," the whole of this clause, except the figures "36," being printed. A subsequent clause, wholly in writing, under the printed heading "Special conditions, if any," provided that the contract was "to remain in force after the expiration of the said 36 months for the term that the party of the second part (the lessee) renews his lease for the (building)," with certain provisions as to payment of the expense of wiring:—Held, that there was no rule of law requiring more weight to be given in a contract of this kind to a written provision than to a printed one; that the clauses must be read together; and that their fair meaning was that the

contract was to be in force for at least thirty-six months, and thereafter during any renewal term of the lease, until cancelled in writing. *Ottawa Electric Light Co.* v. *St. Jacques*, 21 Occ. N. 105, 1 O. L. R. 73.

Public Work—*Finding of References—Claim of Contractor—Repetition—Waiver.*]—The specifications accompanying a call for tenders for the widening and deepening of canals formed a part of the contract subsequently entered into, and provided that no part of the work could be unwatered during the season of navigation, but might be at the close of navigation. The contractor claimed payment for extra work and increased cost by reason of the refusal to unwater during the winter months:—Held, that the contractor might be called upon to work under water during the time the canal was closed to navigation, as well as when it was open, and was not entitled to extra payment therefor, especially as no demand was made for unwatering. The contractor was entitled to payment at a specified rate for removal of earth and at a higher rate for "earth provided, delivered, and spread in a satisfactory manner to raise towing path where required." He claimed payment at the higher rate for over 200,000 cubic yards, and the resident engineer returned 69,000 as falling under the above provision, and the Government allowed 23,000 yards. The Exchequer Court Judge referred it to the registrar of the Court and two engineers, who reported that the amount allowed by the Crown was a sufficient allowance, and their report was confirmed by the Court:— Held, that the Supreme Court would not overrule the judgment of the expert referees. Other clauses of the contract required the contractors to make and repeal their claims in writing within fourteen days after the date of each monthly certificate during the progress of the works, and every month until adjusted or rejected. By the order in council referring the claims of the appellant to the Exchequer Court these clauses were waived "in so far as the repeated submission of claims is required:"—Held, that the waiver did not relieve the contractor from making a claim after the first monthly certificate issued subsequent to its having arisen, but only from repeating it after the following certificate. *Paupore* v. *The King*, 24 Occ. N. 163.

Removal of Timber—Injunction — Refusal—Appeal—Merits—Affirmance. *Murphy* v. *Lake Erie and Detroit River R. W. Co.*, 1 O. W. R. 827, 2 O. W. R. 444.

Sale of Cattle—*Substituted agreement—Terms of Trade—Usage.*]—On the evidence it was found that, by usage among cattle-men in the McLeod District, calves under six months old and unbranded are, in the buying or selling of a herd of cattle by the head, included with the cows with which they are running. Where an agreement related to two classes of things, and one of which alone was subsequently dealt with by a substituted agreement, and a new agreement dealing with the other class was made for the purpose of continuing the first agreement regarding it, the first agreement was properly looked at to interpret the second. The same expressions used in different parts of the same document should ordinarily be interpreted in the same sense. *Woolf* v. *Allen*, 21 Occ. N. 99, 4 Terr. L. R. 431.

Sale of Goods—*Delivery—Place—"At," Meaning of.*]—A tender by H. to supply coal to the town of Goderich, pursuant to advertisement therefor, contained an offer to deliver it "into the coal shed at pumping station, or grounds adjacent thereto, where directed by you." (Meaning by a committee of the council.) The tender was accepted, and the contract afterwards signed called for delivery "at the coal shed." A portion of the coal was delivered, without directions from the committee, from a vessel upon the dock, about 80 feet from the shed, and separated from it by a road:—Held, reversing the judgment of the Court of Appeal (15th November, 1901, unreported), that the coal was not delivered "at the coal shed," as provided by the contract signed by the parties, which was the binding document:—Held, also, that if the contract was to be decided by the terms of the tender, the delivery was not in accordance therewith, the place of delivery not being "at the pumping station or grounds adjacent thereto." (See, also, 20 Occ. N. 303.) *Holmes* v. *Town of Goderich*, 22 Occ. N. 222, 32 S. C. R. 211.

Sale of Homestead and Stock—*Entire Contract—Invalidity as Regards Homestead—Conversion.*]—The plaintiff signed a written memorandum as follows: "I hereby agree to sell, and make and execute the necessary papers to convey, all my right, title, and interest in (describing his homestead, for which he had not been recommended), also (3 horses, a waggon and a plough), and any other implement or chattel of which I am now the owner to (the defendant) for the sum of $480 to be paid as soon as the necessary papers are executed." The defendant, without the plaintiff's knowledge, took possession of the horses; the plaintiff immediately objected to this. The plaintiff sued for conversion and the defendant counterclaimed for damages for breach of the agreement:—Held, that the contract was an entire one, and that, according to its terms, the property in the personal property would vest only on a proper conveyance of the land. (2) That the agreement, being one for the assignment of an unrecommended homestead, was void, and that, although an agreement may be void in part and valid in part, yet this being an entire contract was wholly void. Judgment was therefore given for the plaintiff for damages for conversion of the horses; and the defendant's counterclaim for damages for breach of the agreement was dismissed. *Flannaghan* v. *Healy*, 4 Terr. L. R. 391.

Sale of Timber—*Terms of Payment.*]—The appellant held rights in unpatented lands and agreed to sell the timber thereon to respondent, one of the conditions as to payment therefor being that, as soon as the Crown grant issued, the respondent should "settle" a judgment against the appellant, which, they both understood, could at that time be purchased for $500. On the issue of the grant, about six months afterwards, the judgment creditor refused to accept $500 as full settlement at the latter date, and he took proceedings to enforce execution for the full amount. The execution was opposed on behalf of the appellant, the respondent becoming surety for the costs and being also made a party to the proceedings:—Held, affirming the judgment in 10 B. C. R. 84, that the agreement to settle the outstanding judgment was not made unconditionally by the respondent, but was

limited to settling it for $500, after the issue of the Crown grant for the land:—Held, also, Davies, J., dissenting, that the costs incurred in unsuccessfully opposing the execution of the judgment, upon being paid by the respondent, were properly chargeable against the appellant. *O'Brien* v. *Mackintosh*, 24 Occ. N. 115, 34 S. C. R. 169.

Services of Advertising Agent — Remuneration—Territory—Extra services—Account—Access to books of principal. *Miller* v. *Globe Printing Co.*, 3 O. W. R. 369, 6 O. W. R. 258.

Supply of Electric Power—*Continued Existence of Property—Condition Precedent.*]—Where, under the terms of an agreement, the plaintiffs were to supply the defendants with electric current to a specified amount of horse power, to be used by them for operating their machinery, and for use in their business, and for no other purpose, the limitation was held to be for the purpose of confining the use of the power to the defendants' premises, and not to any existing mill thereon, so that the fact of such mill being afterwards destroyed by fire did not dispense with the defendants' obligation to receive and pay for the power. Taylor v. Caldwell, 3 B. & S. 826, distinguished. *Ontario Electric Light and Power Co.* v. *Baxter and Galloway Co.*, 23 Occ. N. 152, 5 O. L. R. 419.

Termination—Provisions for renewal—Waiver—Rights of third persons—Injunction—Parties. *Street Railway Advertising Co.* v. *Toronto R. W. Co.*, 3 O. W. R. 849.

Uncertainty—*Findings of Fact—Appeal.*]—The findings of a trial Judge on questions of fact will not be disturbed unless it appears clearly that such findings are erroneous. In an action on a contract to furnish supplies to be used in floating one of the defendants' steamships, where the evidence was of a contradictory character, the trial Judge, as to certain amounts claimed, found in favour of the defendants, on the ground that if the plaintiff wished to make a contract under which he would be fully paid, whether the services were or were not performed that should have been clearly expressed in his tender and not left in doubt:—Held, that the decision ought not to be disturbed. *Barrey* v. *Allan, S. S. Co.*, 36 N. S. Reps. 307.

Work and Labour—*Substituted Contract—Consideration—Extras.*] — The plaintiff, who had contracted to supply materials for re-seating a church, contended that, under the terms of his contract to furnish, among other things, "pew ends, divisions, seat, lining, book racks," for a lump sum, "seat, lining," should read "seat-lining," and that, under this term, he was only bound to furnish materials of which the seats were to be constructed. The defendant's contention was that the "lining was intended to go over the old wainscoting":—Held, that to admit the plaintiff's contention would be to ignore the actual reading, and to give an unusual and improper meaning to the word "lining" so as to materially vary the terms of the contract; and a promise, if any, to pay for such lining as an extra could not be supported, the performance by a contractor of what he is already bound to do not being a consideration to support such a promise; and quære, whether the settlement in this way of a bona fide dispute between the parties, as to the meaning of the terms used, would constitute sufficient consideration for the alleged promise to pay. *Dempster* v. *Bauld*, 37 N. S. Reps. 330.

V. Enforcement.

Adoption of Illegitimate Child—*Promise to "make her Heir"—Statute of Frauds—Part Performance.*]—The plaintiff was the illegitimate daughter of D. C. K. The plaintiff's mother and D. C. K. lived together for several years, but finally separated. The mother died in 1897. The plaintiff lived with her grandmother until the latter's death. On the 1st April, 1899, the plaintiff wrote to D. C. K. telling him of her mother's death and asking him to write to her. Some time afterwards he wrote to her addressing her as "Dear daughter," singing himself as "Your anxious father." In a postcript he added, "Now I have agreed to become your real solid father as hard and fast as you can wish." A close correspondence followed, which resulted in the plaintiff going to Winnipeg to live with her father; he met her at the station, took her to his house, and they lived together as father and daughter until he died suddenly on the 6th June, 1903. After his death a will was found dated the 5th December, 1881, by which he bequeathed all his property to another. So far as known, D. C. K. had not, at the time of his death, any relative existing. The plaintiff swore that her father told her on various occasions that all his property would be hers when he died; that he would make a will to that effect. Friends were called as witnesses, who stated that D. C. K. told them he would make his will in the plaintiff's favour and make her his heir:—Held, specific performance will be enforced by the Court of an agreement in writing, though not in formal terms, whereby the father of an illegitimate child offered, if she (plaintiff) would come to him and live with him as his daughter, to keep her and leave all his property by will to her, the agreement having been acted upon by the parties and fully performed on the part of the plaintiff, and the omission to make the promised will being attributable to mere negligence and procrastination, no contrary intention on the part of the father appearing; in spite of the want of mutuality, the complete performance by the plaintiff sufficed to take the case out of the Statute of Frauds. *Kinsey* v. *National Trust Co.*, 24 Occ. N. 104, 15 Man. L. R. 32.

Non-compliance with Statutory Duty—*Imperative Statute—Penalty.*]—Action to recover the price of electric lighting. The defendant pleaded non-compliance with the Electric Light Inspection Act, 57 V. c. 39, s. 13, s.-s. 2, which is as follows: "Wherever a reading of a meter is taken by the contractors for the purpose of establishing a charge upon the purchaser, the contractors shall cause a duplicate of such reading to be left with the purchaser." The plaintiffs did not leave duplicate readings with the defendant, and only left a memorandum shewing the amount due and the number of kilos, etc. The trial Judge held the statute to be merely

directory and decided in favour of the plaintiffs:—Held, on appeal, that the intention of the statute was clear, and, although no penalty was provided, the provision of the statute must be observed. *Cape Breton Electric Co.* v. *Slater*, 24 Occ. N. 135.

Parent and Child — Conveyance of land —Agreement for maintenance — Subsequent oral agreement—Specific performance — Setting aside original agreement—Improvidence —Want of independent advice. *Poole* v. *Poole*, 3 O. W. R. 831.

Promise to Transfer Shares—*Consideration—Measure of Damages—Interest.*]—The plaintiff was superintendent of the blast furnaces of a company of which the defendant was the president. The plaintiff's contract of employment was for no definite period, and the employment could be terminated upon two months' notice by either party. During the plaintiff's employment the defendant promised him a certain number of the shares of the capital stock of the company if the production of the blast furnaces was increased to a certain number of tons, and he gave the plaintiff a memorandum containing the figures mentioned. The blast furnaces produced the necessary number of tons, and on two occasions the defendant sent the plaintiff certificates for shares "with my compliments." The furnaces continued to produce the requisite number of tons, but the defendant failed to deliver any more shares, and thereupon this action was brought to recover damages for breach of the contract. The shares of the capital stock of the company had gone up in value, and then had gone down between the time when the stock should have been delivered and the date of the trial:—Held, that the stock delivered was not a mere gratuity; that there was a contract for the delivery of the stock, and consideration for the same. It was not a case of assessing the damages at the highest price reached between the date of refusal and the trial, but simply a case in which their market value at the time when the stock should have been delivered should determine the amount of damages. Interest should not be allowed. *Means* v. *Whitney*, 24 Occ. N. 93, 237.

Restraint of Trade—*Sale of Goods—Stipulation that Vendee shall Re-sell at Fixed Price — Validity — Interest of Vendor—Termination of Contract — Injunction.*]—An agreement between the manufacturer of an article and the retailer thereof that the latter will sell the article at a fixed price, is not unlawful nor in restraint of trade, nor against the public interest, when the manufacturer has an interest in entering into the agreement by sharing in the profits of sales or otherwise. When no time is specified for the duration of an agreement of this kind, either party may terminate it without the consent of the other. One who seeks an injunction to prevent some one doing something—in this case to prevent freedom of trade in the Wampole preparation — must prove, as must every plaintiff, an actual and tangible interest in bringing the action, and, as well, that, unless an interlocutory injunction is granted, he will suffer serious and irreparable injury. *Wampole* v. *Lyons*, Q. R. 25 S. C. 390. See *S. C.*, Q. R. 14 K. B. 53.

Services—*Contract to Accept Part Payment in Stock—Failure to Deliver—Damages —Specific Performance.*]—The plaintiff contracted with the defendant to do certain work at the rate of $7 a day, whereof $1.50 should be paid in cash, and the balance of $5.50 in stock in a mining company at fifteen cents a share:—Held, that on the defendant's failure to deliver the stock the plaintiff was entitled to damages for breach of contract, and could not be compelled to accept stock. *Miller* v. *Averill*, 24 Occ. N. 103, 10 B. C. R. 205.

Services Rendered to Relative—Promise to remunerate by testamentary bequest —Part fulfilment — Inadequacy of provision —Action against executors. *Fitzgerald* v. *Wallace*, 2 O. W. R. 1047, 3 O. W. R. 900.

Services to Deceased Person—Action against administrators — Presumption from quasi relationship — Rebuttal—Evidence — Corroboration. *Doan* v. *Canada Trust Co.*, 3 O. W. R. 655.

Specific Performance—Parent and child —Maintenance of parent—Promise to make provision by will—Part performance—Executors—Damages—Quantum meruit — Moneys disbursed. *Campbell* v. *Pond*, 4 O. W. R. 16.

Statute of Frauds—*Oral Promise—Payment of Debt—Consideration—Assignment of Chose in Action—Notice.*]—S., in consideration of B.'s giving him a confession of judgment and other security for a debt due by B. to S., gave B. an oral promise to pay two promissory notes of B. in favour of A. B. assigned his right of action against S. to the plaintiff, the executrix of A.:—Held, that the promise by S. to pay the notes was an original promise, founded on a new consideration, and was not a promise to pay the debt of another within the Statute of Frauds, and need not be in writing. That the assignment was good under the Supreme Court Act, 1897, s. 150 (N.B.), and the plaintiff might bring an action without notice of the assignment before action brought. *Allen* v. *Shehyn*, 35 N. B. Reps. 635.

Undertaking for Performance by Another — *Specific Performance—Authentic Contract.*]—Where A. has contracted with B. that until a third party does a certain act, he, A., will be personally responsible for the fulfilment of the obligation under the contract on the part of such third party—if the latter does not do the thing stipulated, B. has an action against A. to enforce specific performance of obligation, and to compel A. to sign an authentic contract, and to obtain an order from the Court that in the event of A. refusing to sign, the judgment shall avail in lieu of such authentic or notarial contract. Connolly v. Montreal Park and Island R. W. Co., Q. R. 22 S. C. 322, distinguished. *Beaubien* v. *Ekers*, Q. R. 24 S. C. 199.

VI. Evidence to Vary.

Sale of Land—*Possession Under Written Agreement — Timber—Seizure Under Execution—Bill of Sale.*]—The plaintiff sold to S. a property containing a quantity of woodland, for $8,500, under an agreement in writing by

which S. agreed to pay a portion of the purchase money on the execution of the agreement, and the balance in yearly instalments, with interest subject to the condition that if S. failed to pay any of the instalments, with interest, as agreed, the payments made would be forfeited and the plaintiff would be at liberty to resume possession; and subject to the further condition that S. would not cut more than a specified quantity of lumber in any one year. In an action of replevin brought by the plaintiff against the defendant sheriff, who had levied upon a quantity of lumber on the premises, under executions issued at the suit of creditors of S., the plaintiff tendered evidence to shew that all lumber cut by S. was to be sold, and the proceeds, after deducting certain disbursements, paid to the plaintiff on account of the purchase money, and that the title to the land and lumber was to remain in the plaintiff until the payments agreed to be made by S. were completed:—Held, that the evidence was not admissible, the effect of it being to vary the written contract:—Held, further, that a bill of sale of the lumber made by S. to the plaintiff, while writs of execution, of which the plaintiff failed to shew that she had not notice, were in the hands of the sheriff, was void, as made contrary to the provisions of the statute. *Blaikie v. McLennan*, 33 N. S. Reps. 558.

VII. Illegality.

Hiring Conveyances — *Parliamentary Elections — Evidence — Ratification.*] — The plaintiff, a livery stable keeper, sued the defendant on an account for horses and rigs furnished by him to the defendant, who was a candidate at an election for a member of the House of Commons of Canada. The evidence shewed that to the knowledge of the plaintiff his account was for horses and rigs furnished by him to the defendant during the time he was a candidate and solely for the purposes of and in connection with the election:—Held, following Luke v. Perry, 12 C. P. 424, that the contract of hiring was an executory one and that it came therefore within the terms of s. 131 of the Dominion Elections Act, which is incorporated with the North-West Territories Representation Act, by 57 & 58 V. c. 15, s. 10, and that the contract was therefore void in law, and the plaintiff could not recover. The plaintiff also sued the defendant on an account for horses and rigs furnished by one P., some of them to the defendant, others to the defendant's wife, and some to both of them, which account P. had assigned to the plaintiff. These horses and rigs were not clearly shewn to have been furnished in connection with the election, though the evidence led to a strong suspicion to that effect:—Held, that when the defendant seeks to rely upon provisions of the statute to avoid liability upon an executory contract alleged to have referred to or arisen out of an election, nothing should be intended in favour of such a defence, and it must clearly appear that such contract did refer to an election held under the Act. Evidence of ratification discussed. *Parslow v. Cochrane*, 4 Terr. L. R. 312.

Immorality—Bawdy house—Part performance—Locus pœnitentiæ—Rescission before execution. *Perkins v. Jones* (N.W.T.), 1 W. L. R. 41.

Lottery—*Recovery Back of Moneys Paid —Statute.*]—The respondent, having obtained from the Lieutenant-Governor of the Province of Quebec, authorized to that effect by a statute of the legislature, the privilege of carrying on a lottery to assist a work recognized by the legislature as being a laudable and useful public work, delegated his powers to the appellant, on the condition that the latter should pay him $5,000 per year. The appellant carried on the lottery for two years, realizing considerable profits, and during this time paid the respondent $10,000. The carrying on of the lottery having been declared illegal, the appellant sued to recover back the $10,000 which he had paid to the respondent. Both parties admitted the unconstitutionality of the statute by virtue of which the lottery had been authorized:—Held, that the payment in question having been made voluntarily and not by mistake by the appellant, who had made considerable profits by virtue of his contract with the respondent, the appellant, who alleged the illegality of the contract, could not, the contract having been executed on both sides in good faith, recover the sums which he had so paid. *Brault v. L'Association St. Jean Baptiste*, Q. R. 12 K. B. 124.

Performance in Unlawful Place — *Municipal Regulations — By-laws — Music Halls—Licensing.*]—Cafés-chantants — that is to say, establishments in which intoxicating liquors are sold and in which vocal or instrumental music, or both, are furnished with the object of attracting passers-by—being prohibited by the by-laws of the city of Montreal, a contract by which the services of a person have been retained to provide music in such a café-chantant is void, because it has for its object a thing prohibited by law, and, therefore, a musician who has been dismissed cannot maintain an action for wrongful dismissal. 2. By-law No. 236 of the city of Montreal, which imposes a license fee of $50 a year upon museums, halls for concerts, dances, theatrical performances, and other amusements, does not apply to cafés-chantants, or drinking shops were music is given for the purpose of attracting passers-by, in such a way as to withdraw them from the prohibition of by-law No. 36 of the same city. *Morel v. Morel*, Q. R. 19 S. C. 123.

Sale of Intoxicating Liquors—*Liquor License Act—Canada Temperance Act—Place of Making Contract—Agent—Knowledge of Illegal Purpose.*]—E. & Co., who did business at Halifax, N.S., acted as agents for the plaintiffs, whose head office was at Glasgow, Scotland, but they had no power to accept orders or make sales, the scope and extent of their agency being limited to receiving orders and transmitting them to the plaintiffs, whose officers alone had power to decide whether they would accept the orders and forward the goods or not. In the course of their business E. & Co. received orders from the defendant for a quantity of whisky, and, the orders having been transmitted to the plaintiff, the whisky was delivered to a carrier at Glasgow, to be forwarded to the defendant at Halifax and Truro, in the Province of Nova Scotia. In an action brought against the defendant on his acceptances given for the price of the whisky, the defendant sought to escape liability on the ground of illegality, pleading that the plaintiffs carried on business in Halifax without a

license, and that the liquors were sold and shipped by the plaintiffs knowing that they were to be disposed of in contravention of the Liquor License Act, R. S. N. S. 1900 c. 100, and the Canada Temperance Act:—Held, that the contract sued on was made in Glasgow and not in Halifax, and the plaintiffs were therefore entitled to recover:—Held, further, that, in the absence of a statutory enactment to the contrary, the law requires actual knowledge on the part of the vendor of the illegal purpose on the part of the vendee, and assuming that the plaintiffs' secretary, who was at one time in the province, acquired some knowledge of the law then in force, this fact did not raise a presumption that he or the plaintiffs knew, at the time the orders were received, or delivery was made, that such law still existed, or that the defendant intended to dispose of the goods illegally. *Craigellachie Distillery Co.* v. *Bigelow*, 37 N. S. Reps. 482.

Statutory Prohibition—*Penal Statute — Wholesale Purchase — Liquor License — Guarantee—Validity of—Forfeiture.*] — An agreement guaranteeing payment of the price of intoxicating liquors sold contrary to statutory prohibition is of no effect. The imposition of a penalty for the contravention of a statute avoids a contract entered into against the provisions of the statute. *Brown* v. *Moore*, 22 Occ. N. 196, 32 S. C. R. 93.

Stifling Prosecution — Money paid — Promissory notes—Death of maker—Action by administrator for delivery up—Parties in pari delicto—Misrepresentations. *Wood* v. *Adams*, 6 O. W. R. 407, 10 O. L. R. 631.

Threshing Wheat — *Weights and Measures Act—Burden of Proof—Voluntary Payment—Appropriation of Payments — Appeal —Question of Fact.*]—The chief part of the plaintiff's claim was for the price of threshing oats and wheat for the defendant, and the defence was that the quantities were ascertained in a manner prohibited by the Weights and Measures Act, R. S. C. c. 104, and that therefore the plaintiff could not recover. It appeared from the evidence that the oats threshed had been measured by the bag, but it also appeared from a statement rendered to plaintiff by defendant that he had credited the plaintiff with the amount of his account for threshing the oats, and charged the plaintiff with certain items dated prior to any other credit to the plaintiff and amounting to about the same as the price of threshing the oats:—Held, following the rule in Clayton's Case, 1 Mer. 610, that the defendant had appropriated the amount of his charges in settlement of the price of threshing the oats, and, following Hughes v. Chambers, 14 Man. L. R. 163, 22 Occ. N. 333, that he could not now set off such amount against the price of threshing wheat. As to the threshing of the wheat, the bargain was that the defendant was to pay by car measurements, if it was clean, if not, then by bag measurement, neither of which modes would be legal under the statute; but the defendant in the statement rendered to the plaintiff had credited him with the threshing of 4,597.20 bushels of wheat at 5¼ cents per bushel. The defendant gave no evidence, and there was no express testimony that the wheat had been measured by the bag, but the trial Judge held that the proper inference was that the measurement had been by the bag, and he dismissed the plaintiff's claim:—Held, following Hanbury v. Chambers, 10 Man. L. R. 167, 14 Occ. N. 321, that the trial Judge was not bound to draw such inference in a case where it would enable the defendant to evade payment of an honest claim; that, as there was no conflict of testimony, the appellate Judge was free to follow his own views as to the conclusions to be drawn from the evidence; that the defence raised should not prevail without strict proof of a violation of the Act; and that there was no such proof in this case. *Fox* v. *Allen*, 23 Occ. N. 28, 14 Man. L. R. 358.

Unduly Lessening Competition—*Trade Association—Criminal Code, sec. 520 (d)—"Cheque Conditional Deposit."*]—The Brantford Coal Importers' Association was an organization composed of all the coal dealers in the town of Brantford. They had agreed to sell coal at a fixed price, and for breach of such agreement were to forfeit $1 for each and every ton of coal so sold. Among other contracts put up at auction among the members of the association was one for the public schools of the city, and the defendant was declared the purchaser thereof at $212, and on the 19th June, 1901, he forwarded his cheque to plaintiff for that amount, it being marked "cheque conditional deposit:" the condition being referred to in the letter accompanying the cheque as follows: "That the contract for the city schools is to be awarded to me, and the same commenced and binding tenders received on the 20th day of the current month. Defendant was awarded the contract and was paid the contract price fixed by the association, but owing to a disagreement arising the defendant notified the bank not to pay the cheque. Action brought upon the cheque. Defence: 1. That the cheque was given conditionally. 2. That the Brantford Coal Importers' Association was an organization coming within sec. 520 of the Criminal Code, and that the transactions out of which the alleged cause of action arose were illegal, and plaintiff could not recover. On appeal the trial judgment was reversed and defence held good, the Divisional Court finding that there was an agreement by the members of the association to "unduly lessen competition in the sale of coal," and that the association was an illegal one within sec. 520 of the Criminal Code, therefore plaintiff could not recover. *Hately* v. *Elliott*, 5 O. W. R. 261, 9 O. L. R. 185.

Unlawful Consideration—*Public Policy —Monopoly—Trade Combination—Interest—Judicial Notice—Laws of Another Province.*] —Action to recover advances with interest under an agreement which defeated the policy of the Government of Ontario seeking the cheap manufacture of binder twine, obtained a monopoly, and increased the price of its production. The defence was the general issue, breach of contract, and an incidental demand of damages for the breach. The judgment appealed from maintained the action and dismissed the incidental demand, giving the plaintiffs interest according to the terms of the contract:—Held, that, under the provisions of the Civil Code, the moneys so advanced could be recovered back, but that in-

terest before action could not be allowed thereon, as the law merely requires that the parties should be replaced in the positions they respectively occupied before the illegal transactions took place: Taschereau and Gwynne, J.J., dissenting. Rolland v. La Caisse d'Economie de Notre-Dame de Quebec, 24 S. C. R. 405, discussed, and L'Association St. Jean Baptiste de Montreal v. Brault, 30 S. C. R. 589, referred to:—Held, also, that laws of public order must be judicially noticed by the Court ex proprio motû:—Held, further, that, in the absence of any proof to the contrary, the laws of another province must be presumed to be similar. *Consumers' Cordage Co.* v. *Connolly*, 21 Occ. N. 331, 31 S. C. R. 244.

VIII. MAKING THE CONTRACT.

Acceptance—*Purchase of Goods—Acceptance by Delivery.*]—The plaintiff, who had had previous dealings with the defendants, wrote to them on the 5th May, asking them if they were going to buy cucumbers that year, and what they were going to pay for them; adding, "please let me know, as I want to make a contract with someone for them, as I want to put in quite a few this year." The defendants replied: "We are pleased to learn that you are going to do a lot of growing this year, and will be pleased to take all you grow at the same price as last year. We will see you later on and make final arrangements." Nothing further occurred until the following August, when the plaintiff sent several loads of cucumbers to the defendants, who accepted them and paid for them, nothing being said at the time of any contract between the parties:—Held, that the defendants' letter was not an offer open to acceptance by the plaintiff, or by the delivery of cucumbers to them by the plaintiff, but a statement of their readiness to enter into an agreement with the plaintiff upon terms to be arranged. Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q. B. 256, distinguished. *Baston* v. *Toronto Fruit Vinegar Co.*, 22 Occ. N. 232, 4 O. L. R. 20, 1 O. W. R. 301.

Agent—*Ratification.*]—A contract made by an agent is complete before he has advised his principal of it, and before the latter has sent a ratification to the other party to the contract. *Hibbard* v. *Thompson Co.*, 5 Q. P. R. 372.

Cause of Action, where Arising—*Correspondence—Place of Making—Sale of Goods—Place of Delivery—Superior Court—District.*]—A contract by correspondence is completed at the place where the acceptance is received, to the knowledge of the acceptor. 2. An action for damages on account of the insufficiency and poor quality of goods sold may be begun in the district in which such goods ought to be delivered, inspected, and paid for. *Reeves* v. *McCullock*, 4 Q. P. R. 285.

Correspondence—*Acceptance—Mailing—Post Office Act—Place of Payment—Domicil—Delivery of Goods Sold.*]—An offer was made by letter dated and mailed at Quebec, the defendant's acceptance being by letter dated and mailed at Toronto. In a suit upon the contract in the Superior Court at Quebec, the defendant, who was served, substitutionally, opposed a judgment entered against him by default by petition in revocation of judgment, first by preliminary objection taking exception to the jurisdiction of the Court over the cause of action, and then, constituting himself incidental plaintiff, making a cross-demand for damages to be set off against the plaintiff's claim:—Held, that, in the Province of Quebec, as in the rest of Canada, in negotiations carried on by correspondence, it is not necessary for the completion of the contract that the letter accepting an offer should have actually reached the party making it, but the mailing in general post office of such letter completes the contract, subject, however, to revocation of the offer by the party making it before receipt by him of such letter of acceptance. Underwood v. Maguire, Q. R. 6 Q. B. 237, overruled. Article 85 of the Civil Code, as amended by 52 V. c. 48, providing that the indication of a place of payment in any note or writing should be equivalent to election of domicil, at the place so indicated, requires that such place should be actually designated in the contract. *Magann* v. *Auger*, 21 Occ. N. 329, 31 S. C. R. 186.

Correspondence—*Parties in Different Provinces — Jurisdiction.*]—Where the contract upon which the action was based arose out of a proposition made by the defendants at Kingston and sent to the plaintiffs at Montreal by letter, and accepted by the latter, also by letter:—Held, that it was made at Kingston and the Courts of the district of Montreal had no jurisdiction. *Beaubien Produce and Milling Co.* v. *Richardson*, 3 Q. P. R. 464.

Correspondence—*Place of Contract—Parties in Different Provinces—Breach—Sale of Goods—Property in Province—Jurisdiction.*]—1. A contract by correspondence is not complete until the answer of the person to whom the offer is made has reached him who makes the offer. 2. When the vendor of articles ascertained as to kind only, who resides in Ontario, and also by virtue of a contract completed at Montreal, sends from Ontario, the goods sold to the purchaser at Montreal, if the purchaser, who has paid for them in advance, does not find them to be as stipulated for, and refuses them, his action to recover what he has paid and the costs cannot be begun at Montreal, because the whole cause of action has not arisen there, the fact of the shipping from Ontario being a part of the cause of action. 3. Goods shipped to Montreal which the purchaser refuses to accept should be considered as property belonging to the defendants for the purposes of the suit, and to give jurisdiction to the Court at Montreal. *Hislop* v. *Bernatz*, 3 Q. P. R. 451.

Correspondence—*Place of Completion—Acceptance.*]—A contract by correspondence is complete at the place whence the acceptance is sent. *Ward* v. *Johnston*, 5 Q. P. R. 123.

Hiring—*Breach—Cause of Action, where Arising—Contract Made Outside of Province—Jurisdiction.*]—In an action for damages for breach of an agreement of hiring, the contract itself and its conditions are material

facts which must be proved by the plaintiff; therefore, if the contract was made outside of the Province of Quebec, it cannot be said that the whole cause of action arose in the province. *Landry* v. *Hurdman*, 5 Q. P. R. 273.

Offer and Acceptance — *Telegrams — Completion—Mutuality.*]—On the 7th December, 1897, the plaintiff telegraphed defendant asking for quotations for white and mixed oats delivered at Truro, N. S. On the same day the defendant replied offering white oats for 32c. per bushel, in bulk, and 34½c. in bags, and mixed oats for one-half cent less. On the following day the plaintiff telegraphed the defendant confirming purchase of "20,000 bushels of oats, at 32c. and mixed 31½c, bagged, even four bushels, in my bags." On the same day the defendant replied "Cannot confirm bagged—am asked half cent for bagging—bags extra." Plaintiff replied on the same day, "All right; book order; will have to pay for bagging:"—Held, (Meagher, J., dubitante) that the defendant by his last telegram, which was thus accepted, kept on foot the offer previously made, and that the telegram constituted an offer by the acceptance of which the parties reached the same terms. *Sumner* v. *Cole*, 32 N. S. Reps. 179; reversed 30 S. C. R. 379, 20 Occ. N. 324.

Offer in Writing — *Acceptance — Concluded Agreement — Proviso as to Formal Contract.*]—The defendants by advertisement invited tenders for lighting the city buildings for five years. The plaintiffs tendered to supply the necessary light for $945 per annum. The city council by resolution accepted the plaintiffs' tender, and the city clerk on the 18th May wrote to the plaintiffs notifying them thereof, and adding:—"The necessary contract will be prepared as soon as possible." No formal contract was ever signed by the parties. The plaintiffs supplied the defendants with gas, and sent in quarterly accounts for $236.25, which were paid by the defendants. The plaintiffs' president made inquiries about the formal contract from time to time from the city clerk and the chairman of the finance committee, and this state of things continued for nearly two years, when the plaintiffs wrote to the defendants, submitting that there was no existing contract, because the formal contract had never been executed, and also making certain complaints. They also claimed payment on the basis of a quantum meruit, contending that there was no binding contract:—Held, that by the offer of the plaintiffs and the acceptance of the defendants there was a concluded agreement; that the words at the end of the acceptance did not qualify the acceptance or leave it conditional on the execution of a contract. The conduct of the plaintiffs shewed that they did not so construe it, for they immediately after the acceptance entered upon and performed their part of the agreement without first requiring any formal contract, sent in their accounts for eighteen months on the basis of the contract being in existence, and were paid accordingly. *Ottawa Gas Co.* v. *City of Ottawa*, 21 Occ. N. 528.

Place of Making — *Cause of Action — Jurisdiction.*]—An action to recover a sum of money paid to his principal by an agent for the sale of goods on commission, in excess of what is due, cannot be brought at the place in this province where the money so paid was deposited to be transmitted by the bank, if the contract between the parties was not entered into at the same place, but in another province. *Hamel* v. *Stapleton*, 5 Q. P. R. 247.

Place of Making — *Correspondence — Superior Court—Territorial Jurisdiction.*]—A contract by correspondence is made at the place where the acceptance is sent, by letter or telegram, to the party making the offer. *Schmidt* v. *Crowe*, 5 Q. P. R. 361.

Place of Making—*Purchase of Goods—Superior Court—Territorial Jurisdiction.*]—A contract made by telephone for the purchase of goods to be forwarded by the vendor, at the expense and risk of the purchaser, is not regarded as having been made at the place from which the goods are sent. 2. The receipt by the vendor of letters confirming the purchases made by telephone is not sufficient to give jurisdiction to the Court of the district in which these letters are received and from which the goods bought have been sent. *Walker* v. *Gervais*, 5 Q. P. R. 330.

Place of Making—*Sale of Goods—Circuit Court — Territorial Jurisdiction.*] — Where an order is given to a travelling salesman to have sent by a carrier goods which are at the warehouse of the vendor and are afterwards delivered to the traveller to be forwarded to the purchaser, the contract is made at the place from which the goods are forwarded, and the Court of the district in which that place is situated has jurisdiction in an action for the price of goods so sold and delivered. *Gravel* v. *Gendreau*, 5 Q. P. R. 360.

Purchase of Goods — *Correspondence—Acceptance — New Terms.*] — On the 2nd October, O. handed the company's purchasing agent the following letter:—"I can offer you thirty cars of timothy hay, at $10.50 per ton, on cars at Chewelah, subject to acceptance in five days, delivery within six months. P.S.—I also agree to furnish seven cars of timothy hay at $10 per ton if above offer for 30 cars is accepted." On the 5th October the company mailed to O. an answer as follows:—"We would now inform you that we will accept your offer on timothy hay as per your letter to us of the second instant. Please ship as soon as possible the orders you already have in hand, and also get off the seven cars at $10 as early as possible, as our stock is very low. Try and ship us three or four cars so as to catch the next freight here from Northport. We will advise you further as to the shipment of the 30 cars. Should we not be able to take it all in before your roads break up, we presume you will have no objection to allowing balance to remain over until the farmers can haul it in. Do the best you can to get some empty cars at once, as we must have three or four cars by next freight." This letter was received by O. on the 8th October:—Held, per McColl, C.J., and Martin, J., that the company's reply was not a complete acceptance. Per Walkem and Irving, JJ., that it was a complete acceptance. *Oppenheimer* v. *Brackman and Ker Milling Co.*, 9 B. C. R. 343.

Telegrams—*Completion — Place of Contract.*]—A contract made by telegraph is not

complete until the party who has made the offer has received from the party to whom it was made notification of his acceptance.—2. Such a contract is regarded as made at the place where it has been completed. *Beaubien Produce and Milling Co.* v. *Robertson*, Q. R. 18 S. C. 429.

Want of Consensus — *Misrepresentation.*]—The defendant, negotiating with the plaintiffs' agent for the purchase of a stacker, was asked to sign an order for one. The agent filled up a form of order, and the defendant said to him: "Now, if there is anything in this order that binds me to keep the stacker if it does not give satisfaction, I won't sign it." To which the agent replied that there was not, that he could take the stacker out and keep it ten days, and if it did not give satisfaction he need not settle for it, but could bring it in and leave it on the agent's platform at B. The defendant then signed the order without reading it, as he was in a hurry to catch a train. By the terms of the order only one day's trial of the machine was allowed, and the buyer, if it did not give satisfaction, was to return it to the plaintiffs at C. There was a printed direction at the top of the order to give the purchaser a duplicate, but none was given to him. On receipt of the machine the defendant tried it, and, not finding it to work satisfactorily, returned it within ten days to the agent at B. At the trial the agent admitted that, at the time the order was signed, he thought it provided for a ten days' trial:—Held, that there was no such consensus ad idem between the parties as is necessary to create a binding contract, and that the verdict of the County Court Judge in favour of the defendant in an action by the plaintiffs for the price of the machine should be sustained, and the plaintiffs' appeal dismissed with costs. Foster v. McKinnon, L. R. 4 C. P. 704, Smith v. Hughes, L. R. 6 Q. B. 597, and Murray v. Jenkins, 28 S. C. R. 565, followed. Saults v. Eaket, 11 Man. L. R. 597, distinguished. *Jones Stacker Co.* v. *Green*, 22 Occ. N. 264, 14 Man. L. R. 61.

IX. Novation.

Acceptance of Note of Stranger on Account of Debt—*Receipt — Liability of Debtor.*]—Intention to effect novation is not apparent from the fact that the note of a third party was accepted on account of the debt, where a receipt was given as follows: "Received from J. V. (the debtor) the note of M. S. & Sons for $160 at 30 days, on account of pony and buzz planer." In the event of the note not being paid at maturity the creditor retains his recourse against the debtor for the debt. *Cowan* v. *Vezina*, Q. R. 20 S. C. 7.

Consideration — Collateral promise — Oral evidence to alter writing—Costs. *Webb* v. *Ottawa Car Co.*, 1 O. W. R. 90, 2 O. W. 62.

Substitution of Third Party—*Relief Over.*]—A party, who is bound under a condition which has not been fulfilled, and whose obligations have been assumed by a third party accepted by the plaintiff, cannot, if he is sued for non-execution of the contract which he has thus transferred, bring in en garantie the third person who has been substituted for him. *Veilleux* v. *Atlantic and Lake Superior R. W. Co.*, 5 Q. P. R. 290.

X. Reformation.

Obvious Error.]—Judgment in 20 Occ. N. 359 varied as to interest. *Sinclair* v. *Preston*, 21 Occ. N. 97, 13 Man. L. R. 228.

XI. Rescission.

Cancellation in Part — *Construction —Municipal Works—Deductions — Deferred Payments — Interest—Payments in Advance —Rebates—Damages.*]—Article 1691, C. C., does not give the owner of works being constructed under a contract at a fixed price the power of cancelling the contract in part and maintaining it as to another part; it must be cancelled in toto or not at all. A municipality agreed to pay for works by promissory notes, payable in two years without interest, to be delivered to the contractor on the completion of the works, and to bear a date assumed to be the mesne date of completion of the works as carried on in detail. The mesne date was settled as 15th December, 1899, and the notes for the balance due were delivered in 1900:—Held, that interest on advance payments made before 15th December, 1899, was payable only from that date; but the interest should be calculated on the basis of the actual amounts of the advance payments made, and not on the basis of the actual cost of the works. Certain of the works were not executed by orders from the municipality, and on this head a reduction was made from the plaintiffs' claim. It appeared that the plaintiffs had, at least tacitly, consented to this diminution, and made no protest in respect thereof:—Held, that, under the circumstances, the plaintiffs could not claim the sum in question as damages under Arts. 1065, 1691, C.C. *Town of Maisonneuve* v. *Banque Provinciale du Canada*, 33 S. C. R. 418.

Conduct—*Injunction — Parol Agreement —Statute of Frauds — Part Performance—Services—Quantum Meruit—New Trial.*]—Previous to 1891, a verbal agreement was entered into between the plaintiff and the defendant, under which the plaintiff was to be employed in the care and management of the defendant's business, and in return the defendant was to afford the plaintiff support and maintenance during the defendant's lifetime, and at his death was to give to him one-half of a certain island belonging to the defendant. The plaintiff entered upon his duties and continued to perform his side of the agreement until August, 1897, when, by an injunction order, issuing out of the Equity Court, made in a suit in which both the plaintiff and the defendant were parties, he was restrained from any longer interfering with the care or management of the defendant's business, and was compelled to quit the island. He accordingly handed over to one B., who was acting under a power of attorney from the defendant, all the property of the defendant in his possession, and, treating the conduct of the defendant as equivalent to a rescission of the agreement, in the same month of August brought an action against

the defendant for the value of his services during the six years previous to the issuing of the injunction order. The jury found that the defendant had annulled and put an end to the agreement on the 3rd August, 1897, the day the injunction order was issued, and a verdict was found for the plaintiff. In December, 1897, some months after the commencement of the action, the defendant made a deed of the island in question to B. upon certain trusts, the nature of which did not appear in evidence:—Held, that, although neither the obtaining of the injunction order nor the making of the deed to B. was sufficient to sustain the finding of the jury as to the annulment of the agreement, and the plaintiff ought, therefore, in strictness, to be nonsuited, yet, as there was a point of view of the facts which had not been presented to the jury, and under which the plaintiff might be entitled to recover on a quantum meruit, the case should be further investigated, and there should therefore be a new trial: Tuck, C.J., and McLeod, J., dissenting. *Frye* v. *Frye*, 34 N. B. Reps. 569.

Deceit and Fraud—*Evidence—Concurrent Findings of Lower Courts—Duty of Second Court of Appeal.*]—A sale of timber limits to the plaintiff was effected through a broker for a price stated in the deed to be $112,500, but the vendor signed an acknowledgment that the true price, so far as he was concerned, was $75,000. At the time of the execution of the deed a statement was made shewing how the purchase money was to be paid, and the vendor signed an agreement that out of the balance of the $112,500, viz., $46,502.02, the plaintiff was to get $37,500, i.e., the amount of the difference between the true price and that mentioned in the deed. The vendor refused to pay over this $37,500, on the ground that the plaintiff and the broker had conspired together to deceive him as to the actual price to be obtained for the limits, and that the sale was not in fact to the plaintiff for $75,000, but to the plaintiff's principals, the grantees in the deed, for the full consideration of $112,500, and that the plaintiff and the broker were acting fraudulently and seeking by deceit and artifice to deprive him of the full price at which the sale had been effected. In an action to recover the $37,500 from the vendor:—Held, affirming the judgment appealed from, that the acknowledgments signed by the vendor settled the rights of the parties, unless there was very strong evidence to the contrary, and, as there was no such evidence, and the circumstances, as found by the Courts below, tended to shew that the plaintiff was entitled to the money in dispute as the natural result of the transactions between the parties, the case was one in which a second Court of appeal would not be justified in disturbing the concurrent findings at the trial and of the Court appealed from. *Veilleux* v. *Ordway, Price* v. *Ordway*, 24 Occ. N. 109, 34 S. C. R. 145.

Duration—*Right to Cancel — Repugnant Clauses.*]—A contract for supplying light to a hotel contained the following provisions: "This contract is to continue in force for not less than 36 consecutive calendar months from date of first burning, and thereafter until cancelled (in writing) by one of the parties hereto. . . . Special conditions if any. This contract to remain in force after the expiration of the said 36 months for the term that the party of the second part renews his lease for the Russell House." After the expiration of the 36 months the lease was renewed for five years longer:—Held, reversing the judgment of the Court of Appeal, 1 O. L. R. 73, 21 Occ. N. 105, that neither of the parties to the contract had a right to cancel it against the will of the other during the renewed term. *Ottawa Electric Co.* v. *St. Jacques*, 22 Occ. N. 77, 31 S. C. R. 636.

Improvidence — Absence of independent advice. *Rogers* v. *Rogers*, 2 O. W. R. 673, 3 O. W. R. 587.

Misrepresentations — *Sale of Mining Areas—Evidence—Speculative Property.*] — In an action to set aside a sale of gold bearing areas purchased by the plaintiffs from the defendant, who was joint owner with H., the plaintiffs relied upon evidence shewing that they were induced to make the contract by certain representations as to value contained in a report prepared by H. and handed by the defendant to L., who was acting for the plaintiffs, as a means of inducing the sale. Evidence was given on behalf of the defendant to shew that at the time the report was handed to L., he was given to understand that the defendant could not say anything as to its correctness, and that L. must verify it for himself. The trial Judge decided the action in favour of the defendant, and on appeal the Court in banc was divided, both as to the effect of the evidence and as to the admissibility of evidence taken (under an order) after the judgment of the trial Judge. *Leckie* v. *Stuart*, 34 N. S. Reps. 140.

Non-fulfilment of Obligations—*Parties Both in Default.*]—In order that the rescission of a contract may, by virtue of art. 1065 of the Civil Code, be adjudged against a party who has not fulfilled the obligations of it, it is necessary that such rescission should put the parties as they were before the contract, and it will not be adjudged if its effect will be to enrich one party at the expense of the other. 2. If one party has failed to fulfil his obligations as much as the other, he cannot demand against the other the rescission of the contract. *Dupuis* v. *Dupuis*, Q. R. 19 S. C. 500.

Threats—*Apprehension.*] — In order that a father may have the right to rescind a contract which he has made, on the ground of threats to his daughter, it is necessary that these threats shall have produced an apprehension in him which is the sole reason of his consenting to execute the contract. The apprehension of his daughter, if he himself did not share it, has no effect upon the contract. *Giroux* v. *Vinet*, Q. R. 24 S. C. 1.

XII. Sale of Goods.

Delivery—*Place—"At," Meaning of.*] — A tender by H. to supply coal to the town of Goderich, pursuant to advertisement therefor, contained an offer to deliver it "into the coal shed at pumping station, or grounds adjacent thereto, where directed by you. (Meaning by a committee of the council.) The tender was accepted, and the contract afterwards signed called for delivery "at the coal shed." A portion of the coal was delivered, without directions from the committee, from a vessel

upon the dock, about 80 feet from the shed, and separated from it by a road:—Held, reversing the judgment of the Court of Appeal (15th November, 1901, unreported), that the coal was not delivered "at the coal shed." as provided by the contract signed by the parties, which was the binding document:—Held, also, that if the contract was to be decided by the terms of the tender, the delivery was not in accordance therewith, the place of delivery not being "at the pumping station or grounds adjacent thereto." (See, also, 20 Occ. N. 303.) *Holmes* v. *Town of Goderich*, 22 Occ. N. 222, 32 S. C. R. 211.

Failure to Deliver — Counterclaim for refusal to accept — Damages. *Kennedy* v. *Joyce* (N.W.T.), 1 W. L. R. 197.

Goods to be Manufactured—Breach—Construction of contract — Implied condition — Expectancy — Consideration — Property passing—Destruction by fire — Appropriation of goods to contract. *Delaplante* v. *Tennant*, 4 O. W. R. 76, 5 O. W. R. 81, 6 O. W. R. 217.

Lowest Wholesale Price—*Special Discount.*]—By contract in writing whereby the defendants agreed, for 3 years from the date thereof, to purchase for their business surgical instruments manufactured by the plaintiffs only, the latter contracted to supply their products at "lowest wholesale prices," and for all goods furnished from New York to allow a special discount of 5 per cent. from the prices marked in a catalogue handed over with the contract:—Held, that under this agreement the plaintiffs could allow to purchasers of their goods in large quantities a greater discount from the wholesale prices than 5 per cent. without being obliged to give the same reduction to the defendants. Judgment of the Court of Appeal, 4 O. W. R. 187, affirmed. *Kny-Scheerer Co.* v. *Chandler and Massey*, 25 Occ. N. 106; *Chandler and Massey* v. *Kny-Scheerer Co.*, 36 S. C. R. 130.

Machine—Extras — Conflicting evidence. *Pendrith Machinery Co.* v. *Taylor*, 6 O. W. R. 1010.

Refusal to Complete Delivery — Breach—Damages — Measure of. *Johnston* v. *Hurb* (Man.), 1 W. L. R. 565.

Right to Sell Article in Particular Territory—Action for price of assignment of right—Counterclaim for breach by selling in same territory. *Delahay* v. *Congdon*, 3 O. W. R. 934.

Sale of Monument — *Sample* — *Evidence.*]—In an action for the price of a tombstone, the defence was that it was not of the design ordered. It had been ordered from photographic samples, and an order form was filed in, which, when produced at the trial, contained the words "E. M. Lewis Reporter Design," which the defendant asserted were not in it when it was signed by him, but which were there two or three hours later when handed to one of the vendors by their foreman who had taken the order and filled in the form. The evidence at the trial was conflicting, and the Chancellor, trying the case without a jury, dismissed the action. His judgment was reversed by the Court of Appeal (1 O. W. R. 602):—Held, per Taschereau, C.J., that the evidence established that the words in dispute were in the order when it was signed, and the plaintiffs were entitled to recover:—Held, per Sedgewick and Davies, JJ., Mills, J., hæsitante, that, even if these words were not originally in the order, the circumstances disclosed in evidence shewed that the design supplied was substantially that ordered; and the judgment appealed from should stand. *Lewis* v. *Dempster*, 23 Occ. N. 179, 33 S. C. R. 292.

Sale on Credit—Representation by purchaser—To whom credit given — Contradictory evidence—Liquor License Ordinance—Licensee—Restaurant business — Estoppel. *North American Transportation and Trading Co.* v. *Olsen* (Y.T.), 1 W. L. R. 518.

Services Performed — Money paid—Account — Items — Commission—Evidence—Admissibility. *Pinki* v. *Western Packing Co.* (N.W.T.), 2 W. L. R. 336.

Time of Delivery—Novation—Discharge of old contract—Statute of Frauds—Breach of contract — Damages — Return of goods given in exchange. *Clement* v. *Faircloth Co.* (Man.), 1 W. L. R. 524.

Time of Shipment—Fulfilment of provision—Time of loading on cars—Receipt of shipping bill—Place of weighing—Departure from contract—Mistake — Costs. *Perry* v. *Manitoba Milling Co.* (Man.), 1 W. L. R. 541.

Unascertained Goods—Appropriation—Passing — Acceptance — Part payment. *Southampton Lumber Co.* v. *Austin*, 1 O. W. R. 578, 2 O. W. R. 638.

XIII. Statute of Frauds.

Absence of Writing — *Novation.*]—M., who had agreed with the defendants and a number of other lumber manufacturers to drive down their logs for them, the defendants' contract being an oral one, arranged with the plaintiff to act for him; the obligation to drive the defendants' logs to continue to a named date, for which the plaintiff was to be paid a specified sum, and if M. did not then arrive and take over the drive, the plaintiff was to continue it and to be paid a specified sum per day for himself and those employed by him. M. did not arrive, and the drive was continued by the plaintiff. Subsequently, M. having some difficulty in paying his men, an oral agreement was entered into between M. and the defendants, whereby in consideration of M. assigning over to them the amounts due him by the defendants and other manufacturers, the defendants undertook to continue the drive and to pay the existing as well as the indebtedness thereafter to be incurred, the plaintiff being instructed and agreeing to continue the drive on these terms:—Held, by Robertson, J., that there was a new contract founded on new and substantial consideration, so that the Statute of Frauds did not apply. On appeal to a Divisional Court the judgment was affirmed, on the grounds (1) of novation, or (2), even if M.'s indebtedness still continued, the moneys coming to

nim having been assigned to the defendants upon their express promise to pay the indebtedness thereout, and the plaintiff having continued the drive on such terms, there was a binding obligation to pay him, and that in either view the Statute of Frauds did not apply. *Bailey* v. *Gillies*, 22 Occ. N. 289, 4 O. L. R. 182, 1 O. W. R. 325.

Failure to State Terms—*Nudum Pactum—Conditions—Impossibility of Performance.*]—The plaintiff, having recovered judgment for $542.50 against O'B., issued a garnishee order against the defendant, and an issue having been ordered the trial Judge held that the agreements between O'B. and the defendant, by virtue whereof the alleged indebtedness arose, did not comply with the Statute of Frauds, inasmuch as the parties had omitted to state therein the terms actually agreed upon, and decided the issue in favour of the defendant:—Held, on appeal, that the promise made by the defendant and now sought to be enforced against him was nudum pactum. 2. That O'B. and the defendant in reality came to an agreement in ignorance of the fact that its performance, in view of the conditions it was contingent upon, was impossible. *Manley* v. *Mackintosh*, 10 B. C. R. 84.

Interest in Land—*Part Performance—Evidence.*]—M. leased land to his two sons S. and W., of which 50 acres was to be in the sole tenancy of W. In an action by M. against S. for waste by cutting wood on the 50 acres, the defence set up was that by parol agreement, in consideration of S. conveying 100 acres of his land to W., he was to have a deed of the 50 acres, and having so conveyed to W., he had an equitable title in the latter. M. admitted the agreement, but denied that the land to be conveyed to S. was the 50 acres:—Held, per Nesbitt and Idington, JJ., that the conveyance to W. was a part performance of the parol agreement, and the Statute of Frauds was no answer to the defence. The majority of the Court held that, as the possession of the 50 acres was referable to the lease as well as to the parol agreement, part performance was not proved, and affirmed the judgment appealed from in favour of the plaintiff (37 N. S. Reps. 23) on this and other grounds. *Meisner* v. *Meisner*, 25 Occ. N. 101, 36 S. C. R. 34.

Master and Servant—*Employment for an Indefinite Term—Damages.*]—A sub-contract to employ a person as a salesman so long as the employer's contract with third persons might remain in force, that contract being terminable at any time, is not within the Statute of Frauds, for the sub-contract may or may not continue for a year. Such a sub-contract does not come within s. 5 of the Master and Servants Act, R. S. O. 1897 c. 157. The employers' contract came to an end by the voluntary dissolution of their firm:—Held, that this voluntary dissolution operated as a wrongful dismissal of the plaintiff under his sub-contract, and that, although the probable duration of the contract and consequently of his sub-contract would have been, apart from the dissolution of partnership, quite uncertain, he was entitled to substantial and not merely nominal damages. *Glenn* v. *Rudd*, 22 Occ. N. 113, 3 O. L. R. 422, 1 O. W. R. 116.

Memorandum — *Signature—Conflicting Evidence.*]—Action for damages for breach of a contract for the delivery of flour. The writings relied on were: (1) paper signed by plaintiffs and addressed to defendants, to enter order for 2,000 barrels of flour and to have option for 3,000 barrels more with delivery as required. (2) The entry made in the contract book of the defendants in these words: "1904. Dec. 30. By 2,000 P. Rose $4.10—cash discount of one per cent." This appeared as one of a series of orders under heading on the page of Nasmith Co., and formed an item of an account which began in the book in 1899. On the fly sheet of the book was stamped the name of defendants with words in red ink above it, "New account, 1st June, 1902:"—Held, that the contract sued on by the plaintiffs was not proved against defendants according to the requirements of the Statute of Frauds. *Nasmith Co.* v. *Alexander Brown Milling and Elevator Co.*, 4 O. W. R. 451, 25 Occ. N. 38, 9 O. L. R. 21.

Oral Agreement for Use of Roadway—*Part Performance—Evidence — Unsigned Draft of Agreement.*] — Where the defendants' predecessors in title induced and allowed the plaintiff's predecessors in title to remove their house and fence and give up their land for the purpose of improving the entrance to the street in the way they wished, there was sufficient part performance to take an oral agreement for the use of a roadway, though relating to an interest in land, out of the Statute of Frauds; and unsigned drafts of such agreement containing alterations providing for the part maintenance of the way by the plaintiff's predecessors in title, which obligation is entirely disclaimed by the plaintiff, are not admissible in evidence where they were not shewn to the parties to the agreement when giving evidence, and no explanation as to them was sought from the parties. *Fairweather* v. *Lloyd*, 36 N. B. Reps. 548.

Promise to Become Answerable for Debt of Another — *Form of Action—Pleading.*]—In an action against the defendants M. and G. for work done and materials provided by the plaintiff for the defendants, at the defendants' request, the evidence shewed that the defendant G. entered into a contract with the defendant M. for the building of a house, and that the defendant M. employed the plaintiff to do the work of painting and glazing. M. failed to make payments to the plaintiff as agreed, and the plaintiff thereupon went to G., who told him to go ahead and he would see him paid:—Held, that, as there was no evidence to shew that the defendant M. was to be discharged, the promise made by the defendant G. was within s. 4 of the Statute of Frauds, and, not having been made in writing, could not be enforced:—Held, that, in view of the form of action, there was no necessity for pleading the statute, and that judgment was rightly given in favour of the defendant G. *Boorstein* v. *Moffatt*, 36 N. S. Reps. 81.

XIV. TIMBER.

Delivery of Timber—Correspondence—Evidence — Non-completion of contract. *McGibbon* v. *Charlton*, 1 O. W. R. 828.

Logging — Moneys advanced — Scaling logs—Conditions of contract. *Lequime* v. *Brown* (B.C.), 1 W. L. R. 193.

Oral Contract—*Sale of Interest in Timber Limit—Part Performance — Statute of Frauds — Amendment — Partnership.*]— The plaintiff, who had an interest in a contract for driving logs, brought an action against the defendant, who had an interest in a timber limit, alleging that by an oral agreement the defendant had agreed to give him (the plaintiff) half his interest in the timber limit in consideration of an interest in the log driving contract. It was shewn that the defendant had received an equal share with the plaintiff ($2,530.27) of the profits of the driving contract. The defendant alleged that this was a return for his services in driving the logs, and denied any agreement to pay the plaintiff any share of the profits from the timber limit:—Held, that a contract for an interest in a timber limit is a contract for an interest in land within the Statute of Frauds. That the division of the profits of the driving contract was not a sufficient part performance to take the case out of the statute, as it, at the most, could only be regarded as payment of the purchase money. That there was no evidence that the timber limit was held as partnership property, and, even if it was so, that it did not follow that a transfer by one partner of his interest would not be within the statute. Had the evidence of the alleged agreement been clear and satisfactory, leave to amend and recover the consideration paid on the footing of the contract might have been given. But, as the verdict of the jury was so manifestly against the evidence, the action was dismissed, and leave given to the plaintiff, if so advised, to bring a new action to establish the oral agreement and recover the purchase money. Judgment of Teetzel, J., 2 O. W. R. 714, reversed. *Hoeffler* v. *Irwin*, 25 Occ. N. 32, 2 O. W. R. 714, 4 O. W R. 172.

Sale of Timber — No provision as to time of performance—Reasonable time—Time for commencement and completion of work—Notice — Trespass — Damages—Injunction. *Johnson* v. *Dunn* (B.C.), 2 W. L. R. 317.

Sale of Timber—*Terms of Payment.*]— The appellant held rights in unpatented lands and agreed to sell the timber thereon to respondent, one of the conditions as to payment therefor being that, as soon as the Crown grant issued, the respondent should "settle" a judgment against the appellant, which, they both understood, could at that time be purchased for $500. On the issue of the grant, about six months afterwards, the judgment creditor refused to accept $500 as full settlement at the latter date, and he took proceedings to enforce execution for the full amount. The execution was opposed on behalf of the appellant, the respondent becoming surety for the costs and being also made a party to the proceedings:—Held, affirming the judgment in 10 B. C. R. 84, that the agreement to settle the outstanding judgment was not made unconditionally by the respondent, but was limited to settling it for $500, after the issue of the Crown grant for the land:—Held, also, Davies, J., dissenting, that the costs incurred in unsuccessfully opposing the execution of the judgment, upon being paid by the respondent, were properly chargable against the appellant. *O'Brien* v. *Mackintosh*, 24 Occ. N. 115, 34 S. C. R. 169.

Towing—*Delivery of Logs—Lost Logs—Payment for.*] — Under a contract to tow logs, the owner of the tug is entitled to be paid only for the logs delivered; and where the special term that he is to be paid for logs "lost or not lost" is relied on, it must be proved specifically. *Pacific Towing Co.* v. *Morris*, 11 B. C. R. 173.

XV. Work and Labour.

Agreement to Work Adjoining Homesteads Jointly — Partnership — Goods purchased—Account — Counterclaim. *Furlong* v. *Thomas* (N.W.T.), 2 W. L. R. 188.

Appliances for Work—*Use of by Contractor—Tacit Permission—Injury by defects in—Action against Contractor—Relief Over against Owner—Evidence.*] — A contractor who undertakes a work at a fixed price, by a contract containing no stipulation as to the construction of scaffolds necessary for such work, although such scaffolds have been previously erected by the owner for use in other works being executed at the same time, is considered to have contracted with the tacit understanding that he may use the scaffolds, especially if he makes use of them with the knowledge and approval of the owner.—Therefore, if, in consequence of defects in the construction of such scaffolds, an accident happens, the contractor, being sued on account of injuries sustained thereby, has a right to call upon the owner of the scaffolds for relief over.—2. The costs of the scaffolds as compared with the contract price, as well as the uselessness of having new scaffolds, are properly the subject of evidence in such an action. *Tardivel* v. *Fabrique de St. Jean Deschaillons*, Q. R. 13 K. B. 9.

Assignment—Payment for work done—Estimates—"Moneys due"—Moneys retained as guarantee—Moneys payable to contractor—Claims of lien-holders, assignees, and creditors—Priorities — Marshalling. *Re Bunyan and Canadian Pacific R. W. Co.*, 5 O. W. R. 242.

Breach—Refusal to allow contractor to complete—Construction of contract—Payment—Default—Damages. *Williams* v. *Alpena Oil and Gas Co.*, 6 O. W. R. 401.

Breach — Wrongfully preventing contractor from completing—Delay — Damages. *Reiner* v. *Ross*, 6 O. W. R. 25.

Breach by Contractors—Completion of work by employers—Notice — Assent—Reasonable expenditure—Recovery — Condition precedent. *Toronto Harbour Commissioners* v. *Sand and Dredging*, 2 O. W. R. 1178.

Damages for Delay — *Liquidated Damages or Penalty—Part Performance—Useful Occupation—Extras—Time.*] — Where damages or a penalty have been stipulated in advance for delay in the completion of a contract for work, the party for whom the work was done is entitled to recover such sum, without being obliged to prove the actual amount of damage suffered,—the object of the clause being to obviate the necessity of determining the amount of the damages by

an action at law or expertise.—2. A contractor, restricted as to time for the execution of a contract, who undertakes extra work in connection with the same contract, without stipulating for additional time, is not relieved from responsibility for the penalty or damages fixed by the contract for delay in the completion of the work.—3. Work is not "performed in part," within the meaning of Art. 1076, C. C., where the owner cannot have useful occupation of the portion completed. *McDonald* v. *Hutchins*, Q. R. 12 K. B. 499.

Discharge of Contractor—Architect—Fraud. *Anderson* v. *Chandler*, 1 O. W. R. 417, 2 O. W. R. 186.

Expenditure — *Indemnity.*]—A contract for the performance of work for a block price may be cancelled as to a portion of such work, by the party for whom it is to be performed, subject to the obligation of indemnifying the other party for any expenditure made by him in connection with the work cancelled, as well as for the loss of any profit which he would have made thereon had the contract been wholly executed. *Town of Maisonneuve* v. *Banque Provinciale du Canada*, Q. R. 12 K. B. 490, 33 S. C. R. 418.

Failure to Complete—Employment of person to finish work—Counterclaim—Damages for bad work. *Klugman* v. *Mitchell* (N. W.T.), 2 W. L. R. 522.

Labour and Materials — Failure to complete to satisfaction of defendants—Adoption of work and materials—Costs. *Smith* v. *Toronto General Hospital Trustees*, 6 O. W. R. 999.

Paving Work—Measurements — Certificate of engineer. *Guelph Paving Co.* v. *Town of Brockville*, 4 O. W. R. 483, 5 O. W. R. 626.

Payment—Quantum meruit—Pleading—Amendment after trial and appeal—Claim on quantum meruit changed to claim on contract — Judgment — Terms—Parties — Costs. *Patriarche* v. *Town of Orillia*, 3 O. W. R. 595, 723.

Preparation of Literary Work—Employment of editor by publishers—Right to literary materials — Replevin. *Morang* v. *Hopkins*, 2 O. W. R. 285, 703.

Preventing Contractor from Executing Work — Cancelling contract—Conduct justifying cancellation—Refusal to proceed—Architect's certificate—Delay—Evidence—Appeal on questions of fact. *Sloane* v. *Toronto Hotel Co.*, 5 O. W. R. 460.

Proof of Contract—Servant or contractor—Burden of proof—Damages for defective work — Trade discounts — Right of master to credit for—Counterclaim—Costs. *Brown* v. *Vandervoort*, 2 O. W. R. 742.

Railway Work — Sub-contractor — Knowledge of terms of principal contract—Remuneration—Damages for breach—Counterclaim. *Carroll* v. *Gilbert*, 3 O. W. R. 357.

Services—Account — Reference—Report —Appeal. *Rabbitts* v. *McMahon*, 6 O. W. R. 716.

Services—Implication of promise to pay for—Circumstances shewing intention—Professional services—Officer of Court. *Willcox* v. *Barclay*, 6 O. W. R. 522.

Smelting—*Sampling Ores — Mine Owner's Representative—Authority—Ores Improperly Sampled — Method of Estimating Values.*]—A contract between mine owners and smelter owners provided inter alia that the ores supplied by the former to the latter should be sampled within one week after shipment. The evidence shewed that "automatic" or machine sampling had displaced the old method of "grab" or "shovel" sampling and had been in vogue for about twenty years:—Held, per Hunter, C.J., and Walkem, J., that the contract was entered into on the footing that the sampling was to be done automatically. Per Drake and Irving, JJ.,—The contract permitted any mode of sampling, so long as it was done properly, and the true value of the ore was arrived at. A mine owner's representative at a smelter for the purpose of watching the weighing and sampling of ores, so that the mine owner may be satisfied as to the correctness of the weight and sampling, has no authority to consent to a method of sampling not allowed by the contract. Where the smelter returns of ore of average character sampled either negligently or in a manner not contemplated by contract, shew a value below the average, the probable value of the ore will be estimated by the Court by taking the average value of a certain number of lots immediately before and after the lots in dispute. *Le Roi Mining Co.* v. *Northport Smelting Co.*, 24 Occ. N. 32, 10 B. C. R. 138.

Warranty — *Heating of Building—Construction—Judge's Charge—Condition Precedent—Allowance for Defects—Admissions—Mistake—Substantial Performance—Waiver —Quantum Meruit.*]—Action to recover the contract price of putting a hot water heating apparatus into a building for the defendant. The contract provided "as the essence" that "the heating of the entire building shall easily and without forcing the boilers, maintain throughout the building a temperature of not less than 65 degrees Fahrenheit in the most severe cold." The trial Judge charged the jury (inter alia) that the contractors were bound to supply a system which would easily maintain 65 degrees without forcing the boilers; that they were bound to put in a radiating surface to the percentage named in the contract in any event, and if a greater surface was necessary, in order to produce the 65 degrees, they were bound to furnish it; that the maintenance of the 65 degrees was necessary to entitle the plaintiffs to recover; that if the jury found that the system was not capable of maintaining the required temperature, they must find for the defendant, and must not take into consideration the question of the amount which would be required to alter the system to render it capable of giving the required temperature; that the defendant was not bound by an admission in a letter as to the amount due by him, so long as the plaintiffs had not altered their position by reason of the admission, and the defendant was not precluded from shewing that the admission was a mistake. The jury found a verdict for the de-

fendant:—Held, that there had been no misdirection. The questions of the "substantial performance" of a contract and of the waiver of a special contract and the substitution of a new contract to pay according to a quantum meruit, discussed. *Toronto Radiator Mfg. Co.* v. *Alexander*, 2 Terr. L. R. 120.

Water Power—*Construction of Dam—Agreement to Pay for Damages by Flooding—Indemnity—Protective Works.*]—Owing to the condition of the locality and the character of certain improvements made for the purpose of increasing the water power at Chambly rapids, in the Richelieu river, the parties entered into an agreement respecting the construction of dams and other works at the locus in quo, and it was provided that the company should assume the responsibility and pay for all damages caused by "flooding of land, bridges, or roads, if any, as well as all other damages caused" to the plaintiff "during or by reason of" the constructions: — Held, reversing the judgment appealed from, that, under the agreement, the plaintiff could recover only such damages as he might suffer from time to time in consequence of the floods at certain seasons being aggravated by the constructions in the stream, and that, in the special circumstances of the case, the Courts below erred in decreeing the construction of protective works, inasmuch as the company were entitled to take the risks on payment of indemnity as provided by the contract. *Chambly Manufacturing Co.* v. *Willet*, 24 Occ. N. 204, 34 S. C. R. 502.

Work and Labour—*Substituted Contract—Consideration — Extras.*]—The plaintiff, who had contracted to supply materials for re-seating a church, contended that, under the terms of his contract to furnish, among other things, "pew ends, divisions, seat, lining, book racks," for a lump sum, "seat, lining," should read "seat-lining," and that, under this term, he was only bound to furnish the materials of which the seats were to be constructed. The defendant's contention was that the "lining was intended to go over the old wainscoting:"—Held, that to admit the plaintiff's contention would be to ignore the actual reading, and to give an unusual and improper meaning to the word "lining" so as to materially vary the terms of the contract, and a promise, if any, to pay for such lining as an extra could not be supported, the performance by a contractor of what he is already bound to do not being a consideration to support such a promise; and quære, whether the settlement in this way of a bona fide dispute between the parties, as to the meaning of the terms used, would constitute sufficient consideration for the alleged promise to pay. *Dempster* v. *Bauld*, 37, N. S. Reps. 330.

XVI. Other Cases.

Advertising Privileges—Renewal—Uncertainty—Invalidity — Construction of contract. *Henning* v. *Toronto R. W. Co.*, 5 O. W. R. 227.

Agreement for Maintenance — *Consideration — Conveyance of Property — Evidence to Vary Agreement—Reformation—Detinue—Damages.*]—In an action to recover certain personal property which, it was alleged, the defendant unlawfully detained, the defendant relied upon an agreement, entered into between the plaintiff and him, whereby the plaintiff, in consideration that the defendant would provide him with sufficient and comfortable maintenance during his lifetime, agreed to convey to the defendant his real and personal property. The document put in evidence in support of the defence set up contained no reference to personal property:—Held, that parol evidence could not be introduced to vary the terms of the written document, and that the plaintiff was entitled to judgment; and if, through fraud or mistake, the personal property was omitted from the written agreement, the defendant had his remedy in a proper action to have the agreement reformed. The damages assessed for the detention of the personal property being excessive, the Court directed a reference back to the County Court Judge who had tried the action, to make a new assessment. *Guiou* v. *Thibeau*, 36 N. S. Reps. 542.

Board and Lodging—Bequest in lieu of payment—Lapse. *Larose* v. *Ottawa Trust and Deposit Co.*, 1 O. W. R. 210, 309.

Broker—Profits on stock transactions — Evidence of agreement — Security—Redemption. *Sherlock* v. *Wallace*, 1 O. W. R. 54, 393.

Carriage of Goods — *Bill of Lading — Provision as to Forum for Determining Disputes — Ousting Jurisdiction of Supreme Court of Nova Scotia.*] — A bill of lading which formed the contract for the carriage of goods by the defendants from Halifax, N.S., to Liverpool, G.B., and their delivery there to a steamer of the Cunard line, to be carried to a port in Italy, contained a condition that "any claim or dispute arising on this bill of lading shall be determined according to English law in England." The defendant failed to deliver the goods to a steamer of the Cunard line, as agreed, at Liverpool, but delivered them to a slow and inferior steamer of another line, on account of which acceptance of the goods was declined, and the contract of purchase cancelled. An action for damages was brought in the Supreme Court at Halifax:—Held, that the Court had no jurisdiction, and that the action must be dismissed. *Hart & Son, Limited*, v. *Furness, Withy & Co., Limited*, 37 N. S. Reps. 74.

Carriage of Goods—Freight rates—Dispute—Correspondence — Construction. *Pacific Cold Storage Co.* v. *Troughton* (Y.T.), 1 W. L. R. 529.

Commercial Usage—*Custom of the Parties—Principal and Agent—Broker—Evidence—Commencement of Proof in Writing.*]—An allegation of a custom and commercial usage is good in law, especially when it is alleged that this custom and usage have always been accepted by the parties in their business dealings and particularly in the transaction which was the basis of the action. An order to a broker or agent, to sell goods on commission, is a civil contract which cannot be proved by oral testimony, and, in a suit by such agent to recover his commission, he cannot testify in his own favour, at least until he has offered commencement of proof in writing. *Laflamme* v. *Dandurand*, Q. R. 26 S. C. 499.

Condition Precedent—*Right of Action.*]—In a contract for the construction of works, it was provided that the works should be fully completed at a certain time and that no money should be payable to the contractors until the whole of the works were completed. In an action by the contractors for the full amount of the contract price, the trial Judge refused leave to amend the claim by adding a count for quantum meruit; found that the works were still incomplete at the time of action; but entered judgment in favour of the plaintiffs for a portion of the contract price, with nine-tenths of the costs. The defendant alone appealed from this decision, and the judgment was affirmed by the Court of Review:—Held, reversing the judgment appealed from, that, as the whole of the works had not been completed at the time of the institution of the action, the condition precedent to payment had not been accomplished, and the plaintiffs had no right of action under the contract. *Whiting* v. *Blondin*, 24 Occ. N. 203, 34 S. C. R. 453.

Consideration — *Public Exhibition — Competition for Medal — Competition Instituted by Manager of Exhibition — Scope of Duties.*]—Three proprietors of blends of tea, exhibiting their teas at a public exhibition held by the defendant society, allowed their teas to be judged by a committee appointed by the society, in competition for a gold medal offered by the society. During the exhibition each of the competitors served the public gratuitously with samples of made tea, and tea was served by them to the committee in the same way that it was served to the public. The committee having awarded the medal to the plaintiff, a competitor:—Held, that there was consideration for the offer, entitling the plaintiff to the medal. Where the executive of the above society adopted a resolution to award medals to all displays of merit or excellence of goods on exhibition, the awards to be made by regularly appointed judges, and the general manager of the exhibition, who was a vice-president of the executive, and a member of a committee of three to appoint judges, thereupon arranged the above competition, and, with a co-member of the committee to select judges, named the judges for the competition, it was held that the competition must be taken to have been instituted by the society. *Peters* v. *Agricultural Society of District 34*, 25 Occ. N. 90, 3 N. B. Eq. 127.

Delivery of Scrip — Breach—Return of deposit—Principal and agent—Authority of agent—Costs. *McDougall* v. *Bull* (N.W.T.), 2 W. L. R. 193.

Division of Profits—Partnership—Question of fact — Onus—Appeal. *Rat Portage Lumber Co.* v. *Kendall*, 1 O. W. R. 197, 528.

Dominion Lands Act — *Assignment of Interest in Homestead before Patent Issued—Invalidity of Agreement.*] — The defendant made a homestead entry of land, and afterwards, finding cement upon it, made an agreement with the plaintiff to give him a one-half interest in all cement deposits on the land. The plaintiff claimed a declaration that he was the owner of a half interest in the lands, and that the defendant should be ordered to convey to him. The defendant raised the point that the agreement between him and the plaintiff was illegal and void, being in contravention of the provisions of the Dominion Lands Act, R. S. C. c. 54, s. 42, as amended by 60 & 61 V. c. 29, s. 5:—Held, that a nonsuit should be entered, without costs. The invalidity of the agreement went to the root of the whole action, and the plaintiff could not recover. In the present case the point involved was not merely a penalty imposed upon an infringement of some provision of the statute, nor a mere prohibition; the statute says positively that the act in question, viz., every assignment or transfer of homestead rights and every agreement to assign or transfer any homestead right, or any part thereof, after patent obtained, made or entered into before the issue of the patent, "shall be null and void." *Cumming* v. *Cumming*, 24 Occ. N. 406.

Exchange of Lands—*Change of Boundary Line—Executed Agreement—Removal of Fence — Enforcement against Successors in Title — Deed — Mistake in Description—Adverse Possession—Statute of Limitations.*]—The predecessors in title of the plaintiff and defendant, for the purpose of "squaring" their respective lots of land, entered into an oral agreement to make a change in the direction of the boundary line between them, and to exchange the triangular pieces of land lying between the old line and the new. The arrangement so entered into was completed by the erection of a new fence on the substituted line, and by the making of improvements. By an inadvertence in drawing the plaintiff's deed, the original instead of the amended description was followed:—Held, that both the plaintiff and defendant were bound by the arrangement entered into by their predecessors in title; that the defendant had acquired equitable rights which the Court would protect; and that, irrespective of the Statute of Limitations, the fact that, at the time of the conveyance to the plaintiff, the land claimed was in the adverse possession of another party, was sufficient to prevent her from recovering. *Holcsworth* v. *Fitch*, 37 N. S. Reps. 143.

Fraud in Reducing to Writing — Foreigner—Void agreement—Sale of standing timber—Interest in land—Execution by wife—Construction of contract. *Lasjinski* v. *Campbell*, 1 O. W. R. 114.

Payment for Services — Proof of contract—Jury—Nonsuit. *Dowling* v. *Dowling*, 2 O. W. R. 422.

Printing of Reports — Assignment by printers of claim for payment—Subsequent assignment for creditors—Sale of claim by assignee—Rights of vendee—Judgment—Set-off. *Langley* v. *Law Society of Upper Canada*, 1 O. W. R. 143, 718.

Religious Society—*Expulsion of Member—False Imprisonment—Compensation for Services—Statute of Frauds—Public Policy—Residence of Society—Branch in Ontario—Jurisdiction.*]—Action to recover the value of plaintiff's services to a religious society, incorporated in France, having branches in United States, Quebec and Ontario, these appearing to be separate corporations. The plaintiff became a member in United States and took vows of poverty, chastity and obedience required of an "aspirant," in which condition the plaintiff remained until dismissed.

In 1901 she was transferred to Mount Hope Institute at the city of London, Ontario, where she remained until the following month of June, when, in consequence of great disturbance and destruction of property in the Institute, ascribed to her, she was removed to Longue Pointe Insane Asylum in the Province of Quebec, upon certificate of two physicians that she was insane. Here she remained until the following September, when she was declared cured and was discharged. During this time the Mother Superior reported these facts to the society in France, and obtained a release from her vows for the plaintiff, and on being released from the asylum she executed a release under seal, before a notary in the city of Montreal, whereby, in consideration of $300, then paid her, she released the society, the Mount Hope Institute and Les Dames Religieuses du Sacre Cœur, and all persons members of the society, from all actions, debts, etc. Shortly after the plaintiff brought this action against the society, the Mount Hope Institute, and Elizabeth Sheridan, claiming wages, damages for wrongful dismissal, false imprisonment and imputations of insanity; contending that she was not insane at any time:—Held, in answer to several defences—1. That there was jurisdiction; 2. That the defence of the Statute of Frauds fails, see McGregor v. McGregor, 21 Q. B. 424; 3. Action dismissed as against the Mount Hope Institute (it being clearly a separate corporation, incorporated by a Canadian statute), on grounds that plaintiff never had any contract with this Institute, and for some reason was also dismissed against the Mother Superior of that Institute; 4. The document executed in Quebec held binding, the plaintiff failing to shew that the defendants had taken any undue advantage of her. *Archer* v. *Society of the Sacred Heart of Jesus*, 2 O. W. R. 847, 5 O. W. R. 113, 9 O. L. R. 474.

Remuneration for Services—Quantum. *White* v. *Harris*, 3 O. W. R. 352, 620.

Seal—*Undisclosed Principal — Partnership —Amendment.*]—P. sold mining areas, and was paid part of the price. The purchaser signed an agreement under seal that he would organize a company to work the areas and give P. stock for the balance at the market price. H. organized a company, which received a deed of the land and did some work, but finally ceased operations. Only a small part of the stock was sold, and none was given to P., who brought an action against the purchaser H., in which he alleged that the latter was a partner of the purchaser, and that the agreement was signed on behalf of both. The purchaser did not defend the action:—Held, that no action could lie against H. on the agreement under seal not signed by him, even if it was for his benefit, and a seal was not necessary. The Court refused to interfere with the discretion of the Court below in refusing an amendment to the statement of claim. *Porter* v. *Pelton*, 23 Occ. N. 213, 33 S. C. R. 449.

Services as Agent—Promise of employment—Recovery of money for breach. *Manning* v. *Small*, 2 O. W. R. 264.

Services by Near Relatives—*Implied Right to Remuneration — Presumption.*] — The presumption against an implied right to remuneration for services rendered by near relatives arises only when the persons rendering the services, and those to whom they are rendered, are in effect living together as members of the same household, but even where this is not the case the implied right to remuneration may in the case of near relatives be negatived on very slight grounds. The Court held on the facts in this case that the plaintiff, a married woman who left her own home to nurse her sister, was not entitled to remuneration for her services. *Mooney* v. *Grout*, 23 Occ. N. 327, 6 O. L. R. 521.

Setting Aside—Improvidence — Absence of independent advice. *Rogers* v. *Rogers*, 2 O. W. R. 673.

Supply of Light to Building—Rate of payment—Continuance after expiry of period — Acquiescence. *St. Thomas Gas Co.* v. *Donley*, 2 O. W. R. 209.

CONTRAINTE PAR CORPS.

See ARREST.

CONTRIBUTION.

Costs of Former Action—Joint defence — Agreement — Evidence — Counterclaim — Money paid for timber—Failure of consideration—Set-off—Costs. *Reece* v. *Payne*, 3 O. W. R. 712.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

CONTRIBUTORIES.

See COMPANY.

CONTRIBUTORY NEGLIGENCE.

See INNKEEPER — MASTER AND SERVANT — NEGLIGENCE—RAILWAY — STREET RAILWAYS—WAY—TRIAL.

CONTROLLER.

See MUNICIPAL ELECTIONS.

CONTROVERTED ELECTIONS.

See MUNICIPAL ELECTIONS—PARLIAMENTARY ELECTIONS.

CONVERSION.

Goods Obtained by Fraud — *Sale to Innocent Purchaser — Title—"Agent"—"Intrusted with the Possession"—R. S. O. c. 150.*] —One McK., who was in the habit of taking

orders from persons desirous of obtaining the plaintiffs' machines, and forwarding the orders to the plaintiffs to be filled, but who was not employed by the plaintiffs to sell their machines, by a course of falsehood and forgery obtained a machine from the plaintiffs, which he sold to the defendant, and the price of which he received from the defendant, who believed that he was purchasing from McK. and did not know the plaintiffs in the transaction, while the plaintiffs believed they were selling to the defendant, having received an order for the machine and a promissory note for the price, both purporting to be signed by the defendant, whose signature was forged by McK.:—Held, in an action for conversion of the machine that McK. never had any title thereto, and therefore at common law could pass none to the defendant, and at common law there was no defence; nor was McK. an "agent" of the plaintiffs or "intrusted with the possession" of the machine, within the meaning of R. S. O. 1897 c. 150; and therefore the plaintiffs were entitled to succeed. *Ontario Wind Engine and Pump Co.* v. *Lockie*, 24 Occ. N. 220, 7 O. L. R. 385, 3 O. W. R. 281.

Leave and License—Findings—Appeal. *Jones* v. *Lakefield Cement Co.*, 2 O. W. R. 107.

President of Company—Detention of Books — Terms of giving up. *Strathroy Petroleum Co.* v. *Lindsay*, 1 O. W. R. 356.

Proof of Plaintiff's Title—*Contract—Statute of Frauds—Pleading.*]—In an action for damages for the conversion of goods, the plaintiff must prove an unquestionable title in himself, and, if it appears that such title is based on a contract, the defendant may successfully urge that such contract is void under the Statute of Frauds, though no such defence is pleaded. It is only when the action is between the parties to the contract which one of them seeks to enforce against the other, that the defendant must plead the Statute of Frauds if he wishes to avail himself of it. Judgment in 32 N. S. Reps. 459, affirmed. *Kent* v. *Ellis*, 21 Occ. N. 153, 31 S. C. R. 110.

Purchase of Goods—*False Pretences of Supposed Agent of Purchaser—Contract — Consensus.*]—H. fraudulently represented to the plaintiffs that he was the agent of the defendants sent by them to make a purchase of goods. He was not, in fact, in the defendants' employment; they did not send him to make the purchase, nor did they know he was going to make it; but, on the contrary, after he had so fraudulently obtained the goods, they purchased the goods from him and paid him in full without knowing where he had purchased. The goods were afterwards sold by the defendants in the ordinary course of business:—Held, that the property in the goods did not pass to the defendants, and they were liable to the plaintiffs for conversion. Cundy v. Lindsay, 3 App. Cas. 459, applied. There was no contract between the plaintiffs and defendants—no consensus ad idem—and no contract between the plaintiffs and H. *Eby-Blain Co.* v. *Frankel*, 23 Occ. N. 173.

Sale—Trover—Judgment against vendor—Failure to realize—Action against vendee—Levy of small part—Part payment. *McArthur* v. *Clark*, 2 O. W. R. 319.

Trespass — Trees — Damages. *Parent* v. *Cook*, 1 O. W. R. 366.

CONVEYANCE.

See DEED.

COPYRIGHT.

Book—*Absence of Registration—Pirating—Injunction—Change of Title.*]—The author of a work not protected by registration as provided by law has no exclusive right of republication; and is not entitled to an injunction to restrain the republication and sale of the work by another without the author's consent, or to recover damages for such republication. 2. The fact that in republishing the work the title was changed to one which was disagreeable to the author and wounded his susceptibilities, does not give him the right to restrain the sale of such republication, — particularly where both the original work and the republication appeared under a pseudonym and it was not proved that the author was known to the public under such pseudonym. *Angers* v. *Leprohon*, Q. R. 22 S. C. 170.

Book—*Infringement—Counterfeit — Prescription—Damages — Profits—Costs—Witness Fees.*]—The infringement of copyright duly registered, by the publication of a counterfeit book of a similar character, largely composed of material taken from the copyrighted work, and the sale of copies thereof, constitutes an offence successive and continuous, and the short prescription of Art. 2261, C. C., does not apply. 2. The owner of the copyright is entitled, by way of damages, to all the profits realized by the counterfeiter on the sale of counterfeit copies, and also to the costs of expert witnesses who were engaged to establish infringement. *Beauchemin* v. *Cadieux*, Q. R. 22 S. C. 482.

Books — *Infringement—Imperial Act — Colonies — Importation of Foreign Reprints — Assignment of Proprietorship — Necessity for Registration — Status to Maintain Action.*] — At the time of an author's death he was the owner of and entitled to the copyright in a book for the British Dominions including Canada, and after his death such copyright and ownership was assigned and transferred to the plaintiffs by those upon whom they devolved. The defendants had imported copies of the book from the United States of America and were offering them for sale in Canada:—Held, that s. 17 of the Imperial Act to Amend the Copyright Act, 5 & 6 V. c. 45, prohibiting the importation of foreign reprints by any person, not being the proprietor of the copyright or some person authorized by him, is in force in Canada; and the plaintiffs were therefore entitled to prohibit the importation of foreign reprints into Canada. 2. But the plaintiffs had no right

to maintain this action or proceeding, for, although they were the assignees of the proprietorship and ownership of the book, they had not complied with s. 24 of 5 & 6 V. c. 45 by causing an entry of their proprietorship to be made in the book of registry of the Stationers' Company: the word "proprietor" in s. 24 meaning the person who is the present owner of the work. Dictum of Cockburn, L.C.J., in Wood v. Boosey, L. R. 2 Q. B. 340, not followed. Weldon v. Dicks, 10 Ch. D. 253, and Liverpool General Brokers' Association v. Commercial Press Telegraph Association, [1897] 2 Q. B. 1, followed. *George N. Morang & Co., Limited* v. *Publishers' Syndicate, Limited*, 21 Occ. N. 77, 32 O. R. 393.

Book — Infringement — 5 & 6 V. c. 45 (Imp.)—Injunction—Damages. *Oman* v. *Copp-Clark Co.*, 1 O. W. R. 542.

Foreign Reprints — *Notice to English Commissioners of Customs—Entry at Stationers' Hall—Encyclopædia — Prima Facie Evidence — Imperial Acts — Agreement — License—Assignment—Registration.*]—Section 152 of the Imperial Customs Act, 1876, 39 & 40 V. c. 36, requiring notice to be given to the Commissioners of Customs, of copyright and of the date of its expiration, is not in force in this country, notwithstanding the statement to the contrary in the note to table IV. of the appendix to vol. 3 of R. S. O. 1897. That statement is no part of the enactment of the legislature, but is intended merely as a reference, so that the Imperial Copyright Act of 1842, 5 & 6 V. c. 45, is left to its full operation; Garrow and Maclaren, J.J.A., dissenting. Smiles v. Belford, 1 A. R. 436, followed. A certified copy of the entry at Stationers' Hall of an encyclopædia is prima facie evidence of ownership under ss. 18 and 19 of the Act of 1842, and it is not necessary in making a prima facie case to prove the facts whereby such sections are made conditions precedent to the vesting of the copyright in one who is not the author. An agreement in writing whereby the plaintiffs, for value, gave certain other persons the right to print and sell a work at not less than certain fixed prices for the remainder of the term of the copyright, except the last 4 years thereof, and under which the plates used in printing were delivered over, which, with all unsold copies, were to be redelivered on the expiry of the agreement, and in which it was agreed not to announce the publication of another edition before such last mentioned period, expressly reserving the copyright to the plaintiffs:—Held, to be a license, and not an assignment and so not to require registration under s. 19 of 5 & 6 V. c. 45 (Imp.) Judgment in 5 O. L. R. 184, 23 Occ. N. 68, 1 O. W. R. 743, 2 O. W. R. 117, affirmed. Black v. Imperial Book Co., 8 O. L. R. 9, 3 O. W. R. 467, affirmed. The court, however, declining to decide whether or not Smiles v. Belford, 1 A. R. 436, was rightly decided. *Imperial Book Co.* v. *Black*, 35 S. C. R. 488.

Infringement — Historical work—"Pirating." *Liddell* v. *Copp-Clark Co.*, 2 O. W. R. 16.

Literary Property—*Dictionary—Nomenclature—Infringement—Evidence — Presumption.*]—An historical, biographical, and geographical dictionary, containing a selection of articles treating in an original manner subjects taken from the public domain, may be the subject of copyright. It is the same with the nomenclature of such dictionary, it being the result of a work of choice. The infringement may be shewn by any kind of evidence, and notably by the resemblance between the two works, but the presumption which results from that is less strong when the works in question are compilations. However, when, besides the resemblance, the animus furandi appears in the author of the second work, the presumption which results from it is evidence of infringement. It matters little that the second work is an improvement upon the first, and contains additional information, the improvements not effacing the wrong. Upon the question of literary property English jurisprudence must prevail over French when there is a divergence between the two. *Beauchemin* v. *Cadieux*, Q. R. 10 K. B. 255. Affirmed 31 S. C. R. 370.

Musical Compositions—*Authorship — Infringement — Pleading — Assignment — Notice.*]—A company alleging that they are the registered owners and proprietors of certain Canadian copyrights, covering certain musical compositions, may answer allegations that they are not the authors, or legal representative of the authors, of the musical compositions, by saying that the British proprietors of the copyrights assigned the same of them, and that they gave legal notice of such assignment to the Minister of Agriculture before registration in Canada. *Anglo-Canadian Music Publishing Assn.* v. *Dupuis*, 5 Q. P. R. 351.

Newspaper—*Infringement — "First Publication."*]—A newspaper printed and issued at a place in the United States, copies of which are deposited in the post office there addressed to subscribers both in that country and England, cannot be considered to be first published or even simultaneously published, in England, so as to come within the provisions of the Imperial Act 5 & 6 V. c. 45, requiring first publication in the United Kingdom to entitle the publishers to British copyright. *Grossman* v. *Canada Cycle Co.*, 23 Occ. N. 48, 5 O. L. R. 55, 1 O. W. R. 846.

Operatic Composition — *Proof of Proprietorship — Infringement — Indemnity — "Place of Dramatic Entertainment" — Liability of Performers and Committee—Registration—Damages—Costs.*]—Held, that the proprietorship of the plaintiff in the operatic composition in question was established by the evidence; and that the evidence also established that the opera performed by the defendants was the identical composition of which the plaintiff had the sole right of representation. Boosey v. Davidson, 13 Q. B. 257, and Lucas v. Williams, [1892] 2 Q. B. 117, considered. 2. The town hall, where the defendants performed the opera, was a "place of dramatic entertainment" within the meaning of the statute, tickets for admission of the public having been sold. Russell v. Smith, 12 Q. B. 217, and Duck v. Bates, 13 Q. B. D. 846, followed. 3. All the defendants who took part in the performance or in the work of the committee of the society in relation to the performance.

were liable to the plaintiff. 4. It was not necessary for the plaintiff to prove registration under the Copyright Act, R. S. C. c. 62; the Imperial Act, 5 & 6 V. c. 45, applying to Canada by express enactment; and the Dominion Act having no provision relating to the right of dramatic representation. Smiles v. Belford, 25 Gr. 590, 1 A. R. 436, followed. 5. As to the question of damages and costs, the Imperial Act, 51 & 52 V. c. 17, applies and the damages should be of such amount as the Court considers reasonable, and the costs in the discretion of the Court. *Carte* v. *Dennis*, 21 Occ. N. 68, 267, 5 Terr. L. R. 30.

Pleading—*Notice of Objections—Imperial Copyright Act*, 1842.]—Section 16 of the Imperial Copyright Act, 1842 (5 & 6 V. c. 45) provides that the defendant in pleading shall give to the plaintiff a notice in writing of any objections on which he means to rely on the trial of the action. Section 26 allows the pleading of the general issue:—Held, that s. 16 is complied with if the objections intended to be relied on are taken in the statement of defence. Dicks v. Yates, 18 Ch. D. 76, followed. *Carte* v. *Dennis*, 21 Occ. N. 68, 5 Terr. L. R. 30.

Works of Fine Art—*Imperial Statute.*]—The Imperial Fine Arts Copyright Act, 1862, confers on British subjects and persons resident in British dominions copyright in pictures, drawings, and photographs. It extends to the whole of the United Kingdom, but does not extend to any part of the British dominions outside the United Kingdom. Tuch & Sons v. Priester, 19 Q. B. D. 629, approved. There is nothing in the Canadian Copyright Act, 1875, or in the International Copyright Acts, which conflicts with this view. Judgment in 22 Occ. N. 172, 3 O. L. R. 697, 1 O. W. R. 259, affirmed. *Groves* v. *Gorrie*, [1903] A. C. 496.

CORPORATION.

See COMPANY—MUNICIPAL CORPORATIONS.

CORPSE.

Post Mortem Examination.]—No post mortem examination of a body will be allowed where persons having a family interest in relation to the removal of the body from the vault and its examination, oppose the same. *In re Grothe, North American Life Assurance Co.* v. *Grothe*, 7 Q. P. R. 111.

See CEMETERY.

CORROBORATION.

See EVIDENCE.

CORRUPT PRACTICES.

See MUNICIPAL ELECTIONS—PARLIAMENTARY ELECTIONS.

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I. GENERALLY—RIGHT TO COSTS.

Adjournment of Trial.]—No costs of an adjournment of the trial of an action will be allowed to the successful party, where the adjournment was caused by reason of there being no court room available. *Macdonald* v. *Perry*, 10 B. C. R. 326.

Appeal — *Point not Raised Below.*] — Where an appeal is allowed on a point of law not taken at the trial or in the notice of appeal, but open on the pleadings, it is not in strictness successful, and no costs of the appeal will be allowed, but, as the appellant should have succeeded at the trial, he will be allowed the costs of it. *Byron N. White Co.* v. *Sandon Waterworks and Light Co.*, 10 B. C. R. 361.

Appeal — *Offer of Settlement.*]—Where the amount of a judgment is reduced on appeal, and pending the disposition of the appeal the respondent offers to accept in settlement an amount smaller than the original judgment but greater than the reduced judgment, the appellant will be allowed the costs of the appeal. *Dallin* v. *Weaver*, 8 B. C. R. 241.

Attorney's Fees—*Discretion.*]—The fee to be allowed attorneys upon questions of law submitted to the Court under Art. 509, C. P., is in the discretion of the Court. *Pare* v. *County of Shefford*, Q. R. 24 S. C. 50.

Conviction — *Discharge of Prisoner — Order for Payment by Informant.*]—The defendant was convicted for stealing the property of B., and was sentenced to be imprisoned in the city prison of the city of Halifax. An order made by the Judge of a county court, under N. S. Acts of 1897 c. 32, s. 2, for the defendant's discharge, under a writ of habeas corpus, directed that the informant B. pay to the defendant his costs of the application and order for his discharge. There was nothing to shew that B. was the informant, except a statement to that effect in the affidavit of the defendant, upon which the application for the order was made, which was not borne out by either the con-

viction or the commitment:—Held, that the order was wrong, and must be set aside. Per Meagher, J., that B. was not bound to appear in answer to the summons for the writ of habeas corpus, and that the fact of his not appearing was not to be regarded as conduct or acquiescence justifying the imposition of costs. Quære, also, whether the Judge had jurisdiction to make the order. *Regina* v. *Bowers*, 34 N. S. Reps. 550.

Conviction—*Motion to Quash.*] — In a motion to quash a conviction, such conviction being in a criminal matter, and not merely for a penalty imposed by or under provincial legislation, no jurisdiction is conferred on the High Court to give costs to the applicant against the prosecutor or magistrate. *Rex* v. *Bennett*, 22 Occ. N. 290, 4 O. L. R. 205, 1 O. W. R. 360.

Criminal Libel—*Depositions not Used at Trial—Abortive Trial.*]—The prosecution was for criminal libel, and the defendant, in support of his plea of justification, obtained a commission and had the evidence of certain witnesses out of the jurisdiction taken, for use at the trial. The order granting the commission provided that the costs of the commission be reserved to be dealt with by the trial Judge. The evidence was used at the first trial, and the jury disagreed. At the second trial the jury again disagreed. At the third trial the defendant was acquitted, but the evidence was not used, owing to the private prosecutor giving evidence and admitting substantially what was stated by the witnesses in their depositions before the commissioner:—Held, that, as the commission evidence was not put in by the defendant as part of his case, the defendant should not have the costs of it:—Held, also, that the defendant was not entitled to the costs of the abortive trials. *Rex* v. *Nichol*, 22 Occ. N. 75, 8 B. C. R. 276.

Declaration of Garnishee — *Striking out—Option.*]—A garnishee having made default in the completion of his declaration, the attaching creditor made a motion to strike out such declaration or to give the garnishee the option of continuing and completing it:—Held, that the costs of such motion should be paid by the garnishee. *Garbacht* v. *Silverman*, 4 Q. P. R. 439.

Depriving Defendant of Costs—*Discretion — Good Cause — Rule 430 (4) — Appeal.*]—Plaintiff, a widow, claimed insurance under policies on her late husband's life, in favour of his mother, which by his dying declaration and attempted disposition she was to receive $1,500, and that if these policies were not altered by Mr. A. through illness and reliance on the assurance that his wishes would be carried out, it would be a fraud upon her. The solicitor for the plaintiff wrote Joseph Armstrong, the deceased husband's brother, requesting a settlement. He replied that the policies were always in favour of the mother and refused settlement. Action was commenced against mother of her husband. After it was discovered that the policies had been assigned by mother to her son Joseph. Motion was then made under Rule 430 (4) to discontinue action without costs. Motion granted owing to the letters written to the plaintiff's solicitor, which deceived him by leading him to believe the policies were in the mother's name, which was not true. *Armstrong* v. *Armstrong*, 4 O. W. R. 223, 301, 25 Occ. N. 74, 9 O. L. R. 14.

Depriving Successful Party—*Conduct—Acquiescence—Custom.*]—In an action for damages for an alleged interference with a fishing berth, judgment was given in favour of the defendant, but he was deprived of costs, it appearing that both the defendant and plaintiff acted throughout as if they thought the fishing berth in controversy was in Lunenburg county; that it had, up to the time of action, been under the charge and control of Lunenburg officers; that the defendant attempted to take it up according to the custom of fishermen followed in that county; that he attended before the fishery officers of that county when they attempted to settle the dispute between himself and the plaintiff, and did not question their jurisdiction; and that the defence that the berth was not in Lunenburg but in Queen's county was not pleaded, nor the objection taken until the trial:—Held, that this was not a case in which the discretion of the trial Judge should be reviewed. Semble, that the parties were bound by the custom assented to by them and the dicision of the fisheries officer. *Selig* v. *Nowe*, 36 N. S. Reps. 99.

Depriving Successful Party — *Nolle Prosequi—Powers of Trial Judge.*]—Where a nolle prosequi had been entered as to certain defendants before trial, and a verdict was afterwards obtained against the remaining defendant, the trial Judge, under s. 373 of the Supreme Court Act, granted a certificate depriving the first mentioned defendants of their costs:—Held, that the certificate was authorized by the section. *Mellon* v. *Municipality of Kings*, 35 N. B. Reps. 291.

Depriving Successful Party—*43 Eliz. c. 6—County Courts.*]—The statute 43 Eliz. c. 6, authorizing a Judge to certify to deprive a plaintiff of costs, is in force in New Brunswick, and is made applicable to County Courts by s. 68 of the County Courts Act, 1897. *Warman* v. *Crystal*, 35 N. B. Reps. 562.

Executor — Administrator—Reference — Construction of will—Accounts. *Re Boyd. Boyd* v. *Boyd*, 2 O. W. R. 1056, 3 O. W. R. 343.

Indemnity — Liability of plaintiffs for costs—Right to costs against opposite party. *Township of Sarnia* v. *Sarnia Street R. W. Co.*, 6 O. W. R. 367, 478.

Joint Judgment for Costs—*Execution for Whole Amount Against One—Opposition—Deposit.*]—A party adjudged jointly with several others to pay the costs of a proceeding, may oppose an execution against him for the whole costs; such an opposition, accompanied by a deposit of an aliquot part of the costs, will not be struck out on motion. *Poplinger* v. *Muir*, 6 Q. P. R. 445.

Lien—*Creditors' Action to Preserve Fund.*]—Costs incurred in a creditors' action in preserving for creditors property which had been fraudulently transferred, are a first lien upon the fund recovered, and are allowed as between solicitor and client. *Hood* v. *Tyson. In re Judgments Acts*, 9 B. C. R. 233.

Lien—*Salvage—Partition—Property Made Insaisissable.*]—The defendant and his mother owned certain immovables in undivided shares. The defendant's undivided portion had been devised to him by his father à titre d'aliments and with a clause making it insaisissable, and burdened with a substitution. R., the mother's advocate, brought an action of partition of these immovables against the defendant and the curator of the substitution. By the judgment in that action the lands were divided, and three-fourths of the costs were to be paid by the defendant. R., to recover his costs against the defendant, had caused to be seized an undivided third of the immovables which by the partition fell to the lot of the defendant. The plaintiffs, the advocates of the defendant, had made opposition to R.'s seizure, alleging that he had been paid and invoking the insaisissabilité clause. R. pleaded that he had not been paid, and that the clause did not apply to his debt, his services having preserved the property to the opposants. The opposition was dismissed, and the undivided third was sold. R. had his costs of the opposition taxed at $125.57, but upon revision the amount was reduced to $54.57. The plaintiffs now sued the defendant for their costs of the opposition which they had made for him and their costs of the motion for the revision of R.'s costs, and obtained judgment for $147.80, under which they caused to be seized the remaining two-thirds of the defendant's portion of the immovables. He made an opposition, invoking the insaisissabilité clause. The plaintiffs pleaded to the opposition that their debt was for costs which they had incurred in good faith to protect the first third from R.'s seizure, which made it an alimentary debt; that it mattered not that the opposition to R.'s seizure had been dismissed; and that their debt was a first charge upon all the alimentary property of the defendant:—Held, that, as R. did not contest the insaisissabilité clause, but only said that it did not apply to his debt, the opposition to R.'s seizure was of no utility as regards the property seized in this action, any more than as regards that seized by R.; that there was no relation between the claim of the plaintiffs for their costs and the property seized in this action; and, therefore, the claim of the plaintiffs was not alimentary nor was it a charge upon property which was insaisissable. *Pouliot* v. *Michand*, Q. B. 20 S. C. 432.

Mechanics' and Wage-earners' Lien Act—*Costs Subsequent to Judgment.*]—Action to enforce liens under the Mechanics' and Wage-earners' Lien Act, R. S. M. 1902 c. 110. At the trial judgment was given in favour of the plaintiffs, declaring that Humphries was entitled to $240.60 and Philp, another plaintiff, to $81.65. The costs of the plaintiffs down to and including the trial, were taxed at $190.16 and inserted in the judgment. The defendant was ordered to pay the above sums; in default the lands to be sold, with a reference to the Master. The lands were sold and the purchase money paid into Court. The plaintiffs then brought in a subsequent bill of costs covering the proceedings subsequent to the judgment, which bill was taxed at $229.30, inclusive of disbursements. The costs up to judgment and the subsequent costs together amounted to $419.16, of which $228.75 was costs other than disbursements, while the total amount of the liens enforced amounted to only $322.25. The defendant appealed from the taxation of the plaintiffs' subsequent bill of costs, contending that under the Act the plaintiffs were entitled to costs only to an amount equal to 25 per cent. of the amount of the judgment, besides actual disbursements, and that the amount of costs allowed far exceeded this:—Held, that a plaintiff seeking to enforce a lien may do so by an action in the King's Bench, following the ordinary procedure in actions in that Court. Nothing in the Act ousts the general jurisdiction of the Court to enforce a lien. The plaintiff may, instead of following the ordinary procedure, adopt the summary procedure, in ss. 31, 32. In the present case the judgment was drawn up in a very peculiar manner, an attempt being made to adopt the form of judgment upon a summary trial, although the action was set down and tried in the ordinary manner. The sale was carried out by the Master, and the judgment empowered him to tax and add to the plaintiffs' claims the subsequent costs of the proceedings. Under the terms of the judgment the taxing officer properly allowed the ordinary costs of a sale conducted in the Master's office. *Humphries* v. *Cleave*, 24 Occ. N. 374.

Mise en Demeure—*Advocate's Letter—Presentation of Draft—Lis Pendens.*]—When a debt is payable at the domicil of the debtor, a demand of payment made by an advocate's letter is not a mise en demeure sufficient to compel him to pay the costs of it, if he is afterwards sued by his creditor. 2. The presentation at the place of business of the debtor of a bill of exchange drawn by his creditor for the amount of the debt, constitutes a mise en demeure sufficient to fix him with the costs of a suit begun against him. 3. A proceeding which has not been entered in Court is not a cause, and cannot be set up in support of a plea of lis pendens, if the debtor is afterwards sued for the same cause of action. *Lay* v. *Cantin*, Q. R. 23 S. C. 405.

Mortgage—Action for redemption—Costs of appeal in former action—Attempt to add to claim—Dismissal without costs—Effect of. *Nelson* v. *Nelson*, 2 O. W. R. 956, 3 O. W. R. 884.

Mortgage — Action for redemption — Opposition to — Former foreclosure proceedings. *Plenderleith* v. *Parsons*, 4 O. W. R. 262, 6 O. W. R. 145, 399.

Offer to Suffer Judgment by Default — *Time of Offer.*] — The plaintiff, notwithstanding that she had received notice of an offer to suffer judgment by default within the ten days allowed to her by the statute for its acceptance, carried the cause down to trial and obtained a verdict therein for a sum exactly equal to the amount mentioned in the offer. On a motion to review the taxation of the plaintiff's costs:—Held, that the making of the offer in no way operated as a stay of proceedings, and the taking of the cause down to trial by the plaintiff was not equivalent to a rejection thereof; and that she was, therefore, entitled to have the costs up to trial allowed to her on taxation. Quære (per Tuck, C.J.):—If the verdict had been for a less amount than

that for which the offer to suffer judgment was made, could the plaintiff after verdict have accepted the offer and signed judgment for the larger sum? *Sharp* v. *Woodstock School Trustees*, 21 Occ. N. 56, 35 N. B. Reps. 243.

Opposite Party — *Liability of Client—Corporation Solicitor—Change in By-law.*]—By arrangement between the defendants and their solicitor he was to receive a salary of $1,800 a year, for all services, including the costs of any litigation in which the defendants should be engaged. The present action against the defendants was dismissed with costs on the 14th September, 1901, and the defendants brought in their bill for taxation:—Held, following Jarvis v. Great Western R. W. Co., 8 C. P. 280, and Stevenson v. City of Kingston, 31 C. P. 333, in preference to Galloway v. Corporation of London, L. R. 4 Eq. 90, and Henderson v. Merthyr Tydfil Urban District Council, [1900] 1 Q. B. 434, that in view of the above agreement with their solicitor, the defendants could not tax their costs against the plaintiffs:—Held, also, that the rights of the defendants must be governed by the circumstances which existed on the 14th September, 1901; and a by-law of the defendants subsequently passed could not affect those rights. *Ottawa Gas Co.* v. *City of Ottawa*, 22 Occ. N. 408, 4 O. L. R. 656, 1 O. W. R. 647, 697, 2 O. W. R. 579.

Payment of Costs—*Leave to Bring New Action — Husband and Wife — Action for Separation — Authorization.*]—A wife who has brought an action for separation from bed and board, can not be authorized to bring another without having discontinued the first and paid the costs. An application for leave to discontinue an action will only be granted on its being stated that such discontinuance is with costs. *Armiston* v. *Dick*, 7 Q. P. R. 304.

Petition — *Moneys Deposited in Expropriation Proceedings.*]—The corporation of the city of Montreal cannot be ordered to pay the costs of a petition to withdraw money from the custody of the prothonotary of the Superior Court, in consequence of an expropriation. *In re City of Montreal and Collins*, 6 Q. P. R. 264.

Quashing Conviction—*Nominal Prosecutors.*]—Where an appeal under the Towns Incorporation Act, 1896, from a conviction by a police magistrate, was allowed, and the conviction quashed on the ground that the magistrate had refused to hear material evidence, the Court refused to make the order without costs against the town of Grand Falls, who took no part in the prosecution, and were only parties by virtue of the Act requiring the prosecution to be in their name. *Turner* v. *Mockler*, 36 N. B. Reps. 245.

Railway—*Expropriation of Land—Abandonment.*]—The word "desist" in C. S. C. c. 66, s. 11, s.-s. 6, has the same meaning as "abandon" in 51 V. c. 29, s. 158 (D.), i.e., to leave off or discontinue. Whether voluntarily or compulsorily makes no difference; if the railway company cease operations to expropriate land and give a new notice as to other operations, that is desistment or abandonment, and the company must pay costs to the land owner. Widder v. Buffalo and Lake Huron R. W. Co., 24 U. C. R. 234, applied and followed. *In re Oliver and Bay of Quinte R. W. Co.*, 24 Occ. N. 18, 6 O. L. R. 543, 2 O. W. R. 953, 3 O. W. R. 318.

Recovery as Damages—*Action Induced by Conduct of Defendant.*]—A plaintiff whose action was dismissed because the defendant, whom he sued as a widow, was in fact a married woman, cannot claim from her as damages the costs which he incurred in the action so dismissed, not even where she allowed herself to be known as a widow. *O'Malley* v. *Ryan*, Q. R. 23 S. C. 417.

Recovery from Opposite Party—Relations of municipal corporation with solicitor—By-law—Change in—Retroactivity—Profit costs. *City of Ottawa* v. *Ottawa Electric Co.*, 3 O. W. R. 65, 588, 796, 4 O. W. R. 190.

Reference for Trial—Report — Award of costs—Jurisdiction of referee—Order or judgment—Execution. *McIntyre* v. *Munn*, 2 O. W. R. 694, 3 O. W. R. 41.

Solicitor's Letter before Action — *Costs of—Tender.*]—Since the passing of 3 Edw. VII. c. 34, s. 9, the debtor who has received a letter demanding payment from his creditor's attorney, must pay the fee therefor fixed by the tariff, and a tender by him to such creditor of the debt only is not sufficient. *Rayer* v. *Bélanger*, Q. R. 27 S. C. 95, 7 Q. P. R. 97.

Special Case in Action to Recover Succession Duty—*Costs Payable by Crown where Unsuccessful.*]—In litigation under the Succession Duty Act express power is given to the High Court to deal with the costs thereof; and where, therefore, the trustees of an estate had paid, or were ready to pay, all the duty which could properly be claimed against it, they were held entitled against the Crown to the costs of a special case and an action by the Attorney-General to recover higher duties; but only one set of costs was allowed to the trustees and beneficiaries. *Attorney-General* v. *Toronto General Trusts Corporation*, 23 Occ. N. 194, 5 O. L. R. 697, 1 O. W. R. 807, 2 O. W. R. 271.

Summons for Summary Judgment.]—Summons for judgment under Order XIV. The right to judgment was not disputed, but it was contended on behalf of the defendants that the plaintiffs were not entitled to any more costs than they could have got by taking judgment in default of defence, as the time for filing the defence had expired before the summons was issued:—Held, that the plaintiffs were entitled to the costs of the summons. *Diamond Glass Co.* v. *Okell Morris Co.*, 22 Occ. N. 190, 9 B. C. R. 48.

Trespass to Land—*Nominal Damages—Depriving Successful Plaintiff of Costs—Discretion—Appeal.*]—In an action for damages for breaking and entering the plaintiff's close, and destroying and injuring his grass and crops, and permitting cattle, calves, and other animals to break and enter, &c., the trial Judge found that the trespass committed was a very trifling one, that the action was the result of ill-feeling and of previous litigation, and that no substantial injury to the plaintiff's property was suffered. He found that

the plaintiff was entitled to recover, but, in view of all the circumstances, he fixed the damages at $5, and refused the plaintiff his costs of action:—Held, that there was no reason for interfering with the discretion of the trial Judge in refusing costs. *Meisner* v. *Meisner*, 37 N. S. Reps. 20.

Trover for Goods Converted—Return of goods after action begun—Dispute as to identity of goods—Motion to dismiss action. *Brown* v. *Canada Port Huron Co.* (Man.), 2 W. L. R. 151.

Unnecessary Action — *Setting Aside Hypothec.*]—An action to set aside a hypothec resulting from a life rent will be maintained, but without costs, the law giving a means of obtaining such relief without action. *Lafontaine* v. *Lafontaine*, 4 Q. P. R. 170.

Will — *Action to Establish — Failure of Charges of Fraud and Undue Influence—Costs Out of Estate.*] — An action to establish a will, defence set up fraud and undue influence, which failed. Probate granted, but owing to the peculiar facts and circumstances which came out during the trial, and considering fairly the conduct of the beneficiary, costs were allowed out of the estate. *Gilbert* v. *Ireland*, 4 O. W. R. 460, 25 Occ. N. 39, 9 O. L. R. 124.

II. Counsel Fees.

Action by Attorneys to Recover—Quebec Courts—"Distraction" in favour of attorneys—Rights against unsuccessful party in litigation—Interest. *Hutchinson* v. *McCurry*, 2 O. W. R. 136; 5 O. L. R. 261.

Action by Solicitor for—Reference—Costs of. *Sale* v. *Watt*, 2 O. W. R. 115.

Court en Banc—*Application to Fix Disbursements — Travelling Expenses.*] — It is not proper to make a formal application to the Court en banc to fix a counsel fee in a case argued before it. If the marking of the fee is overlooked by the Court, it would be proper for counsel to draw attention, either in open Court or otherwise, to the omission, and, as a matter of courtesy only, to notify counsel on the other side of his intention.—No allowance can be made to counsel for travelling expenses. *Hull* v. *Donohue* (No. 2), 2 Terr. L. R. 351.

Foreign Commission.]—Where a rogatory commission is issued to another province, or to a foreign country, and the parties do not annex interrogatories and cross-interrogatories thereto, but consent that the commission shall be an open one, and that the witnesses shall be examined directly before the commission, such consent does not justify the taxation against the losing party of counsel fees, for attendance before the commission,—the tariff not making any provision for such case. Young v. Accident Insurance Co. of N. A., M. L. R. 5 S. C. 222, approved. *Magann* v. *Grand Trunk R. W. Co.*, Q. R. 21 S. C. 72, 4 Q. P. R. 348.

Increased Counsel Fee — Time for applying. *Cooper* v. *Yorkshire Guarantee Co.* (B.C.), 1 W. L. R. 337.

Mechanics' Lien Action—Examination for discovery—Disbursements—Counsel fees —Professional disbursements. *Cobban Mfg. Co.* v. *Lake Simcoe Hotel Co.*, 2 O. W. R. 48, 310; 5 O. L. R. 447.

Right of Action for — *Liability of Client—Fees Paid to Solicitor.*]—Counsel in British Columbia have the right to maintain an action for their fees.—Where a solicitor, contrary to his client's expectation, does not pay over to a counsel fees received from his client, the client is still liable to the counsel. *British Columbia Land and Investment Agency* v. *Wilson*, 9 B. C. R. 412.

Second Counsel—*Written Argument.*]—Where a case is submitted to the Court upon factum by the consent of parties, a second counsel fee will not be allowed, even if, at the time the case is mentioned to the Court and consent given to the factum being put in, the advocate and counsel were both present and robed. *Société des Artisans Canadiens Français* v. *Hébert*, 5 Q. P. R. 372.

III. Distraction.

Execution—*Party to Cause—Consent of Advocate — Opposition.*] — In order that a party may have execution against the opposite party for his costs, as to which there is a distraction in favour of his advocate, it is necessary that the consent of the advocate should appear by writing upon the fiat, the writ of execution, and the procès-verbal of the seizure.—2. If this consent in writing does not appear as above, the party issuing execution, not being a creditor for these costs, cannot seize in his own name, and therefore an opposition to the seizure based upon this default is well founded and will be maintained. *Martin* v. *County of Arthabaska*, Q. R. 23 S. C. 297.

Execution—*Solicitor—Client's Right.*]—When an attorney demands a writ of execution for his costs which are subject to distraction, and signs the præcipe as attorney for the party whom he represents, it will be assumed that he has been paid, and that he thereby authorizes his client to issue execution in his name.—2. If he has so permitted his client to issue the execution in his name, he has no right to contest in his own name an opposition made to a seizure under the execution. *Martin* v. *County of Arthabaska*, Q. R. 22 S. C. 302.

IV. Interlocutory Costs.

Appeal — "*No Order as to Costs*" — *Meaning of.*]—From an interlocutory order made in the action an appeal was taken. Before the hearing of the appeal, the plaintiff lost his interest in the case by allowing the mineral claim in question to lapse, and so the full Court "struck out the appeal—no order as to costs." Subsequently the plaintiff's action was dismissed with costs, and the defendants claimed the costs of the appeal, which the registrar disallowed on taxation:—Held, following In re Hodgkinson, [1895] W. N. 85, that the statement "no order as to costs" means that each party must pay his own costs. So also where the Court refuses to make any order as to costs. *McCune* v. *Botsford*, 22 Occ. N. 340, 9 B. C. R. 129.

Appeal—*Practice.*]—In interlocutory appeals, when a party is allowed costs, they are payable forthwith. *Star Mining and Milling Co.* v. *Byron N. White Co.*, 22 Occ. N. 104, 9 B. C. R. 9.

Conclusion of Litigation.]—There is no fixed rule in British Columbia that in all cases costs of interlocutory proceedings shall not be payable until the conclusion of the litigation. *Jones* v. *Davenport*, 7 B. C. R. 452.

Motion for Summary Judgment—"*In any Event.*"]—A summons for judgment under Order XIV. was discharged with costs, but the question as to whether or not the costs should be payable forthwith was reserved: — Held, that if the case is not within the Order, or there are circumstances which render it improper to grant the application, or the plaintiff knew the defendant relied on a contention which would entitle him to unconditional leave to defend, the summons will be discharged with costs in any event, but not payable forthwith. Where leave to defend is given, costs, as a general rule, will be in the cause. It is only in exceptional circumstances that costs will be ordered to be paid forthwith. In Chambers applications, generally, costs are made payable by the unsuccessful party in any event, but not forthwith. *City of Victoria* v. *Bowes*, 21 Occ. N. 151, 8 B. C. R. 15.

Set-off—*Solicitor's Lien.*]—A defendant is entitled to set off interlocutory costs in the same cause, payable to him by the plaintiff, against the damages and costs recovered against him in the final result of the cause; notwithstanding the plaintiff's attorney's lien, which only attaches on the general result of the action. *Anderson* v. *Shaw*, 35 N. B. Reps. 280.

V. Liability for Costs.

Contestation as to Costs—*Costs of.*]—A party who prays that the costs of an application be borne by another party, who is under no obligation to him, thereby forcing the latter to appear and contest, will be condemned to pay the costs of such contestation. *Gingras* v. *Boon*, 6 Q. P. R. 37.

Desistment from Action—*New Action—Partnership—Costs of Former Action.*]—A plaintiff who has desisted from an action against a single defendant, will not be ordered to pay the costs of that action before beginning a new action based upon the same claim against a commercial partnership of which the original defendant was a member. *St. Laurent* v. *Doran*, 5 Q. P. R. 449.

Partnership Action—*Joint and Several Liability of Defendants—Commercial Case—Pleading—Conclusions.*]—The plaintiff sued the defendants, a commercial partnership having a collective name, en reddition de compte. The undertaking of the defendants which was the subject of the action was an absolutely commercial affair. Thus the action was itself of a commercial nature, and it necessarily followed that the liability of the defendants was a joint and several one. Nevertheless, the plaintiff did not claim upon a joint and several liability, and judgment was rendered for the plaintiff without any mention of that liability. Some time afterward the plaintiff's attorney issued in his own name as advocate an execution against the defendants for his costs of the action, and, the defendant partnership having no property of its own, he caused to be seized property of two of the defendants for the total amount of his costs, that is to say, without dividing his costs. Each of these two defendants made opposition to the seizure, contending that there was no joint and several liability as to costs, inasmuch as the plaintiff had not alleged such liability, and that it did not exist as regards costs:—Held, that in order that there may be joint and several liability among several defendants ordered to pay costs, even in commercial causes, where such liability plainly exists, and in spite of the fact that costs are as a general rule the accessory of the action, the plaintiff should have alleged a joint and several liability; in default of an allegation and claim to this effect, even in commercial affairs, there is no joint and several liability as to costs between several defendants condemned to payment of such costs by the judgment in the action. *Beaubien* v. *Rioux*, Q. R. 21 S. C. 232, 4 Q. P. R. 214.

Third Party—*Rule 214—Discretion—Appeal.*]—Rule 214 gives power to the Court or a Judge to order a plaintiff whose action is dismissed to pay the costs of a third party brought in by the defendant, as well as the costs of the defendant. Such an order is in the discretion of the Court or Judge, and there is no appeal from it, unless by leave, as provided by the Judicature Act, R. S. O. 1897 c. 51, s. 72. *Russell* v. *Eddy*, 23 Occ. N. 166, 5 O. L. R. 381, 2 O. W. R. 164.

VI. Scale and Quantum of Costs.

Action in High Court — Payment of $300 into Court—Creditors' claims—Inquiry—County Court costs—Set-off. *Halliday* v. *Rutherford*, 1 O. W. R. 816, 2 O. W. R. 269.

Amount in Controversy—*Jurisdiction of County Court—Counterclaim.*] — Where the defendant in a Supreme Court action counterclaims for an amount beyond the jurisdiction of the County Court, costs in the County Court scale only will not be awarded to a successful plaintiff, even though the action should have been brought in the County Court. *Pacific Towing Co.* v. *Morris*, 11 B. C. R. 173.

Amount in Controversy—*Work Done by Plaintiff at Defendant's Expense—Cost of.*]—When an action is instituted to compel the defendant to do certain work, and judgment is given ordering that he shall do the work within a specified time, and that, on his default, the plaintiff may do the work at the defendant's expense, the plaintiff's bill of costs should be taxed as in a cause for the amount of the cost of the work ordered to be done. *Bassinet* v. *Collerette*, 7 Q. P. R. 27.

Amount Involved — *Attachment of Debts—Witness Fees.*]—On a contestation of a garnishee's declaration, the class of

action is fixed by the amount claimed by the contestant.—2. The fact that the contestation seeks to have the seizure declared binding does not change the class of action. —3. Even if the amount claimed by the contestation is below $100, if the same is tried before the Superior Court, the winning party is entitled to charge stamps and depositions as in a Superior Court case.—4. The debtor, and the manager of the company garnishee, cannot be allowed for on taxation of costs against the contestant, as witnesses. *Sieyes* v. *Painchaud*, 6 Q. P. R. 369.

Amount Involved—*Judgment.*]—If an action or an incidental demand is maintained for a certain amount only, with costs, and the judgment declares that the amount granted would have been larger but for the plaintiff's consent, the costs of such action will, nevertheless, in the absence of any adjudication to the contrary, be taxed as in an action for the amount of the condemnation. *Collins* v. *Clare*, 6 Q. P. R. 381.

Amount Involved—*Pension.*] — An action to reduce an alimentary pension is classed, as regards the scale of fees, according to the amount of monthly payments of the pension in question. *Lavigne* v. *Pouliot*, 6 Q. P. R. 138.

Amount Involved — *Revendication of Policies.*]—In an action in revendication for the recovery of insurance policies, where the company appears and s'en rapporte à justice, costs should be granted according to the face value of the policies, and not according to the actual value of the policies as title deeds. *McDuff* v. *Metropolitan Life Ins. Co.*, 6 Q. P. R. 133.

Appeal—*Amount Involved — Costs Below.*]—Where a tutor brings, in his capacity as such, an action for damages, which is dismissed with costs against him personally, appeals, and succeeds in having the personal judgment against him set aside with costs, the amount in litigation in appeal is the amount of costs which the tutor has been adjudged to pay personally, and not the amount in question in the original action. *Garnier* v. *Armand*, 6 Q. P. R. 45.

Appeal—*Amount Involved — Costs Below.*]—When an appeal is taken by the plaintiff from a judgment dismissing his action, which was one of the first class, but ordering the defendant to return him some effects claimed, the class of action is determined by the amount for which the action was brought. *Armstrong* v. *Beauchemin*, 6 Q. P. R. 51.

Appeal—*Nuisance — Abatement — Penalty.*]—An action in which the claim is, that the defendants be ordered immediately to cease allowing evil odours and smoke to issue from their establishment, or in default that the plaintiff shall be allowed to abate the nuisance by employing necessary means for such purpose, and that the defendants be ordered to pay $100 with costs, is similar, as regards costs in the Court of King's Bench, to a proceeding by writ of prerogative, and is consequently a first-class action. *Town of St. Paul* v. *Cooke*, 6 Q. P. R. 48.

Appeal from Judgment of Drainage Referee.]—The costs of an appeal to the Court of Appeal from the decision of the Drainage Referee in a proceeding under the Drainage Act initiated before him should (if awarded to either party) be taxed on the scale applicable to appeals in cases begun in the High Court of Justice. Decision of a Divisional Court, 19 P. R. 188, 20 Occ. N. 329, reversed. *In re Township of Metcalfe and Townships of Adelaide and Warwick, In re Township of Colchester North and Township of Gosfield North*, 21 Occ. N. 403, 2 O. L. R. 103.

Appeal under Public Instruction Act.]—In an appeal under Art. 482 of the Public Instruction Act, the costs of the advocates must be taxed pursuant to Art. 105 of the tariff of the Superior Court as regards the general fee, and as in an action of the fourth class in the Superior Court as regards the other costs. *Guay* v. *St. Jerome and St. Monica School Commissioners*, 5 Q. L. R. 124.

Assault—*Small Verdict — Certificate of Trial Judge—Review by Court.*]—The Court has jurisdiction to review the discretion exercised by a Judge in certifying under 60 V. c. 28, s. 74, that there was good cause for bringing the action in the Supreme Court.—Where an action for assault and battery was brought in the Supreme Court, and the jury found a verdict for the plaintiff for only $35, but the trial Judge granted a certificate under the above section, on the ground that the plaintiff's attorney had reasonable grounds for thinking that the title to land would be brought into question:—Held, that a sufficient case had not been made out to induce the Court to interfere. *Cormier* v. *Boudreau*, 36 N. B. Reps. 6.

Attachment of Debts—*Amount Attached.*]—The costs on an attachment after judgment must be taxed according to the amount sought to be recovered from the garnishee, and do not follow the costs of the principal action. *Latour* v. *Latour*, 5 Q. P. R. 306.

Attachment of Debts—*Amount Attached.*]—Where a contestation of the declaration of a garnishee is dismissed, the class of action will be fixed by the amount of the judgment which the contestant could have obtained against the garnishee if the declaration had shewn that the latter was indebted to the judgment debtor, and this although a part of such sum was insaisissable. *De Sieyes* v. *Painchaud*, 5 Q. P. R. 363.

Attachment of Debts—*Contestation of Declaration of Garnishee — Amount Involved.*]—The fee allowed to a garnishing creditor upon a contestation of the declaration of the garnishee, which has been maintained without the garnishee having replied to it, is the fee applicable to an uncontested action, and not that of a contested action, and is regulated by the sum which the garnishee is ordered to pay. *Ettenberg* v. *Kelly*, 5 Q. P. R. 428.

Attachment of Debts — *Saisie-arrêt—Amount Claimed.*]—A saisie-arrêt is a new cause or proceeding, and the costs of a judgment maintaining the disavowal of the advocate who has issued the saisie-arrêt, are to be determined according to the amount for which the writ of saisie-arrêt has been issued. *Lafrance* v. *Parent*, Q. R. 21 S. C. 415.

Certiorari—*Order—Fee on.*]—The costs of advocates or attorneys in a case of certiorari are taxed as in an action of the second class in the Superior Court. 2. No fee is allowed upon a judgment ordering the issue of a certiorari. *Arcand* v. *Montreal Harbour Commissioners*, 5 Q. P. R. 410.

Claim and Counterclaim — Jury. *Coulter* v. *Sweet*, 2 O. W. R. 1.

Class of Action—*Administrator.*] — An action whereby the plaintiff appointed by a foreign tribunal administrator to a decedent estate, seeks to have his quality recognized in this country, against a sequestrator appointed by our courts to the property situate in this country, will be considered a first class action for taxation purposes, if it appears that the property situated in this country amounts to more than $1,000. *Lavoignat* v. *Mackay*, 3 Q. P. R. 479.

Class of Action—*Garnishee—Amount of Judgment Against.*]—When the contestation of the declaration of a garnishee is maintained without hearing, upon default of the garnishee to reply to such contestation, the attorney of the contestant has a right to tax against the garnishee the fee provided by Art. 4 of the Superior Court tariff; and the class of action is determined by the amount of the judgment rendered against the garnishee. *Ettenberg* v. *Kelly*, Q. R. 19 S. C. 143.

Class of Action—*Interest.*]—The costs on an appeal from a judgment for $200 with interest and costs, which is reversed, the action being dismissed by the Court of Appeal, are costs of an action of the fourth, and not of the third class. *Sauriol* v. *Clermont*, 3 Q. P. R. 477.

Class of Action—*Partition and Sale—Price Obtained—Opposition.*]—When an immovable has been sold in an action for partition and sale for a price exceeding $4,000, the costs of an opposition à fin de distraine and of the contestation thereof should be taxed as in an action of the first class, with the additional fee of $30 which the tariff gives in actions for more than $4,000. *Latour* v. *Latour*, Q. R. 19 S. C. 159, 3 Q. P. R. 418.

Class of Action—*Validity of Seizure—Amount in Question.*]—Upon a contestation as to the validity of a seizure en mains tierces, the class of action depends upon the amount seized, and the taxation of the bill according to the class of the original action will be revised accordingly. *Jones* v. *Moodie*, 3 Q. P. R. 354.

Class of Action—"*Value in Contest*"—*Interest and Costs.*]—Neither interest nor costs can be added to the amount in litigation as part of the "value in contest" for the purpose of determining the class of action to regulate the scale of taxation of costs. *Barber-Ellis Co.* v. *Burland*, Q. R. 10 K. B. 218.

Class of Action—"*Value in Contest*"—*Judgment.*] — Where the judgment appealed from was against the appellant for a specific amount, and the respondent did not take a cross-appeal, the "value in contest," for the purpose of determining the class for taxation of costs, is the amount for which judgment was rendered against the appellant by the Court below. *McGarvey* v. *Dougall*, Q. R. 10 K. B. 217.

Class of Action—"*Value in Contest*"—*Judgment—Costs.*]—In determining the class to which a case belongs for the purpose of taxation of costs, only the amount of the condemnation in the judgment appealed from, irrespective of costs, is to be taken into consideration. *Sauriol* v. *Clermont*, Q. R. 10 K. B. 219.

Class of Action — *Value in Contest—Opposition — Dismissal on Motion—Absence of Appearance—Fee—Scale of.*]—Where an opposition is dismissed upon motion, and the plaintiff's attorney has not filed an appearance in writing to the opposition, he is not entitled to a fee de comparution. 2. The fee upon an opposition dismissed upon motion is that of an action dismissed upon preliminary exception. 3. The class of action to which an opposition belongs is regulated by the value of the effects claimed by the opposition, and, in the absence of other evidence, the amount mentioned in the opposition as representing the value of the effects thereby claimed should be regarded as the true one. *Les Curé et Marguilliers de Laprairie* v. *Proulx*, 4 Q. P. R. 33.

Company — *Removal of Liquidator—Appeal.*]—The fees in appeals on a petition to remove a liquidator appointed to a joint stock company are the fees of a second-class and not of a first-class action. *Stimson* v. *North-West Cattle Co.*, 5 Q. P. R. 239.

Contestation in Garnishment — *Amount in Controversy.*]—The fees upon a contestation of the declaration of a garnishee, where it is sought by the garnishment proceedings to avoid a gift of immovables of the value of $800, and to condemn the garnishees each to pay $122, are the fees of an action of the second class. *Brunet* v. *Bergeson*, 4 Q. P. R. 419.

County Court Jurisdiction—Ascertainment of amount—Set-off. *Smith* v. *Toronto General Hospital Trustees*, 6 O. W. R. 960.

County Court Jurisdiction — *Trespass to Land—Amount Involved—Title to Land.*] —Plaintiffs were owners of the remainder in a farm valued at $1,500, and defendant Reece was life tenant thereof, and defendant Payne a purchaser from her of timber on the farm. The action was for an injunction and damages for cutting and removing the timber. The trial Judge found for plaintiffs (1 O. W. R. 516), and assessed the damages at $400, to be paid into Court and paid out to plaintiffs on death of defendant Reece, who was to have the interest in the meantime. This judgment was varied by a Divisional Court (2 O. W. R. 160, 23 Occ. N. 107, 5 O. L. R. 356), by directing that defendants should at once pay to plaintiffs $180. The defences having raised the question of title to an interest in land of a greater value than $200, and therefore the action would not be maintainable in a County Court by virtue of s.-s. 1 of s. 22 of the Act, therefore plaintiff's costs were taxed on the High Court scale. *Whitesell* v. *Reece*, 4 O. W. R. 465, 9 O. L. R. 182.

Criminal Libel—*Criminal Code, s. 835.*] —Quære, where costs are taxable under s. 835 of the Criminal Code, on what scale should they be taxed? *Nichol* v. *Pooley*, 9 B. C. R. 363.

Detention of Goods—*Judgment for Return—Damages.*]—The plaintiff in an action for detention of a horse, alleged to be of the value of $1,000, recovered judgment for its return and $10 for damages:—Held, against the contention of the defendant, that costs should be taxed as in an action under $100, or on the lower scale of the tariff; that, in the absence of evidence to the contrary, the value alleged in the statement of claim should be treated as the real value for purposes of taxation. *Allison* v. *Christie*, 2 Terr. L. R. 279.

Division Court Jurisdiction — *Ascertainment of Amount—Promissory Note.*] — Held, that the debt in this case was not cognizable by a Division Court, the claim being for more than $100 and not ascertained by the signature of the wife (the principal debtor); that the note signed by the husband could not be treated as an ascertainment, it not having been signed by him as her agent, but on his own behalf; and therefore the costs should be on the scale of the County Court in which the action was brought. *Davidson* v. *McClelland*, 21 Occ. N. 188, 32 O. R. 382.

Division Court Jurisdiction—*Balance Due on Contract Signed by Defendant—Extrinsic Evidence.*]—In an action in a County Court for $37.50, the balance due on a building contract of $475, signed by the defendant, where extrinsic evidence was required to shew performance of the contract by the plaintiff, and for $27.35 upon an open account, as against which the defendant was allowed upon his counterclaim $25 for defective work and material:—Held, that a Division Court would have had no jurisdiction, and that the plaintiff was entitled to his costs on the County Court scale. In re Graham v. Tomlinson, 12 P. R. 367, and In re Sawyer-Massey Co. v. Parkin, 28 O. R. 662, not followed. Kinsey v. Roche, 8 P. R. 515, approved. McDermid v. McDermid, 15 A. R. 287, followed. *Krentziger* v. *Brox*, 21 Occ. N. 139, 32 O. R. 418.

Interim Injunction.]—The costs of an interlocutory injunction will be taxed as in an action of the same class as is the action of which it is an incident. *Jodoin* v. *Village of Belœil*, 7 Q. P. R. 222.

Interim Injunction — *Municipal By-law.*]—The fees upon a petition for interlocutory injunction in an action to set aside a municipal by-law, are fees of second, not of first-class actions. *Village of Belœil* v. *Jodoin*, 7 Q. P. R. 77.

Jurisdiction of County Court—*Ascertainment of Amount — Action for Price of Goods—Reduction of Claim by Trial Judge.*] —In an action in the High Court for $340, the balance of a $790 account for logs sold by the plaintiff to the defendant, $450 of which was paid before action, the trial Judge found that the sale was made as contended by the plaintiff, but reduced the amount by $20 for some logs not received by the defendant:—Held, on an appeal from the ruling of a taxing officer, that the plaintiff was entitled only to County Court costs, and the defendant to a set-off. The sum of $340 being an ascertained amount, the reduction of it by the trial Judge did not affect the ascertainment. Brown v. Hose, 14 P. R. 3, distinguished. *Lovell* v. *Phillips*, 23 Occ. N. 114, 5 O. L. R. 235, 2 O. W. R. 119.

Jurisdiction of County Court—Ascertainment of amount claimed. *Minerva Mfg. Co.* v. *Roche*, 1 O. W. R. 550, 722.

Jurisdiction of County Court—Ascertainment of amount—Promissory note—Consideration. *Baldwin Iron and Steel Works (Limited)* v. *Dominion Carbide Co.*, 2 O. W. R. 6, 170.

Jurisdiction of County Court—Ascertainment of amount. *Williamson* v. *Township of Elizabethtown*, 2 O. W. R. 977, 3 O. W. R. 742.

Jurisdiction of County Court—Ascertainment of amount of money demand. *Bastedo* v. *Simmons*, 2 O. W. R. 866, 955.

Jurisdiction of Division Court — Account—Balance — Ascertainment — Settled account. *Taggart* v. *Bennett*, 2 O. W. R. 184, 419, 513.

Lump Sum — *Injunction Motion.*] — The costs of the advocates of the respondent under a judgment dismissing, after hearing a petition for an injunction, were fixed upon application to the Judge at $50. *National Typographic Co.* v. *Dougall*, 5 Q. P. R. 162.

Motion for Particulars—*Prothonotary.*] —A motion for particulars is an ordinary motion. 2. If an action is discontinued after such a motion, the costs of the defendant's advocate will be those of appearance and motion and not those under art. 7 of the tariff. 3. The fee of the prothonotary is also that of a motion, and not of an exception. *Gingras* v. *Finley*, 5 Q. P. R. 118.

Order as to — *Jurisdiction of Trial Judge.*] — In a Supreme Court action, the trial Judge has no jurisdiction to order costs on the County Court scale on the ground that the action might or should have been brought in the County Court. *Russell* v. *Black*, 10 B. C. R. 326.

Payment into Court — *Inquiry as to Creditors' Claims — Certificate for County Court Costs—Set-off—Discretion.*] — Under 59 V. c. 19, s. 3 (O.), the equitable jurisdiction of the County Courts, which had been taken away by the Law Reform Act of 1868, was restored to that Court, so that it has equitable jurisdiction where the subject matter involved does not exceed $200. An action having been brought to set aside an alleged fraudulent conveyance of certain lands to the defendant, a lis pendens was registered, and by a consent order was vacated on payment of $300 into Court, with a provision that creditors should file their claims. Claims were filed to over $200, adjudicated upon by the Master, and fixed at $189.47, the amount found to be due to the plaintiff being $96.20, for which judgment was given with costs on the lower scale; the Master giving a certificate that his ruling was that the plaintiff

was entitled to costs on the County Court scale, without any right of set-off:—Held, that the Master's order as to costs should not be interfered with. *Halliday* v. *Rutherford*, 23 Occ. N. 200.

Petition—*Contestation—Counsel Fees.*]—The fees of an advocate upon a petition under art. 876, C. P., upon which there has been contestation by writing, inscription, examination, and hearing, are the fees of an advocate in an action of the second class, but there can be no fee at the hearing. *Moreau* v. *Gélinas*, 4 Q. P. R. 380.

Petition to Appoint Sequestrator.]—All the fees on a contested petition to appoint a sequestrator are governed by s. 102 of the tariff, not by s. 12 or 28, and the attorney is entitled to all the fees of a third-class action. *Chalmers* v. *Shoe Wire Grip Co.*, 5 Q. P. R. 73.

Petition to Quash Municipal By-law — *Interlocutory Injunction — Taxation — Items.*]—On a motion for the revision of the taxation of the respondent's costs of a motion for an interlocutory injunction incident to a petition to quash a by-law, made by virtue of art. 4389, R. S. Q., the Court will allow a general fee of $50, and will disallow a fee d'audition; a demand for an injunction grafted on an action of this nature, is itself of the same nature, and the costs thereof ought to be taxed as of the second class; the amount payable to the prothonotary on the answer to an application for an interlocutory injunction is $1, as fixed by art. 24 of the tariff, and not the amount payable on a pleading on the merits; and the Court can not, on a taxation, refuse to allow the fee payable on each affidavit filed in support of the petition or against it. *Cameron* v. *Town of Westmount*, 7 Q. P. R. 58.

Petition to Set Aside Injunction Order.]—The costs of an advocate upon a petition to set aside a judgment granting an interlocutory injunction before issue of the writ of summons, not being provided for by the tariff, will, under art. 12 of the tariff, be taxed upon the scale applicable to analogous proceedings; and a petition to set aside a judgment in an ordinary case is an analogous proceeding. *Ozone Co. of Toronto* v. *Massicotte*, 5 Q. P. R. 176.

Revendication of Insurance Policies —*Amount Involved.*]—In an action of revendication of insurance policies, which represented the face value of over $200, the costs should be granted according to the actual value of the titles, not according to the value which the titles represented. *Bouchard* v. *Hétu*, 6 Q. P. R. 44.

Superior Court — *Intervention on Appeal.*]—The costs of contestation of an intervention on appeal (to the King's Bench) will be taxed according to the tariff of the Superior Court which would apply to such contestation if it were made in the Superior Court. *McNally* v. *Préfontaine*, 4 Q. P. R. 125.

Supreme Court—*County Court.*] — The costs of an action in the Supreme Court, which might have been brought in the County Court, are not necessarily taxable on the County Court scale. *Royal Bank of Canada* v. *Harris*, 8 B. C. R. 368.

Tariff —*Interpretation — Class of Action.*] —The allowance of costs, being a matter of statutory declaration and not of right, cannot exceed the limits defined by the text of the statute. Therefore subdivision 7 of the second class of the tariff must apply to the allowance of costs in an action for the rescission of a winding-up order and appointment of a liquidator to a company, although financial interests may be involved in the suit, which, if they formed the subject of the conclusions of the action, would bring it within the first class for the purposes of taxation. *Stimson* v. *North-West Cattle Co.*, Q. R. 12 K. B. 365.

Transfer of Action.] — Where a cause begun in the Circuit Court is transferred by the Court, of its own motion, to the Superior Court, by virtue of art. 171, C. P., the costs will be on the scale appropriate to the amount in controversy in the action. Item 108 of the tariff has no application, there having been no évocation. *Duval* v. *Moffatt*, 3 Q. P. R. 405.

Transfer of Action—*Security for Costs — Event — Revision of Taxation — Jurisdiction.*]—The fee of the defendant's attorney on a declinatory exception which was maintained, the Court ordering the transmission of the record to another district, is that provided for by art. 7 of the tariff. 2. When a motion for security for costs is granted, costs to follow suit, and the record is subsequently transmitted to another district, the costs will follow the final judgment in the case, and not the judgment maintaining the declinatory exception and ordering the transmission of the record. 3. Where, in an action brought at Montreal, where the transmission of the record to Quebec was ordered, the prothonotary, at Montreal, taxed the defendant's bills of costs, the Judges of the district of Montreal are competent to revise such taxation, notwithstanding the judgment ordering the transmission of the record. *Canadian Mutual L. & I. Co.* v. *Tanguay*, 3 Q. P. R. 436.

Trespass to Land — *Title—Pleading—Amendment—Terms—Discretion.*]—In an action in the High Court for trespass of land, of greater value than $200, the plaintiff alleged his tenancy and occupation; the defendant, in his statement of defence, denied both, and asserted title and right to possession in himself, and also pleaded leave and license. About two weeks before the trial the defendant gave notice of motion for leave to amend by withdrawing his denial of the defendant's tenancy, and occupation, and expressly admitting both, and withdrawing his own claim to right of possession. Leave to so amend was granted at the trial, terms as to costs being reserved. The jury found against the defence of leave and license, and assessed the plaintiff's damages at $1, for which a verdict was entered:—Held, that the original defence raised an issue of title, and it not having been amended until the trial, the plaintiff was obliged to go to trial in the High Court, and was entitled to his costs on the scale of that Court:—Semble, also, that as a matter of discretion under Rule 1130, and perhaps also as a term of allowing the amendment, the same disposition of the costs would be made. *Black* v. *Wheeler*, 24 Occ. N. 294, 7 O. L. R. 545, 3 O. W. R. 439.

Trespass to Land — *Title—Verdict for $100 — Jurisdiction of District Court.*]—Where an action for damages for flooding and other trespasses to the plaintiff's lands situated in the Parry Sound district, was brought in the High Court, and the title to the land was brought in question, and, though no evidence was given as to its value, it could not reasonably be contended that it did not exceed $200, and clause (*d*) of s.-s. 2 of s. 9 of R. S. O. c. 109, giving jurisdiction to inferior Courts, where the land is under such value, not applying to such district, and the Judge at the trial having found for the plaintiff and directed judgment to be entered for him for $100 damages, with the costs of the Court having jurisdiction to such amount, without any set-off, the plaintiff was held entitled to tax his costs on the High Court scale. Decision of Anglin, J., 3 O. W. R. 601, affirmed. *Neely* v. *Parry Sound River Improvement Co.*, 24 Occ. N. 349, 8 O. L. R. 128, 3 O. W. R. 601, 778.

Trespass to Land — *Value of Land—Payment of $1 into Court—Acceptance by Plaintiff.*]—In an action for trespass to land, valued at over $200, in which the plaintiff claimed $1,000 damages, and no question of title to land was raised, the defendant paid $1 into Court, and the plaintiff accepted it:—Held, that the plaintiff was entitled to his costs on the High Court scale. Babcock v. Standish, 19 P. R. 195, followed. Chick v. Toronto Electric Light Co., 12 P. R. 58, and Tobin v. McGillis, ib. 60 n., commented on. *McKelvey* v. *Chilman*, 23 Occ. N. 114, 5 O. L. R. 263, 2 O. W. R. 118.

Withdrawal of Part of Claim—*Taxation of Costs—Witness Fees—Foreign Witnesses.*]—The fact that the plaintiff, in an action against the defendants to recover $1,165.28, being $776.85 for the value of goods which had been intrusted to the defendants to be carried, but had not been delivered by them, and $388.46 damages caused by the default to deliver, has filed a retraxit in the course of the suit for $388.73, because the goods have been delivered to him after the commencement of the action, does not take away the right to have his costs taxed as in an action of the first class. 2. The taxation of witnesses subpœnaed out of the jurisdiction may be revised even when no objection has been made when such costs were being taxed, if the total amount of the costs, as taxed, exceeds the cost of a commission to examine such witnesses. *Rothchild* v. *Canadian Pacific R. W. Co.*, Q. R. 21 S. C. 318, 5 Q. P. R. 39.

VII. Security for—Generally—When Ordered.

Absent Plaintiff—Absence in another province—Return to Ontario—Intention to remain—Evidence — Discretion — Appeal. *Gagne* v. *Canadian Pacific R. W. Co.*, 3 O. W. R. 624.

Absent Plaintiff — Acquisition of residence in jurisdiction pendente lite—Temporary or permanent residence. *Barry* v. *Oshawa Canning Co.*, 3 O. W. R. 190.

Absent Plaintiff—*Extension of Time—Procuration—Want of Authentication—Contestation.*] — The procuration or power of attorney furnished by plaintiff resident out of the province may be allowed to stand although not properly authenticated, if the right of the defendant to contest the veracity of it be saved. 2. The Court may, for sufficient cause, extend the delay first allowed for the furnishing of security judicatum volvi and of the procuration ad litem. *Berthiaume* v. *Herreboudt*, Q. R. 13 K. B. 159, 6 Q. P. R. 80.

Absent Plaintiff—*Fixed Place of Abode—Domicil.*]—The plaintiff, an Italian, was engaged at Montreal, in the service of a railway company, until the end of 1904; and, at the time he commenced his action, he worked for this company at Cross Lake, in the province of Ontario. The writ of summons described him as of Montreal; and the place of his domicil or residence before his arrival at Montreal was not shewn. The defendant having, by "dilatory exception," demanded security for costs and procuration:—Held, that the plaintiff did not reside at Cross Lake, his being in that place not constituting a residence within the meaning of Art. 179, C. P. C. The residence of a party is the place where he usually and ordinarily dwells and has a fixed abode. *Cills* v. *Cordasco*, Q. R. 26 S. C. 68.

Absent Plaintiff—*Intention to Return.*]—The fact that the plaintiff proposes to return to reside in the Province of Quebec, while he does not actually reside there, does not withdraw him from the obligation to give security for costs. *Marino* v. *Youngheart*, 6 Q. P. R. 355.

Absent Plaintiff — *One of Several.*] — Where one of the plaintiffs lives in the United States, he will be ordered to give security for costs. *Kirk* v. *Lamontagne*, 6 Q. P. R. 157.

Absent Plaintiff—Property in jurisdiction — Burden of proof—Building society—Terminating shares. *Daniel* v. *Birkbeck Loan and Savings Co.*, 5 O. W. R. 757.

Action Against Municipal Corporation — *Non-repair of Highway — Personal Injuries.*] — Article 793 of the Municipal Code, which requires a person who sues a municipal corporation, of which he is not a ratepayer, on account of non-repair of the roads and pavements of the municipality, to deposit a sum of $10 with the clerk of the Court at the time of the issue of the writ of summons, as security for costs, applies to actions for damages for injuries caused by non-repair, and not merely to actions for the penalty provided by art. 793. *Lalonge dit Gascon* v. *Parish of St. Vincent de Paul*, Q. R. 23 S. C. 65.

Admission that Defendant without Defence—Counterclaim for malicious arrest. *Blumensteil* v. *Edwards*, 3 O. W. R. 772, 5 O. W. R. 341, 796.

Affidavit—*Agent—Advocate — Relief.*] — Rule 520 provides: "When the plaintiff in an action resides out of the Territories . . . and the defendant by affidavit of himself or his agent alleges that he has a good defence on the merits to the action, the defendant shall be entitled to a summons to shew cause why an order should not issue

requiring the plaintiff within three months . . . . to give security for the defendant's costs . . . . :"—Held, that the agent must be someone having personal knowledge of the facts constituting the defence, and the allegation of the existence of a good defence must be positive. An affidavit by the defendant's advocate that he verily believes the defendant to have a good defence is insufficient on both grounds. *Stimpson* v. *Ross*, 5 Terr. L. R. 485.

Amount — Interlocutory appeal to full Court—Consolidation of appeals. *Spencer* v. *Drysdale* (B.C.), 1 W. L. R. 6, 7.

Appeal to Court of Appeal—*Application for Increased Security—Forum.*]—Application for increased security for costs on an appeal from the High Court, should not be made in the High Court, but to the Court of Appeal or a Judge thereof. Centaur Cycle Co. v. Hill (No. 2), 4 O. L. R. 493, followed. *Fitzgerald* v. *Wallace*, 24 Occ. N. 60, 6 O. L. R. 634, 2 O. W. R. 1047, 3 O. W. R. 900.

Application by Person not a Party to Action—Residence abroad—Actor—Costs of motion. *Sparrow* v. *Rice*, 5 O. W. R. 624, 6 O. W. R. 61.

Application for—*Onus—Affidavit—Defence on Merits.*]—On an application for security for costs under Rule 520, the plaintiff, to have the summons discharged, must shew affirmatively that the defendant is not entitled to the order.—Where, therefore, the defendant by his affidavit alleged a good defence to the action on the merits, which the plaintiff sought to rebut by cross-examination, he was held entitled to the order, because his answers, though alleging certain facts not within his personal knowledge, shewed that it was not unreasonable to suppose that the plaintiff's claim might have been satisfied. *Griggs* v. *Grais*, 5 Terr. L. R. 501.

Application for—*Preliminary Exception — Advocate's Fee.*] — If an application for security for costs is made by way of a simple motion, instead of by preliminary exception, the advocate's fee will be that of a motion. *Tisi* v. *Cordasco*, Q. R. 27 S. C. 36.

Application for—*Service of Certificate of Deposit.*]—A defendant who files a preliminary exception demanding security for costs and who makes the deposit required by art. 165, C. P., and Rule of Practice 40, but who does not, at the same time as the notice of motion is served, serve notice on the opposite party of the certificate of the prothonotary setting out the deposit, may be allowed to give this notice to the plaintiff when the latter cannot shew that he has been prejudiced by want of notice. *Wayle* v. *Clunie*, 7 Q. P. R. 22.

Application for — *Time for Moving — Deposit.*]—The notice of a motion for security for costs must be given to the opposite party within three days from the entry of the cause. Such motion cannot be heard unless there be served with the notice the certificate of the prothonotary to the effect that a deposit of the sum fixed by the rules of practice has been made with the clerk. *King* v. *Pelletier*, Q. R. 27 S. C. 37.

Application for Custody of Infant —Application out of Ontario—"Proceeding" —Affidavit. *Re Giroux*, 2 O. W. R. 385.

Application for Payment out of Court—Foreign receiver. *Canadian International Mercantile Agency* v. *International Mercantile Agency*, 4 O. W. R. 338.

Arrest — *Capias after Judgment — Commencement of New Action.*]—A capias issued after judgment is the commencement of a new cause, and a foreign plaintiff, who has already given security for costs of the principal action, may be ordered to furnish fresh security for the capias, and will be ordered to pay the costs of a motion for security if he contests it. *Edgerton* v. *Lapierre*, 6 Q. P. R. 347.

Claimants of Fund in Court — Residence out of Ontario—Cross-motions—Stay of proceedings — Consolidation of actions. *Renouf* v. *Turner*, 2 O. W. R. 970.

Claimant — *Revendication — Foreign Plaintiff.*]—He who intervenes in an attachment in revendication and claims the thing revendicated as his property, is in the position of a plaintiff, and can not obtain security for costs from a foreign plaintiff. *Binmore* v. *Sovereign Bank of Canada*, 6 Q. P. R. 423.

Compliance with Order—Removal of stay—Payment into Court—Notice—Defence. *Northern Elevator Co.* v. *North-West Transportation Co.*, 6 O. L. R. 23, 2 O. W. R. 525.

Costs of Former Action Unpaid—Instructions — Solicitor — Action brought in name of wrong person — Form of order. *Buckindale* v. *Roach*, 2 O. W. R. 775, 788, 824.

Curator of Absentee.]—A resident who sues as curator to an absentee is bound to give security for costs. *Harvey* v. *Desjardins*, 6 Q. P. R. 144.

Curator of Absentee—*Residence.*]—The curator of an absentee will not be ordered to give security for costs of an action brought by him, if he resides in the province of Quebec. 2. Where a plaintiff suing as curator to an absentee describes himself in his proceedings, as of the province of Quebec, and the defendant, in moving the security for costs, by an uncontradicted affidavit, declared that the plaintiff was non-resident, he was ordered to give security. *Tétrault* v. *Rochon*, 6 Q. P. R. 213.

Defamation—Defence—Report of public meeting—Municipal council — Financial ability—Property exigible — Criminal charge. *Parke* v. *Hale*, 2 O. W. R. 1172.

Defamation — Newspaper — Criminal charge—"Provincial crime" — Election Act. *Harman* v. *Windsor World Co.*, 2 O. W. R. 442.

Defamation — Newspaper — Mistake—Apology—Good defence — Trivial or frivolous action. *Evoy* v. *Star Printing and Publishing Co.*, 2 O. W. R. 91, 119.

Defamation—Newspaper—Trivial or frivolous action—Defence on merits. *Marsh v. McKay*, 2 O. W. R. 522, 614, 3 O. W. R. 48.

Exchequer Court—*Admiralty Rule 228—English Practice—Time.*]—Under the provisions of Rule 228 of the General Rules and Orders regulating the practice and procedure in Admiralty cases in the Exchequer Court of Canada, applying the English practice to cases not provided for by such Rules, an order for security for costs may be granted in Admiralty proceedings on motion of the defendant after the plaintiff has filed particulars of his statement of claim. *Morten, Downs, & Co. v. The "Lake Simcoe."* 25 Occ. N. 147, 9 Ex. C. R. 361.

Foreclosure Suit.]—It is not a ground for refusing an order for security for costs, where the plaintiff is resident abroad, that the suit is for foreclosure, upon a mortgage. *Buchanan v. Harvie*, 25 Occ. N. 66, 3 N. B. Eq. 1.

Foreign Judgment—Action on—Merits of defence. *Joshua Handy Machine Works v. Pace*, (N. W. T.), 1 W. L. R. 156.

Form of Bond—*Affidavit of Justification—Real Estate.*]—The affidavit of a surety at the foot of his bond need not necessarily be in the first person or divided into paragraphs numbered consecutively. 2. The description of the surety is sufficient if it is contained in the bond preceding the affidavit. 3. A surety judicatum solvi is not obliged to justify upon real estate when the amount of the costs is not considerable. *Maheu v. Leclerc*, 6 Q. P. R. 225.

Increase—Inadequacy — Rules. *Dever v. Fairweather*, 1 O. W. R. 389.

Increase in Amount — *Costs Thrown Away by Postponement of Trial — Amendment.*]—While the practice as to granting additional security for costs has been relaxed in favour of the granting of such security, the plaintiff, however, must not be checked at every stage of the action by security being ordered dollar for dollar for all costs incurred, or which might be incurred, without regard to the conduct of the parties. On the commencement of an action security to the amount of $200 was ordered. After the action had proceeded, $300 further security was ordered; and, on a commission to take evidence being issued, a further sum of $100. On the action coming on for trial the defendants were granted leave to amend their pleadings, and, on the plaintiffs stating that they were not ready to proceed on the amended record, the trial was postponed, the costs of the day being made costs in the cause to the successful party. The defendants then obtained an order from a local Master directing $600 further security to be given. On an appeal to a Judge, the order was set aside:—Semble, that the application for additional security should have been made to the Judge at the trial at the time the postponement was asked for. *Standard Trading Co. v. Seybold*, 1 O. W. R. 650, 724, 783, 2 O. W. R. 878, 935, 3 O. W. R. 40, 22 Occ. N. 414, 23 Occ. N. 45, 330, 5 O. L. R. 8, 6 O. L. R. 379.

Increase in Amount—Premature application—Leave to renew—Several defendants—One payment. *Fuller v. Appleton*, 2 O. W. R. 424, 448, 829, 1083.

Increased Security—Contest as to next of kin — Foreign Commissions—Administration order—Limited responsibility of plaintiffs for costs. *Hunt v. Trusts and Guarantee Co.*, 3 O. W. R. 432, 554, 5 O. W. R. 405, 6 O. W. R. 1024.

Increased Security—Amount of—Further application. *Burnside v. Eaton*, 2 O. W. R. 412, 3 O. W. R. 77.

Increase — Trial practically concluded. *Woodruff v. Eclipse Office Furniture Co. of Ottawa*, 35, 114, 2 O. W. R. 35, 114, 691, 4 O. W. R. 165.

Infant Plaintiff in Jurisdiction — *Adult Plaintiff and Next Friend out of Jurisdiction — Separate Claims — Appearance—Præcipe Order.*]—Action by the father of an infant as next friend and also on his own behalf to recover damages resulting to the father and the infant from an injury to the infant for which it was alleged defendants were liable. The father resided in England, and the infant in Ontario, as shewn by indorsement on writ of summons. Defendants moved for an order for security for costs. Order granted and in default of security being given it directed that the claim of the father be struck out. *Felgate v. Hegler*, 4 O. W. R. 439, 5 O. W. R. 91, 9 O. L. R. 315.

Infant Plaintiff—Injury to — Action—Joinder of parent—Next friend—Both plaintiffs out of Ontario. *Topping v. Everest*, 2 O. W. R. 744.

Inscription for Review — *Amount of Deposit—Amount Involved.*]—Where there is a contest between two creditors of an insolvent as to priority, and judgment has been given declaring one claim prior to the other to the extent of less than $400, the deposit to make when inscribing in review of such judgment is $50, although the two claims aggregate more than $4,000. *In re Cantwell*, 6 Q. P. R. 195.

Insolvency of Plaintiff—*Appeal.*] — On an application made by the defendant for security for costs of an appeal by the plaintiff, it appeared that the action had been dismissed with costs, but that no costs had been paid, and that, to an execution issued therefor, return had been made that the plaintiff had no property, within the jurisdiction or elsewhere, to respond the execution. It also appeared that the plaintiff had made an assignment for the general benefit of creditors, and that, on an examination before commissioners, it was shewn that he had no real or personal property, book debts, or assets, that none of his creditors had been paid, and that anything recovered in the action would belong to his creditors:—Held, following the practice laid down in Chitty's Archbold, p. 399, that the case was one in which the plaintiff should be ordered to give security. *Shand v. Eastern Canada S. & L. Co.*, 33 N. S. Reps. 241.

Judgment Dismissing Action for Default of — *Assignment by Defendant for*

Benefit of Creditors—Admission of Claim.]—An order was made for security of costs to be given within three months. During this period the defendant made an assignment for the benefit of his creditors. The plaintiffs filed their claim with the assignee, and understood, apparently wrongly, that the claim was admitted. Judgment was afterwards signed by the defendant dismissing the action for non-compliance with the order for security. On motion by the plaintiffs the judgment was set aside on terms. *Macpherson Fruit Co.* v. *England*, 5 Terr. L. R. 388.

Libel—Newspaper—Proof of insolvency of plaintiff—Frivolous action—Criminal charge. *Gordon* v. *Star Printing and Publishing Co.*, 6 O. W. R. 887.

"Libel Contained in a Newspaper."]—The defendant was a country correspondent of the St. Thomas Times, and the action was for an alleged libel contained is one of his periodical contributions to the paper. A local Judge having ordered the plaintiff to furnish security for the defendant's costs under R. S. O. c. 68, s. 10, on the ground that the alleged libel was "contained in a newspaper:"—Held, on appeal, reversing the order, and following Egan v. Miller, 7 Occ. N. 443, that only the editor, publisher, or proprietor of a paper is entitled to security for costs under s. 10, and not a mere correspondent. *Neil* v. *Norman*, 21 Occ. N. 293.

Long Vacation — *Jurisdiction—Opposition.*]—The Court has no jurisdiction, in long vacation, to hear a motion for an order requiring security for costs to be given by an opposant à fin de charge. *Payette* v. *Comic Opera Co.*, 6 Q. P. R. 362.

Money Paid into Court—*Payment out to Successful Party — Proposed Appeal.*]—Money paid into the High Court by the plaintiffs as security for the defendants' costs was ordered by the Master in Chambers to be paid out to the defendants after they had, by the judgment of the Court of Appeal (7 O. L. R. 110), been allowed the costs of the action against the plaintiffs, notwithstanding that the plaintiffs proposed to appeal to the Judicial Committee of the Privy Council. To retain the money in Court would amount to a stay of execution, and if that were desired, the plaintiffs should apply to the Court of Appeal. Rules 827, 832, considered, and the absence of any Rule corresponding to English Order 58, Rule 16, remarked on. *Centaur Cycle Co.* v. *Hill*, 22 Occ. N. 253, 24 Occ. N. 209, 1 O. W. R. 229, 377, 401, 639, 2 O. W. R. 1025, 3 O. W. R. 255, 354, 4 O. L. R. 92, 493, 7 O. L. R. 411, 617.

Motion to Set Aside Order—Money in hands of defendant—Account. *Allen* v. *Crozier*, 2 O. W. R. 485, 736, 805.

Motion — *Formalities.*]—A motion for security for costs is a preliminary exception, and must comply with all the formalities required therefor. *Turner* v. *Fee*, 6 Q. P. R. 139.

Municipal Corporation — *Action Against.*]—The deposit of $10, required by Art, 793, C. M., in an action against a municipal corporation, is only as security for costs, and the obligation to make the deposit is not a condition precedent to bringing the action. *Prévost* v. *Village of Ashuntic*, Q. R. 24 S. C. 408.

Municipality — *Action Against — Deposit.*]—In an action for damages against a municipality for injuries from an accident upon a street pavement, by reason of the neglect of the municipality to keep it in repair, the plaintiff, if he is not a ratepayer of the municipality, must deposit in the hands of the clerk of the Court a sum of $10 at the time of the issue of a writ of summons as security for costs. *Lalonge* v. *Corporation of St. Vincent de Paul*, 5 Q. P. R. 26.

Nominal Plaintiff — *Administrator — Fatal Accidents Act.*]—An administrator appointed for the purpose of bringing an action for the benefit of another under s. 3 of the Fatal Accidents Act, R. S. O. c. 166, is not a mere nominal plaintiff bringing such action for the benefit of somebody else, in the sense of the rule which entitles a defendant to security for costs upon shewing that such nominal plaintiff is also insolvent. So held by Meredith, C.J., (dubitante), and by a Divisional Court, in a case where, if the action had been brought in the name of the person beneficially entitled, he would have been required to give security for costs, because out of the jurisdiction, which gave ground for suspecting that the actual plaintiff was put forward for the purpose of enabling the person beneficially interested to escape liability. *Sharp* v. *Grand Trunk R. W. Co.*, 21 Occ. N. 183, 1 O. L. R. 200.

Nominal Plaintiff—Insolvency—Ejectment — Demise to plaintiff for purpose of enabling him to sue—Indemnity. *Gribbon* v. *King and Spohn*, 6 O. W. R. 756, 843.

Nominal Plaintiff—*Proof of Want of Interest — Inference—Perjury.*]—Very clear proof should be given of the lack of substantial interest of the plaintiff in litigation begun by him, before the Court should intercept it at the outset by an order for security for costs. And where, although it was shewn that the plaintiff was without means, it was not established by any legal evidence, but was rather a matter of conjecture and inference, that he was merely a nominal party suing for the benefit of some one outside of the litigation, a motion for security for costs was refused. There may be strong suspicion or even probable inference that the action, if successful, may enure to the benefit of the outsider; but where the contrary is shewn by all the parties to the transaction, the Court hesitates to find perjury for the purpose of ordering security for costs. *Prichard* v. *Pattison*, 21 Occ. N. 80, 1 O. L. R. 37.

Partnership — *Non-resident Partner — Power of Attorney—Costs of Motion.*]—In action by a commercial partnership, a non-resident member will be ordered to give security for costs; but no power of attorney will be required in such case, the resident partner being presumed to have sufficient authority; and the costs of a motion for security for costs which is contested, will go against the contesting party. *Brown* v. *Taylor*, 7 Q. P. R. 155.

Penalties—Consent of Attorney-General —Unsubstantial plaintiff—Common informer. *Johnston* v. *London and Paris Exchange*, 2 O. W. R. 468, 492, 501.

Petition by Foreign Defendant — *Time for Moving for Security—Appeal on Merits.*]—Where a petition is presented by a foreign defendant at a time when an appeal upon the merits of the action is pending, the time for moving for security for costs will not be extended on this ground. *Baumar* v. *Boilard*, 6 Q. P. R. 62.

Petition by Parents for Custody of Infant—Petitioners out of jurisdiction—Respondents admitting rights of petitioners. *Re Pinkney*, 1 O. W. R. 694, 715, 2 O. W. R. 141.

Petition of Right — *Application by Crown—Limited Company — Practice.*]—Section 69 of the Companies Act, 1862, 25 & 26 V. (U. K.) c. 89, provides that, where a limited company is plaintiff in any action, any Judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be sufficient to pay the costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given. By s. 7 of the English Petition of Right Act, 23 & 24 V. c. 34, it is, among other things, provided that the statutes and practice in force in personal actions between subject and subject shall, unless the Court otherwise orders, extend to petitions of right. The practice in the Exchequer Court is in this respect the same as the practice in England. In a proceeding by petition of right in the Exchequer Court application was made for security for costs under the provision first mentioned. There was nothing to shew that it had ever been acted on in a proceeding by petition of right in England:—Held, that the question of the application of the provision first mentioned to such cases was not sufficiently free from doubt to justify the granting of the application. *Atlantic and Lake Superior R. W. Co.* v. *The King*, 23 Occ. N. 101, 8 Ex. C. R. 189.

Petition of Right—Exchequer Court — Company—Crown—English Companies Act. *Atlantic and Lake Superior R. W. Co.* v. *The King*, 2 O. W. R. 51.

Plaintiff Ceasing to Reside within Jurisdiction — *Proceedings after Judgment —Procuration.*]—A plaintiff who, after obtaining judgment in his favour, ceases to reside within the province of Quebec, and then proceeds to enforce his judgment by garnishment, may be ordered to furnish security for costs, but not a procuration. *Lavallée* v. *Lavallée*, 7 Q. P. R. 35.

Plaintiff Coming into Jurisdiction— *Relief—Terms.*]—A foreign plaintiff obliged to furnish security for costs may, if he comes to reside in the province of Quebec before the expiration of the time within which he is ordered to furnish security, be relieved of his obligation on paying the costs of the order and of his motion. *Radford* v. *Brophy*, 5 Q. P. R. 256.

Plaintiff Leaving Jurisdiction — *Temporary Absence.*]—When in the course of a suit the plaintiff leaves the province of Quebec, security for costs will not be ordered unless a change of residence is clearly established, and proof of mere temporary absence will not suffice. *Blood* v. *McDonald*, 5 Q. P. R. 451.

Plaintiff Ordinarily Resident out of Jurisdiction. *McLaughlin* v. *Rodd*, 2 O. W. R. 309.

Plaintiff Out of Jurisdiction—Assets in hands of defendants—Admissions—Letter ante litem. *Stock* v. *Dresden Sugar Co.*, 2 O. W. R. 896.

Plaintiff Out of Jurisdiction—*Delay in Applying.*]—The action was begun on the 12th February, 1901; statement of claim delivered on the 10th June, 1901; statement of defence on the 20th June, 1901; and the action was set down for trial at a sittings beginning on the 16th September, 1901. The trial was, by consent, adjourned until the winter sittings, the defendants desiring to examine one C. who was present when the plaintiff was injured. On the 25th September, 1901, the plaintiff came from Pittsburgh to Toronto and submitted himself to examination by the defendants for discovery. He then stated that he was living at Pittsburgh, Pennsylvania, that his family were there, and that he did not intend to return. After the injury on account of which the action was brought, the plaintiff was brought to Toronto, in August, 1900, where he lived until August, 1901, when he went to Pittsburgh. After the examination for discovery in September the defendants issued a commission to Montreal to examine C. as a witness, and he was examined thereunder early in December. In the same month the plaintiff examined the defendants for discovery, and gave notice of trial for a sittings beginning on the 6th January, 1902. The defendants launched a motion for security for costs on the 19th December, 1901:—Held, that the delay in moving after the information obtained in September, 1901, was not sufficiently explained by the allegation that the defendants were waiting until after the examination of C., in order that they might be able to swear to a defence on the merits. *Bertudato* v. *Fauquier*, 22 Occ. N. 34.

Plaintiff Out of Jurisdiction — Property within jurisdiction—Shares in mining company — Evidence of value. *Howland* v. *Patterson*, 1 O. W. R. 653.

Plaintiff Out of Jurisdiction—*Return —Ordinary Residence.*]—The plaintiff was a British subject, and was always a resident of Ontario until his second marriage in 1896, since when he had been living and working part of the time in the State of Michigan and part of the time in Ontario; he had no property or means in Ontario; his wife had a home in Michigan, and after his marriage he made that his place of residence so far as possible, and had no other place of residence. When this action was begun in March, 1901, the plaintiff was at his wife's home in Michigan, and his solicitor indorsed that as his place of residence on the writ of summons. In January, 1902, after delivery of statements of claim and defence, the defendants obtained under Rule 1199, on præcipe, an

order for security for costs. The plaintiff and his wife had then come to Ontario for the winter and were boarding at an hotel. The plaintiff stated on affidavit that he had come to reside permanently in Ontario:—Held, that the plaintiff actually resided out of Ontario when the præcipe order was made; but, security not having been given, he might be relieved from that order if he was now actually, and intended to remain, a resident of Ontario. Upon the evidence, however, such was not the case; the plaintiff's place of residence was in Michigan, and was likely so to remain:—Held, also, that if the præcipe order were set aside, an order under Rule 1198 (b) for security for costs, on the ground that the plaintiff's ordinary place of residence was at his wife's home in Michigan, would be properly made. *Nesbit* v. *Galna*, 22 Occ. N. 150, 3 O. L. R. 429, 1 O. W. R. 218.

Plaintiff Out of Jurisdiction—Residence of corporation — Dominion incorporation—Head office. *Delap* v. *Codd*, 2 O. W. R. 790, 849.

Plaintiff Out of Jurisdiction—*Trust Moneys—Assets in Hands of Defendants—Administrator.*] — Security for costs was ordered, where the plaintiff resided out of the jurisdiction, in a suit against an administrator for the payment of a sum of money alleged by the bill to have been received by the intestate as guardian of the plaintiff, it appearing that the intestate's estate was insolvent, and there also being no satisfactory evidence of the alleged indebtedness. *Aiton* v. *McDonald*, 22 Occ. N. 37, 2 N. B. Eq. Reps. 324.

Plaintiff Out of Jurisdiction — Summary proceeding to enforce mechanic's lien—Statement of defence equivalent to appearance—Motion before statement—Undertaking to defend — Waiver. *Busman* v. *Central Trusts Co.*, 2 O. W. R. 1096.

Plaintiff Residing Abroad—Discretion —Property in jurisdiction. *Wills* v. *Timmins* (Y. T.), 2 W. L. R. 121.

Plaintiff Residing Abroad — *Assets Within the Jurisdiction.*]—The plaintiffs, who were non-residents, had, at the time of an application for security for costs, assets within the Territories to the amount of $4,000, consisting of live stock and railway plant in use upon contract work for the Canadian Pacific Railway Company, in construction of the Crow's Nest Branch railway:—Held, that this property was not substantial and fixed, but floating, and an order for security for costs was made. *Doidge* v. *Town of Regina* (*No. 1*), 2 Terr. L. R. 329.

Plaintiff Residing Abroad—Property in jurisdiction—Shares in defendant company. *Sub-Target Gun Co.* v. *Sub-Target Gun Co.* (*Ltd.*), 6 O. W. R. 439.

Police Officer—Public officer—R. S. O. c. 89—Notice of action—Assault—Affidavit. *Lane* v. *Clinkinbroomer*, 3 O. W. R. 613.

Præcipe Order—*Waiver.*] — Where it is stated in the writ of summons that the plaintiff resides out of the jurisdiction, the defendant may, even after delivering his defence, obtain the usual præcipe order for security for costs. *Smerling* v. *Kennedy*, 23 Occ. N. 112, 5 O. L. R. 430; 2 O. W. R. 180.

Public Officer—*Police Sergeant — Information.*] — Held, that the defendant, a police sergeant, laying an information against a cab-driver for using obscene and grossly insulting language, was an officer or person fulfilling a public duty and acting in the performance of such public duty, within the meaning of R. S. O. c. 88, s. 1, and was therefore entitled under R. S. O. c. 89 to security for costs of an action brought against him by the cab-driver for falsely and maliciously laying such information. *Eaves* v. *Nesbitt*, 21 Occ. N. 190, 1 O. L. R. 244.

Public Officers — *Policemen — Action against—Trespass—Warrant.*]—The defendants, police officers, having a warrant to arrest a man, by mistake entered the house of his neighbour, the plaintiff, to execute the warrant, but did not actually arrest the plaintiff, and withdrew on finding their mistake. The plaintiff sued for trespass and assault:—Held, that, as the defendants were acting in good faith under a warrant, and had complied with the requirements of s. 2 of R. S. O. 1897 c. 89, they were entitled under that Act to an order for security for costs. *Lewis* v. *Dalby*, 22 Occ. N. 112, 3 O. L. R. 301.

Qui Tam Action—*Preliminary Exception—Deposit—Chambers Motion.*]—A motion for security judicatum solvi in a qui tam action is a preliminary exception which must be accompanied by the deposit required by Art. 165, C. P., even since the amendment by 1 Edw. VII. c. 24.—2. The fact that a motion is brought before a Judge in Chambers does not change the nature of it, and if it is not accompanied by a certificate of the deposit required by law, it will be dismissed. *Raymond* v. *Larouche*, 6 Q. P. R. 39.

Real Property Act—*Petition—Caveator out of Province — Property in Province — Mortgage—Præcipe—Irregularity.*]—A caveator proceeding under the Real Property Act by way of petition to establish a claim to the land after service of notice at the instance of the applicant for a certificate of title must, as a general rule, be treated as the plaintiff in the proceedings, and, if he is resident out of the jurisdiction, must give security for the caveatee's costs. 2. That the caveator's claim in respect of a registered mortgage on the land, upon which he swears there is money owing and unpaid, will not take the case out of the general rule, if the caveatee in good faith disputes that there is anything due or owing on the mortgage. 3. Under such circumstances the ownership of the mortgage within the jurisdiction will not relieve a caveator from the necessity of furnishing other security for costs. Armstrong v. Armstrong, 18 P. R. 55, distinguished. Objection was taken to the regularity of the præcipe, being the first proceeding taken by the caveatee in the matter, for want of the indorsement of his place of residence and description upon it, as required by the practice of the Court:—Held, that under Rule 335 of the King's Bench Act, no effect should be given to the objection, as it was purely technical, and it did not appear that the interests of the caveator had been or could be affected by the irregularity, if it were one. *Lang* v. *Smith*, 14 Man. L. R. 258.

Residence Abroad—*Both Parties.*]—A defendant who resides abroad can require a plaintiff residing abroad to give security for costs, under Art. 179, C. P. *Robert* v. *Schiller*, 3 Q. P. R. 390.

Residence Abroad — *Both Parties — Rival Claimants of Fund.*] — Where both plaintiffs and defendants were resident out of Ontario and both claimed a fund of $500, bequeathed by a will, both were required to give security, each to the other, for the costs of an issue directed to be tried. In re La Compagnie Générale d'Eaux Minérales, [1891] 1 Ch. 451, followed. Re Société Anonyme des Verreries de l'Etoile, 10 Pat. Cas. 290, and Re Miller's Patent, 11 Pat. Cas. 55, distinguished. *Sinclair* v. *Campbell*, 21 Occ. N. 382, 2 O. L. R. 1.

Residence Abroad — *Business in Province.*] — Plaintiffs residing in the province of Ontario, although having a place of business in the province of Quebec, must give security for the defendant's costs of an action begun in the latter province. *Ross* v. *International Hydraulic Co.*, Q. R. 18 S. C. 439.

Residence Abroad—*Defendant Out of Jurisdiction—Surrogate Court Proceedings—Real Actor.*]—The plaintiff applied to a Surrogate Court for grant to him of letters probate as the executor named in a will. The defendant having filed a caveat and entered an appearance, the plaintiff delivered a statement of claim praying the Court to decree probate of the will in solemn form, and the defendant delivered a statement of defence disputing the factum of the will. The plaintiff then obtained an order for the removal of the proceedings into the High Court: — Held, that, according to the practice and procedure of the High Court, which was applicable, the plaintiff was not entitled to security for costs from the defendant, who was out of the jurisdiction. *Ward* v. *Benson*, 21 Occ. N. 531, 2 O. L. R. 366.

Residence Abroad — *Foreign Company.*]—An American steamship company having its head office in Seattle was the lessee of certain premises in Victoria, where applications for freight and passage could be made to an agent:—Held, that the company was a foreign company within the meaning of s. 144 of the Companies Act, and was bound to give security for costs. *Alaska Steamship Co.* v. *Macaulay*, 8 B. C. R. 84.

Residence Abroad—*Opposition — Contestant.*]—Where an opposition is filed to a seizure in execution of a judgment, the opposant is the person who "institutes a proceeding" within the meaning of Art. 29, C. C., and he is not entitled to ask for security for costs from the plaintiff contesting the opposition on the ground that he resides out of the province. *Chenel* v. *Jobin*, Q. R. 18 S. C. 393, 3 Q. P. R. 355.

Residence Abroad—"*Plaintiff*"—*Claim by Defendant against Co-defendant.*]—Where a defendant proceeds under Rule 215 to seek relief from a co-defendant which he would not be entitled to upon the pleadings and proofs between the plaintiff and defendant, he is a "plaintiff" within the meaning of Rule 1198, and, if resident out of the jurisdiction, is liable to an order for security for costs. Walmsley v. Griffith, 11 P. R. 139, considered. *Molsons Bank* v. *Sawyer*, 21 Occ. N. 27, 19 P. R. 316.

Residence Abroad—*Return to Jurisdiction—Costs of Motion.*]—If, between the service of a notice of motion for security for costs and the presentation thereof, the plaintiff becomes a resident of the province, the motion for security for costs will not be granted, but the costs thereof will follow the result of the suit. *Martel de la Chesnaye* v. *Leduc*, 3 Q. P. R. 385.

Residence Abroad — *Temporary Residence in Jurisdiction.*] — A foreigner usually residing abroad who, before the order for security is granted, has come to reside temporarily within the jurisdiction for the purpose only of prosecuting his action, cannot be compelled to give security for costs. *Violette* v. *Martin*, 20 Occ. N. 88, 35 N. B. Reps. 74.

Residence Out of Province—*Family in Province—Business Out of.*]—The plaintiff was manager of a joint stock company, carrying on business in Ontario, with his head office at Woodstock. His wife and family resided at Woodstock. He was agent of the company at Detroit, but visited his family once a fortnight, and sometimes once a month, but not as a rule for longer than a day and a half at a time:—Held, on motion for security for costs under Rule 1198 (a), that the plaintiff under the above circumstances must be taken to reside in Ontario. *Moffatt* v. *Leonard*, 23 Occ. N. 306, 6 O. L. R. 383, 2 O. W. R. 787, 3 O. W. R. 633.

Residence Out of Province—*Petition for Interlocutory Injunction.*]—A motion for an interlocutory injunction made by petition before the issue of the writ of summons, is not an action or a suit or a process, and the party making such motion cannot, even if he does not reside in the province of Quebec, be ordered to furnish security for the costs of the petition. *Ozone Co. of Toronto* v. *Lyons*, 5 Q. P. R. 238.

Residence Out of Province—*Plaintiff a Judgment Creditor of Defendant.*]—Where plaintiff, a resident out of the jurisdiction, having a judgment in the St. John County Court against the defendant for $67.75, which was defeated by certain conveyances made by the defendant, brought a suit to have the same set aside as fraudulent and void, he was ordered to give security for costs. *Gould* v. *Britt*, 23 Occ. N. 231, 2 N. B. Eq. Reps. 453.

Residence Out of Province — *Rule 1198 (b).*]—A man of about thirty years of age, who had since childhood lived in the United States, came to Toronto in October, 1902, to inspect for his employers, brokers in New York, a branch office in Toronto. He was then instructed by his employers to act as telegraph operator in the Toronto office. These brokers gave up business in a few weeks, and he then was employed as a telegraph operator by their successors. The business of the successors also came to an end within a few weeks, and in connection with that business the plaintiff was accused

by the defendant of fraud, and arrested, this action for damages being brought in consequence thereof. He was an unmarried man, and had been in the habit of living with his mother in Kansas City when out of employment, and he stated on cross-examination that he would return to the United States if he could find employment there:—Held, that under these circumstances the defendant was entitled to security for costs of the action. *Kavanaugh* v. *Cassidy*, 23 Occ. N. 224, 5 O. L. R. 614. S. C. sub nom. *Cavanagh* v. *Cassidy*, 2 O. W. R, 27, 143, 303, 391.

Several Defendants—Separate orders for security — Compliance with — Sufficiency—Further order. *Urquhart* v. *Aird*, 4 O. W. R. 501, 6 O. W. R. 155, 506.

Several Defendants — Solicitor defending by partner—Right to profit costs—Increased security—Measure of—Costs of examination for discovery. *Carew-Gibson* v. *Millar*, 3 O. W. R. 417.

Slander Imputing Unchastity to Married Woman—Action by husband and wife—Separation of causes of action—Pleading. *Clark* v. *Cameron*, 6 O. W. R. 831.

Stay of Proceedings—Non-payment of interlocutory costs—Dismissal of interlocutory motions with costs payable forthwith—Vexatious or frivolous motions. *Keogh* v. *Brady*, 6 O. W. R. 552, 846.

VIII. Security for—Dispensing with.

Appeal to Court of Appeal—*Poverty of Appellant—Infancy—Divisional Court.*]—Security for costs of an appeal to the Court of Appeal was dispensed with, under the power given by Rule 826, where the appellant was an infant suing by her next friend, and unable, by reason of poverty, to give or procure security, the circumstances being that her action had been dismissed by the Judge at the trial, following a reported decision of a Divisional Court, with which the appellant would be met if she appealed to a Divisional Court, which she was at liberty to do without giving security. *Fahey* v. *Jephcott*, 21 Occ. N. 155, 1 O. L. R. 198.

IX. Security for Costs—Practice as to.

Affidavit — *Information.*]—An affidavit in support of a motion for security for costs, in which the deponent does not say that he personally knows that the plaintiff no longer has his domicil in the province of Quebec, but simply that some one has told him so, is insufficient. *Bourassa* v. *Confederation Life Assn.*, 4 Q. P. R. 284.

Affidavit of Merits—*Discretion—Cross-examination.*]—The practice under R. 520 of the J. O. (C. O. 1898 c. 21), as to security for costs, differs from the English practice in making it obligatory upon the defendant to file the affidavit of himself or his agent alleging he has a good defence on the merits. Quære, whether it is necessary to set out the grounds of defence. This Rule leaves the granting of the security to the discretion of the Judge under the circumstances of each case. The Judge may order the deponent to be cross-examined upon his affidavit as to the nature of the alleged defence before deciding the motion. Under the circumstances of this case the Judge was held to have exercised a proper discretion in refusing security. *Clark* v. *Hamilton*, 21 Occ. N. 323, 5 Terr. L. R. 110.

Appeal — *Chambers Orders.*]—An order was made in Chambers allowing the plaintiff to amend his writ, and another order was also made dismissing the defendant's application to set aside the writ. The defendant by one notice appealed from both orders:—Held, two separate appeals, and that security for costs as of one appeal was insufficient. *Sehl* v. *Tugwell*, 7 B. C. R. 359.

Appeal to King's Bench—*Application of Security to Further Appeal.*]—The bond given by a surety for the effective prosecution of an appeal to the Court of King's Bench, and the undertaking therein to pay the amount of the condemnation which may be ordered if the judgment appealed from be confirmed, applies to a confirmation by the Court to which the appeal is made. The obligation of the surety in such case becomes extinct if the judgment be reversed by the Court of King's Bench, and does not revive if the judgment of the Court of King's Bench be subsequently set aside by a higher Court. Judgment in Q. R. 19 S. C. 571 affirmed. *Guertin* v. *Molleur*, Q R. 21 S. C. 261.

Application to Increase Amount — *Waiver of Objection.*] — A respondent by applying to increase the amount of security for costs upon an appeal waives his right to object that the security was not originally furnished in time. *In re Oro Fino Mines, Limited*, 7 B. C. R. 38.

Continuance of Original Security Pending Appeal.]—The plaintiffs, resident outside the jurisdiction, lodged in Court an undertaking as security for costs. At the trial the plaintiffs succeeded, and the defendants appealed, but before the determination of the appeal the plaintiffs applied for a release of the undertaking:—Held, that the security should stand pending the appeal. *Bird* v. *Vieth*, 7 B. C. R. 511.

Dilatory Exception—*Deposit — Certificate—Notice—Amendment.*] — A motion for security for costs is a dilatory exception, and cannot be granted unless notice of the prothonotary's certificate attesting that the deposit required by law has been duly made, has been given to the opposite party.—2. The Court cannot remedy such omission by permitting the party moving for security to give notice of the deposit and certificate. *Wistar* v. *Dunham*, 4 Q. P. R. 195.

Extension of Time for Giving, after Expiry—*Mistake of Solicitor.*] — An order for security for costs contained the following provision: "That in case default is made in giving security within the time aforesaid, this action be dismissed with costs." After the expiry of the time limited, plaintiff's solicitor moved to have the time

enlarged, on the ground that it was by reason of a mistake on his part, that security was not given in time:—Held, that, notwithstanding the expiry of the time limited in the order, a Judge had jurisdiction to entertain an application on behalf of plaintiff to enlarge the time, to enable him to comply with the order. *Ordway* v. *Le Blanc*, 33 N. S. Reps. 185.

Inscription en Faux—*Amount of Deposit—Increase or Reduction.*]—The Court, after having fixed the amount of a deposit to be made by a party who inscribes en faux cannot increase or reduce such amount, especially when the cause is before the Court upon such inscription. *Léveillé* v. *Kauntz*, 5 Q. P. R. 101.

Merits of Defence—*Discretion.*]—The defendant, who was sued on three bills of exchange, moved for security for costs on an affidavit that he had a good defence to the action on the merits, and that he had overheld the plaintiff, who resided out of the jurisdiction. The plaintiff did not cross-examine the defendant on this affidavit, but filed affidavits shewing admissions of the indebtedness by the defendant. These affidavits were not answered or explained. The Rule of Court in force in the Territories requires an affidavit of merits: — Held, that the Judge ought not upon an application for security to try out the merits of the defence, but he may, in his discretion, inquire whether the alleged merits are not a mere pretence; and the defendant in this case having disclosed the nature of his merits, the discretion of a Judge in refusing to order security for costs should not be interfered with on appeal. *Clark* v. *Hamilton*, 21 Occ. N. 323.

Motion—*Notice — Certificate.*]—Upon a motion for security for costs, it is not necessary to give notice of the certificate of the prothonotary that the deposit required has been made. *Wilder* v. *Wilder*, 4 Q. P. R. 433.

Motion—*Notice — Certificate—Deposit.*]—Where, in the notice of the presentation of a motion for security for costs, no notice is given of the certificate of the prothonotary that the deposit required by law has been made, the motion will be rejected with costs. *Robertson* v. *Cobban Mfg. Co.*, 4 Q. P. R. 345. But see *Tougain* v. *Canadian Pacific R. W. Co.*, *ib.* 284, 303.

Motion—*Notice — Certificate—Deposit.*]—Upon a motion for security for costs, it is not necessary to give notice of the certificate of the prothonotary that the necessary deposit has been made. *Tougain* v. *Canadian Pacific R. W. Co.*, 4 Q. P. R. 303.

Motion—*Time—One Plaintiff Out of Jurisdiction—Costs of Contested Motion.*]—A motion for security for costs and production of power of attorney, notice of which has been given for the 1st September, may be presented on the 10th September, that being the first day of the sittings of the Court.—2. A co-plaintiff out of the jurisdiction is subject to the obligation of furnishing security and producing a power of attorney. Semble, that in such circumstances a plaintiff who contests the demand of security and power of attorney will be adjudged to pay costs. *Slater Shoe Co.* v. *Trudeau*, 5 Q. P. R. 120.

Non-compliance with Order—Neglect to indorse order with notice under Rule 329—Notice not applicable. *Thomas* v. *Clark* (Y.T.), 1 W. L. R. 512, 2 W. L. R. 126.

Order for—*Time for Furnishing—Default — Dismissal of Action — Extension of Time.*]—If an order granting a motion for security for costs does not fix the time within which such security is to be furnished, a second motion for the dismissal of the action on the ground of the default of the plaintiff to obey the order, will not be granted, but the Court will allow further time to the plaintiff to furnish the security required by the first order. *Grenier* v. *Jacques Cartier Pulp and Paper Co.*, 5 Q. P. R. 84.

Penalty—*Action for—Alien Labour Act.*]—The plaintiff in an action brought to recover the penalty provided by the Alien Labour Act (60 & 61 V. c. 11, 1 Edw. VII. c. 13) is bound to give security for costs. *Laurin* v. *Raymond*, 7 Q. P. R. 209.

Power of Attorney — *Stay of Proceedings—Dilatory Exception— Certificate—Deposit — Vacation.*] — Although the defendant may apply to a Judge or the prothonotary, out of term, for a stay of proceedings until security be given, he can only invoke the absence of a power of attorney to obtain a stay of proceedings until its production, by means of a dilatory exception, which can only be urged by a motion presented to the Court. 2. Such dilatory exception cannot be presented unless accompanied by a certificate from the prothonotary establishing the deposit in his office of the sum fixed by the rule of practice, and the defendant cannot afterwards apply orally to make such deposit, the making of such deposit not having the effect of making a motion addressed to the Judge or prothonotary a dilatory exception. 3. The Court has no jurisdiction to entertain a motion for security for costs and power of attorney between the 30th June and 1st September. *Mitchell* v. *Meldon*, 5 Q. P. R. 86.

Preliminary Plea—*Deposit.*]—A motion by which a defendant demands security for costs is a preliminary plea, and cannot be made without a deposit. 2. The Court has no right to give to a defendant who has not made such deposit time to make it. *Macdonald* v. *Victoria Montreal Fire Assce. Co.*, Q. R. 18 S. C. 468.

Preliminary Plea — *Deposit — Law Stamps.*]—A motion for security for costs, even when not accompanied by a demand of procuration, is a preliminary exception, and will be dismissed if made without a deposit and with nothing more than the stamps requisite for a motion. *Taylor* v. *Victoria Montreal Fire Ins. Co.*, 3 Q. P. R. 467.

Proceeding against Defaulting Witness.]—A witness against whom a rule nisi is asked for default of appearing, cannot require a bond as security for costs and power of attorney to be given, such a proceeding not being the institution of an action. *In re May* v. *Ischekawa*, 7 Q. P. R. 107.

Rule 1198 (c)—Previous action for same cause against another defendant. *Heyder* v. *New Ontario S. S. Co.*, 6 O. W. R. 886.

Several Defendants—*Præcipe Orders.*]—One of the defendants having obtained on præcipe an order for security for costs, the plaintiffs complied with it by paying $200 into Court, after which another defendant, without notice of the previous order or of the payment into Court thereunder, obtained an order on præcipe for security for costs on his own behalf:—Held, that the plaintiffs were entitled to obtain an order providing that the security given by them should stand as security for the costs of all the defendants, but were not entitled to have the second order for security set aside as irregular. *Syracuse Smelting Works* v. *Stevens*, 21 Occ. N. 441, 2 O. L. R. 141.

Stage when Ordered—*Exchequer Court of Canada.*]—Under the present practice of the Court an order for security for costs may be made at any stage of the proceedings in a cause. Wood v. The Queen, 7 S. C. R. 634, referred to. *Boston Rubber Shoe Co.* v. *Boston Rubber Co. of Montreal*, 21 Occ. N. 279, 7 Ex. C. R. 47.

Stay of Proceedings until Given — *Authority of Solicitor — Time for Motion — Deposit.*]—A motion for a stay of proceedings in an action until the plaintiff should give security for costs and until his attorneys should produce a special procuration, is in the nature of a dilatory exception, and it should be made within the time allowed for preliminary pleadings, and accompanied by a deposit, even since the amendment made to Art. 165, C. P., by 1 Edw. VII. c. 34 (Q.) *Singer Mfg. Co.* v. *Young*, Q. R. 19 S. C. 396.

Time—*Delay—Deposit.*] — A motion for security for costs can be made pendente lite, upon producing an affidavit stating that, since the institution of the action, the plaintiff has ceased to reside in the Province of Quebec. 2. Such motion will be granted if made within three days after the defendant has been informed of the plaintiff's change of residence. 3. Such motion need not be accompanied by the deposit required by Art. 165, C. P. *Vanier* v. *Hurtubise*, 4 Q. P. R. 53.

Time—*Notice—Surety—Attorney for.*] — If a party required to give security for costs does not furnish it on the day fixed, such party cannot afterwards give it except after a new notice of one clear day to the opposite party. 2. A judicial surety cannot be represented by an attorney for the purpose of giving security. *Delisle* v. *McCrea*, Q. R. 21 S. C. 419.

Trust Company's Bond.]—A trust company cannot force a party to accept as security for costs a bond executed by the company for a specific amount, nor force the prothonotary to accept such security. *Ashworth* v. *Montreal and Atlantic R. W. Co.*, 5 Q. P. R. 29.

X. TAXATION.

Abandoned Appeal—*Order.*]—The production of the notice of the abandonment of an appeal will be sufficient authority for the taxing officer to tax the respondent's costs of the appeal, and an order is not necessary. *Fry* v. *Botsford*, 9 B. C. R. 165.

Acquiescence—*Fee on Foreign Commission—Settlement of Action.*]—The receipt of a cheque in payment of fees taxed, and the signature to an acknowledgment thereof, do not amount to acquiescence in the taxation when the cheque has not been presented for payment, the advocate having the conduct of the cause not finding the amount of it sufficient. 2. The advocate of one party who does not join in a foreign commission, nevertheless, has a right to the fee provided by art. 98 of the tariff, if he has received instructions, examined the documents, etc. 3. A fee, upon the hearing is not allowed in a cause declared to have been settled between the parties upon the day on which it has been called for hearing. *Sessenwein* v. *Pillow Hersey Manufacturing Co.*, 6 Q. P. R. 320.

Action Dismissed as Regards One Plaintiff—*Several Defendants—Defence in Law.*]—Where an action brought by two plaintiffs is dismissed, upon defence in law, as to one of them, each of the two defendants is entitled only to half the costs of an action adjudicated after the filing of a plea to the merits. *Major* v. *Paquet*, 6 Q. P. R. 210.

Actions Tried Together — *Separate Fees.*]—Where several actions for damages have been joined for the purposes of examination and hearing, and judgments have been given for different amounts, it cannot be said that the examination and hearing have been absolutely the same in the different actions, and therefore a separate fee may be allowed in each action. *Ritson* v. *Arnold*, 6 Q. P. R. 239.

Actions Tried Together — *Separate Fees.*]—When several issues are united for trial, and there is only one enquête and examination of witnesses, one argument, and one judgment on the several issues, the attorney is not entitled to fees of enquête and argument as if there had been separate trials. *Demers* v. *Sanche*, 6 Q. P. R. 241.

Affidavits—*Irregular Filing.*]—The costs of affidavits for use on a motion in the Weekly Court, filed with the Clerk in Chambers, instead of in the Registrar's office, as required by Rule 102, should nevertheless be taxed, if otherwise taxable, where such affidavits have been before the Court on the motion and are recited in the order made thereon. *Sturgeon Falls Electric Light and Power Co.* v. *Town of Sturgeon Falls*, 21 Occ. N. 33, 19 P. R. 286.

Affidavits — *Motion for Interim Injunction.*]—In the absence of any objection of the adverse party or of any remark of the Judge as to the number of affidavits filed in support of or against a petition for an interim injunction, the successful party is entitled to a fee upon each affidavit. *Brault* v. *Lambert*, 6 Q. P. R. 402.

Appeal to Full Court — *Costs not Specifically Awarded—Statute.*]—The costs of an appeal may be taxed to the successful party although not specifically awarded by the judgment. Supreme Court Act (1903-4), s. 20, s.-s. 7. *Kickbush* v. *Cawley*, 11 B. C. R. 151, 1 W. L. R. 18.

Appeal to Privy Council — *Costs Incurred in Canada—Taxation—Rule 1256—Non-retroactivity.*] — Rule 1256, providing that when the costs incurred in Canada of an appeal to the Privy Council have been awarded, and have not been taxed by the registrar of the Privy Council, they may be taxed by the senior taxing officer, and the taxation shall be according to the scale of the Privy Council, is not to be construed as applying to a case in which the judgment entitling a party to costs was entered before the Rule was made. The quantum of costs, as well as the right to them, is ascertained at the time of the judgment, and the quantum cannot, without the clearest words, be altered by a subsequent change in the tariff, or by the creation of a tariff which had no existence until after the judgment. *Earle* v. *Burland*, 24 Occ. N. 355, 8 O. L. R. 174, 3 O. W. R. 702.

Compensation for Lands Taken for Railway — Arbitration — Claimants severing—Estates under will. *Re Murphy and Lindsay, Bobcaygeon, and Pontypool R. W. Co.*, 6 O. W. R. 361.

Conservatory Intervention—*Leave to Contest.*] — The original plaintiff, who obtains leave to contest, after inscription ex parte, a conservatory intervention, will be ordered to pay the difference between the fees provided by art. 8, and those provided by art. 10 of the tariff. *Williamson* v. *Bradshaw*, 6 Q. P. R. 385.

Costs of Appeal—*Dismissal as to One Party—Half Fees.*] — Where an appeal is dismissed upon motion as to one of the parties only, the advocate's fee will be the whole fee fixed by the tariff, and not merely the half of such fee. *Leduc* v. *Parish of St. Louis de Gonzague*, 5 Q. P. R. 448.

Counsel Fee — *Adjournment of Hearing of Appeal—Negotiations for Settlement.*]—After an appeal was opened, it stood over at the suggestion of the Court in order to give the parties an opportunity to settle; the negotiations for settlement were unsuccessful; and the appeal was ultimately dismissed with costs:—Held, that the successful party was entitled (1) to a counsel fee (under item 224 of the tariff of costs) on the first day's hearing, and (2) to an allowance for costs of the negotiations for settlement under item 81 of schedule No. 4. *Milton* v. *District of Surrey*, 10 B. C. R. 325.

Counsel Fees—*Adjournment of Trial.*]—Except as otherwise specially provided, only one counsel fee can be taxed in an action. Such fee must be taxed on the completion of the action, and cannot be taxed before that event is reached. Where on a motion for a continuance, based upon the absence through illness of the defendant, who was alleged to be a necessary and material witness in his own behalf, the continuance prayed for was granted on payment by the defendant of costs of the day:—Held, that a counsel fee was improperly allowed as part of such costs; and an appeal from an order reviewing the taxation and striking out the item was dismissed. *Acadia Loan Corporation* v. *Westworth*, 37 N. S. Reps. 316.

Counsel Fees—*Demand of Abandonment—Contestation.*]—The fees upon a contestation of a demand of abandonment are those provided by art. 125 of the tariff. Riou v. Massé, 4 Rev. Leg. N. S. 449, followed. *Lynn* v. *Schloman*, 3 Q. P. R. 363.

Counsel Fees—*Exception to the Form.*] —The fees of an advocate upon an exception to the form dismissed are those mentioned in item 23 of the tariff of the Superior Court, and not fees appropriate to a simple motion. *Fonderie de Drummondville* v. *Robillard*, 3 Q. P. R. 378.

Counsel Fees — *Revising Pleadings.*]—The fee allowed by item 230 of the tariff for settling and revising refers to a party's own pleadings, and not to the pleadings received from the opposite party, and the allowance on a taxation of a fee of $10 to the plaintiff on receipt of the statement of defence, as "fee to counsel advising thereon," is improper, but, in a special case, a fee may be allowed under item 229. *Blair* v. *British Columbia Express Co.*, 11 B. C. R. 153.

Counsel Fees Paid to Partner of Litigant — *Affidavit of Payment made by Counsel—Disallowing Costs of—Brief—Correspondence.*]—Where counsel fees were paid by a member of a firm of barristers and solicitors, to his partner for the latter's services as counsel in an action in which the former was defendant, under a prior agreement to pay such fees as would be payable to counsel outside the firm:—Held, that such counsel fees should be taxed to the defendant against the plaintiff under a judgment dismissing the action with costs. Henderson v. Comer, 3 U. C. L. J. O. S. 29, followed. Upon the taxation the defendant made an affidavit of payment of fees to his partner, and the latter also made an affidavit, upon which he was cross-examined:—Held, that the defendant was not entitled to tax the costs of or occasioned by the latter affidavit:—Held, also, per Britton, J., that the discretion of the taxing officer in allowing the defendant the costs of briefing correspondence between the parties, should not be interfered with on appeal, although the correspondence was not used at the trial. *Johnston* v. *Ryckman*, 24 Occ. N. 221, 7 O. L. R. 511, 1 O. W. R. 720, 2 O. W. R. 1088, 1113, 3 O. W. R. 198.

Counterclaim — *Instructions — Brief—Counsel Fees—Costs of Taxation and Appeals.*]—In an action to which the defendant pleaded a counterclaim, the plaintiff was held entitled to the costs of the action, and the defendant to the costs of the counterclaim:—Held, that the defendant, as part of her costs, was entitled to tax a counsel fee, and that the fact that there was no reply to the counterclaim was not material, it being the existence of the defence to the action which determined whether it was a case for a counsel fee or not:—Held, following Atlas Metal Co. v. Miller, [1898] 2 Q. B. 506, that the defendant was not entitled to tax "instructions to sue," but was entitled to tax "instructions for counterclaim." With respect to the amount of "brief" and "counsel fee" taxed, the taxing master's judgment ought not to be disturbed, especially after it had been affirmed by a Judge. The "one-sixth rule" (O. 63, r. 23) is imperative, and there being in this case no reason for departure from it, the appeal of each party should have been and should now be dismissed with costs. *Bauld* v. *Fraser*, 36 N. S. Reps. 21.

Criminal Libel — *Action — Stay — Criminal Code, ss. 833-5*]—N., after his acquittal (at the third trial) on a charge of criminal libel, proceeded to tax his costs as provided by the Criminal Code, and moved before the trial Judge for the costs of some commission evidence used at the first trial. The motion was dismissed (22 Occ. N. 275, 8 B. C. R. 276, Rex v. Nichol), and it was decided that the prosecutors were not liable for the costs of the two abortive trials. As there was no appeal from that order, N. abandoned the taxation, and commenced this action for his costs. The defendants applied for a stay of proceedings:—Held, that the plaintiff should not be allowed to pursue both remedies at once, but, as in the other proceeding there was no appeal, this action should be allowed to proceed, provided that the plaintiff would undertake to abide by such order as might be made at the trial with regard to the costs of the taxation proceedings thrown away, and in the event of the plaintiff giving such undertaking the taxation proceedings should be stayed. *Nichol* v. *Pooley*, 22 Occ. N. 127, 9 B. C. R. 21, 363.

Deposition in Circuit Court.] — The costs of a deposition taken, on consent of parties by stenography, cannot be taxed in a Circuit Court. *Lewis* v. *Hudson's Bay Co.*, 6 Q. P. R. 97.

Desistment—*Fee on Hearing — Inscription.*]—When the plaintiff desists from his demand after inscription for hearing on the merits, the defendant has no right to the fee upon the hearing allowed by art. 36 of the tariff. *Bigras* v. *Viau*, 6 Q. P. R. 332.

Distribution of Costs—*Several Causes of Action—Judgment.*]—The judgment in an action for slander provided "that the plaintiff do recover against the defendant in respect of the matters set forth in the 3rd and 5th paragraphs of the statement of claim the sum of $1 and costs to be taxed," and "that the defendant recover from the plaintiff in respect of the matters set forth in the 4th and 6th paragraphs of the statement of claim his costs to be taxed;"—Held, affirming the decision of Meredith, C.J., that the taxing officer rightly taxed under the judgment to the plaintiff the general costs of the cause, except so much of them as were occasioned by the causes of action upon which he failed, and to the defendant only the costs of the issues upon which he succeeded, the latter being set off. Sparrow v. Hill, 7 Q. B. D. 362, 8 Q. B. D. 479, followed. *Davis* v. *Hord*, 22 Occ. N. 285, 292, 4 O. L. R. 466, 1 O. W. R. 418, 471.

Distribution—Part failure—Jurisdiction of taxing officer—Objection—Waiver. *Pugh* v. *Hogate*, 3 O. W. R. 799, 4 O. W. R. 212.

Double Fees — *Cross-demurrers.*]—The defendant answered the action by a demurrer and by a special plea; the plaintiff demurred to the latter; and the parties were heard upon these two issues of law. The demurrer of the defendant was overruled with costs, and the demurrer of the plaintiff was allowed with costs. The prothonotary allowed the plaintiff, pursuant to art. 24 of the Superior Court tariff, a fee upon the demurrer of the defendant and another upon the plaintiff's own demurrer, seeing that he had succeeded upon the two issues. This was affirmed upon revision. *Luneau* v. *Luneau*, Q. R. 19 S. C. 146.

Evidence — Brief of, used by opposite counsel. *Pennington* v. *Honsinger*, 1 O. W. R. 270, 507.

Examination for Discovery. *Iddington* v. *Douglas*, 2 O. W. R. 734.

Examination for Discovery — Ruling of senior taxing officer—Appeal—Time—Extension—Rules 767, 774. *Mann* v. *Crittenden*, 6 O. W. R. 799, 11 O. L. R. 46.

Exhibit—*Specially Obtained Document.*] —The costs in relation to an exhibit which forms part of the documents of title of the party who files it, should not be included in taxation unless it is stated that such copy has been specially ordered and obtained for the purpose of filing it in the action. *Lavoignat* v. *Mackay*, 5 Q. P. R. 408.

Ex Parte Cause—*Notice of Taxation—Necessity for—Execution—Opposition.*]—In an ex parte cause in the Circuit Court it is not necessary to have the bill of costs taxed adversely before issuing execution. An opposition based solely upon want of notice of taxation, without any allegation of overcharge, will be dismissed with costs. *Poirier* v. *Girard*, 4 Q. P. R. 124.

Illegal Bond — *Leave to Regularize — Costs of Adverse Party.*] — If a judgment permits an appellant to complete a security bond which has been declared illegal, the costs of the respondent comprise the attendance when the security was given, unless the judgment specifies that costs of motion only are granted. *Gelinas* v. *La Compagnie du Magasin du Peuple*, 7 Q. P. R. 98.

Instructions for Affidavit—*Affidavit as Production—Order—Review.*]—The following items were allowed to the plaintiff against the contention of the defendant: 1. Instructions for affidavit of writ of replevin. 2. Two separate affidavits on production by co-plaintiffs, where they resided in different parts of the country. 3. An order postponing trial on the application of the defendant, on terms of payment of costs, taken out by the plaintiff, where the defendant had neglected to take out order. An application by the defendant to have deducted from the bill certain costs of the day, alleged to have been improperly allowed on a previous taxation not appealed from, was not entertained. *Allison* v. *Christie*, 2 Terr. L. R. 279.

Items—*Copies of Interlocutory Orders—Rehearing of Motion.*]—In the district of Montreal the practice is to put upon the record copies of all the judgments rendered in the course of the pendency of a cause; and the costs of such copies will be taxed. 2. If a motion seeks for a condemnation in a case in which the opposite party has not conformed to an order of the Court, there is ground for presenting anew the motion in the case in which the order has not been executed, and, therefore, to claim a fee for rehearing. *Werthemer* v. *Boulanger*, 5 Q. P. R. 293.

Motion to Dismiss Action for Want of Prosecution — Interlocutory application

—Affidavit—Information and brief—Brief and instructions for brief—Counsel fee. *Gibson v. Brennan* (N.W. T.), 1 W. L. R. 577.

Motion to Review — *Limitation to Specific Objections—Reference of Whole Bill to Taxing Officer at Toronto as upon Revision — Erroneous Practice — General Objection to all Items — Delegation of Judge's Duty to Taxing Officer.*]—Defendants, being dissatisfied with a taxation, delivered, pursuant to Rule 1182, to plaintiff and to the taxing officer, objections in writing to the taxation. Besides specifying as objected to, a large number of items in the bill, giving reason therefor, concluded with the following general complaint: "The defendants also complain that the bill generally is exorbitant, that the allowances as a rule are too large, and that altogether too much has been taxed for folios, attendances, etc., etc." The local taxing officer confirmed his previous taxation but did not state his reasons for his so doing. Falconbridge, C.J., in Chambers, referred plaintiff's bill of costs to the senior taxing officer at Toronto to be taxed as upon a revision of taxation and to report. On appeal from this order it was held: A Judge in Chambers, upon an application to him under Rule 774 to review a taxation, has no jurisdiction to delegate the duty which the rule imposes upon him, to a taxing officer at Toronto, or to anyone else. He may take the opinion of that officer as to any and all matters arising upon the application, for his own information, but the parties are entitled to have his opinion, and his alone, in determining the questions raised by the appeal. Quay v. Quay, 11 P. P. 258, overruled. *Campbell* v. *Barker*, 2 O. W. R. 504, 5 O. W. R. 372, 9 O. L. R. 291.

New Tariff.] — Plaintiff taxed, in 1896, his costs of recovering judgment, and on appeal it was ordered that there should be a new trial and that the costs of the first trial should follow the event. Plaintiff, finally, in 1901, recovered judgment with costs:—Held, that the costs of the first trial were not now taxable under the new tariff, which came in force in 1897, but that the old taxation must stand. Semble, costs incurred before the new tariff came into force are still taxable under the old tariff. *Harris* v. *Dunsmuir*, 9 B. C. R. 317.

Notice—*Quantum of Costs — Intervention —Insolvent Estate—Curator.*]—If a party, who has received notice that a bill of costs will be taxed, does not attend upon the day fixed in the notice, but merely urges his reasons against the taxation in a letter addressed to the prothonotary, the party who has given the notice, and who has not had his bill taxed at the time fixed, may have it taxed later, at his pleasure, in the absence of his opponent. 2. Upon an intervention made by the curator of the insolvent estate of the defendants upon a saisie conservatoire, and where such curator contests, not the claim of the plaintiff, but only his right to the effects seized, the bill of costs of the curator, whose intervention has been maintained, will be taxed pursuant to art. 60 of the tariff, and not merely as if it was for costs of a petition to set aside the seizure. Semble, that costs incurred by a curator in litigating a proceeding in the name of an insolvent are payable by the unsuccessful party in such proceeding, and not out of the insolvent estate, except in case of default of the unsuccessful party to pay them. *Auger* v. *Montambault*, 5 Q. P. R. 21.

Opposition — *Amendment — Fees.*] — If, after contestation filed, the opposant is allowed to file an amendment to his opposition, necessitating the filing of a new contestation, the opposant will not be entitled thereby to two fees on contestation and two additional fees, but only to such fee as the Court will allow him, the costs of the amendment having been reserved. *Canada Industrial Co.* v. *Kensington Land Co.*, 6 Q. P. R. 237.

Opposition—*Dismissal.*] — The fee on a motion to dismiss an opposition is that of an ordinary motion and not of a preliminary exception. *Giguère* v. *Payette*, 6 Q. P. R. 178.

Opposition—*Dismissal.*]—The fee of the advocate of an execution creditor who obtains, upon motion, the dismissal of an opposition, is the fee appropriate to an opposition dismissed upon preliminary exception. *Smith* v. *Lapointe*, 6 Q. P. R. 216.

Partition Proceedings—Taxed costs — Special circumstances. *McLaughlin* v. *McLaughlin*, 1 O. W. R. 378, 424.

Petition for Revision — *Desistment from Taxation.*]—A party who has had a bill of costs taxed to him adversely, may, after a petition for revision of the taxation has been presented and taken into consideration, desist from the certificate of taxation obtained by him, upon paying the costs of the petition for revision. *Bergeron* v. *Brunet*, 5 Q. P. R. 429.

Railway Act—*Delegation by Judge—Review of Taxation — Principle of Taxation — Items—Desistment—Arbitration.*]—The usual and convenient course in regard to costs of proceedings under the Railway Act, 51 V. c. 29 (D.), provided for by ss. 154 and 158, is not for the Judge to tax in the first instance, but to relegate the bill of costs to an officer conversant with the practice of taxation to ascertain what has been properly incurred; and his conclusions may be adopted or varied by the Judge. If lands are taken compulsorily the costs should be allowed in larger measure than in ordinary litigation, but in a case of mere desistment, it is enough if the bill is fairly taxed: Held, with regard to items in dispute upon taxation—1. That a consent to take possession was not part of desistment proceedings, and the costs of it were properly disallowed. 2. That costs of steps taken to appoint a third arbitrator were not costs of the land owner; the appointment was a matter to be arranged by the two arbitrators already named. 3. That "instructions for brief" upon arbitration should be allowed. 4. That what was actually disbursed in witness fees to a necessary and material witness as to value should be allowed. 5. That the quantum of the counsel fee upon the arbitration was in the discretion of the taxing officer, and should not be interfered with. 6. That "instructions to move for costs of arbitration" was properly disallowed by the taxing officer, in the discretion given by item 38 of the tariff of the Supreme Court of Judicature. 7. That the costs of a formal order for taxation and its incidents, and not a mere fiat or direction to tax, should be

allowed, the liability for costs having been disputed: see 6 O. L. R. 543. *In re Oliver and Bay of Quinte R. W. Co.*, 24 Occ. N. 296, 7 O. L. R. 567, 2 O. W. R. 953, 3 O. W. R. 318.

Registration of Judgment — *Copy — Appeal.*]—Held, on appeal from the taxation of the prothonotary, that the party who obtains judgment has a right to have a copy of it made and to have it registered, and the expense forms part of the costs of the cause and may be recovered from the adverse party, if the judgment, as in this case, is confirmed, or if the opposite party does not appeal. *Luneau* v. *Luneau*, Q. R. 19 S. C. 146.

Rehearing—*Fee on Enquête.*]—After a cause has been dismissed at the hearing, and a rehearing has become necessary, the parties are entitled to a fee upon the rehearing, but not to a second fee upon the enquête. *Coke* v. *Arnold*, 6 Q. P. R. 238.

Review — *Abandoned Appeal — Briefs — Counsel Fee.*]—On the 20th May the plaintiffs gave notice of appeal, to come on at the November sitting of the full Court, from an order requiring them to give security for the costs of the action. On the 3rd June the appeal was abandoned:—Held, on a review of taxation, that the respondents were entitled to tax briefs and a counsel fee. Counsel fee under the circumstances fixed at $10. A taxation may be reviewed under Rule 583, as well as under Rule 790. *Fry* v. *Botsford*, 22 Occ. N. 378, 9 B. C. R. 207.

Review—*Irregular Proceedings — Insufficient Affidavit on Production—Several Subpœnas.*]—It is not open to a party on taxation of costs to take objections which could or should have been taken by application to set aside the proceedings, or by way of appeal. On this principle costs were allowed as follows: (1) The costs of an order de bene esse, irregularly obtained, were allowed to the defendant, where no application had been made to set it aside, and the plaintiff's advocate had attended on the examination; (2) the costs of an insufficient affidavit on production, where an application for a better affidavit had been dismissed and no appeal taken; (3) the costs of an order to examine the plaintiff issued ex parte and without notice, where an application to set it aside had been refused, and the grounds of the refusal were not shewn on the review. A subpœna for each of several witnesses may be allowed where they reside in different parts of the country, and the same original cannot be conveniently produced to them all. *Craig* v. *New Oxley Ranche Co.*, 2 Terr. L. R. 277.

Severing Defences — *Items — Setting Aside Judgment—Fi. Fa. Lands—Examination for Discovery.*] — Where an action is brought against two or more defendants, and any defendant separates in his defence, and the judgment is against all the defendants, the law is, that each of them is liable to the plaintiff for all costs taxed by him as properly incurred by him in the maintenance of his action, except as to costs caused to him by so much of the separate defence of any defendant as is and can be a defence for that defendant only as distinguished from the other defendants. The rule in Stumm v. Dixon, 22 Q. B. D. 99, 529, applied to an action on a contract. In an action against two joint makers of a promissory note, who, though they set up substantially the same defence, severed in their defences:—Held, that on the taxation of the plaintiff's costs the following items should be allowed as against both defendants: (1) costs of a concurrent writ of summons against one of the defendants: (2) costs occasioned by the separate defences of each defendant; (3) costs of the examination for discovery of one of the defendants, although, as the other defendant had not been notified of the intention to hold the examination, the depositions were not admissible in evidence against him. Where a judgment by default was set aside, and the defendant was given leave to defend on payment of costs:—Held, that the defendant was liable to pay the costs of a fi. fa. lands issued concurrently with a fi. fa. goods. *Lougheed* v. *Parrish*, 4 Terr. L. R. 54.

Solicitor's Letter before Action.]—A debtor is not obliged to pay the costs of a letter before action received from an advocate. Rioux v. Plaisance, Q. R. 21 S. C. 574. *Lay* v. *Cantin*, Q. R. 23 S. C. 405.

Solicitor's Letter before Action.]—A debtor who receives a solicitor's letter, cannot, as against the solicitor, or the creditor, be required to pay a fee for such letter. *Robson* v. *Smith*, 5 Q. P. R. 252.

Special Fee—*Allowance by Judge.*] — A Judge will not take cognizance of a bill of costs and allow a special fee, until the bill has been taxed by the prothonotary. *Campbell* v. *Montreal Street R. W. Co.*, 7 Q. P. R. 79.

Supreme Court of Canada — *Staying Taxation.*]—At the trial the plaintiffs' action was dismissed, but the full Court allowed an appeal by the plaintiffs. On appeal the Supreme Court of Canada allowed the appeal of a defendant, W., and ordered the plaintiffs to pay him the costs of that appeal and also all costs in the Court below, except in so far as he was to be regarded as the representative of the mortgagor in an action to realize a mortgage security, which costs were reserved till final decree. By the same judgment the action was dismissed as against W., except in so far as it was considered to be in the nature of a mortgage action for the purpose of enforcing a security:—Held, reversing an order staying the taxation of W.'s costs of appeal to the full Court until final decree, that there was no jurisdiction to make the order staying taxation. The application should have been made to a Judge of the Supreme Court of Canada instead. *Merchants Bank of Halifax* v. *Houston*, 22 Occ. N. 339, 9 B. C. R. 158.

Tariff—*Provisions of—Circuit Court.*]—Where an action is dismissed upon motion for peremption, after the filing of a plea to the merits, Art. 8 of the tariff of fees of advocates in Circuit Courts applies to the taxation of the costs, and not Art. 9. *Moody* v. *Lachance*, 6 Q. P. R. 99.

Trial of Several Actions Together —*Effect on Costs—Witness Fees—Party in Interest—Bailiff's Fees—Search for Absent Defendant.*]—The fact that several actions are tried together does not prevent the advocates from receiving the fees on examination

and hearing for each of the causes, but only reduces the costs of stenography and witness fees. 2. Witness fees may be allowed for the person declared elected by a judgment sustaining a quo warranto, if he is not otherwise a party to the proceeding. 3. Where the defendant is designated in the writ of summons as absent, the bailiff will not be allowed on taxation for searches for this defendant. *Henry* v. *Sanderson*, 6 Q. P. R. 191.

Triple Costs—*Justice of the Peace — Appeal — Witness Fees.*]—The triple costs which the unsuccessful plaintiff is condemned to pay in an action under Art. 2555, R. S. Q., do not include triple costs of review, nor triple witness fees. 2. The Judge has no discretion to exercise under this provision of the law, and when he adjudges that a penal action against a justice of the peace is not well founded, and dismisses it, he must allow triple costs to the defendant. 3. Where the judgment of first instance dismisses the action with costs, and the plaintiff appeals to the Court of Review, which simply affirms the judgment with costs, triple costs should not be taxed by the prothonotary. 4. But where the judgment of first instance dismisses the action without costs, and the defendant appeals from such judgment and claims triple costs, the Court of Review will grant them to him, and the prothonotary should tax them. *Luneau* v. *Janeau*, 3 Q. P. R. 505.

Withdrawal of Action.] — When a cause inscribed for hearing on the merits is, during the sitting of the Court, withdrawn with costs, by the plaintiff, the defendant has a right to the same fees as if the action had been dismissed (item 9, tariff C. C.), but without fees of the hearing (items 10 and 11, C. C.), if no witness is present in Court, the defendant having been notified that the action would be thus withdrawn. *Gosselin* v. *Giroux*, Q. R. 19 S. C. 145, 3 Q. P. R. 370.

XI. WITNESS FEES,

Advocate—*Experts—Parties.*] — An advocate duly admitted to practise, but whose name is not upon the roll, has the right, nevertheless, when he is called as a witness and his title of advocate given to him upon the subpœna, to be considered an advocate, and upon taxation a professional witness fee will be allowed. 2. If witnesses swear that they had in a cause the quality of experts and such declaration is not contradicted, expert witness fees will be taxed. 3. The manager of a company, party to the cause, is to be regarded as an ordinary witness if called as such, and a witness fee will be allowed on taxation. *Canada Industrial Co.* v. *Kensington Land Co.*, 3 Q. P. R. 379.

Allowance by Trial Judge—*Revision —Special Expenses.*] — The Court has no power to revise the taxation of a witness made in open Court at the trial; counsel must then urge their objection, and, if required, seek the remedies available as to judgments of the Court. 2. If a party wishes to recover special expenses incurred in connection with a suit, taxation after judgment is not the proper proceeding therefor. *Buchan* v. *Montreal Bridge Co.*, 5 Q. P. R. 337.

Experts—*Damages.*]—The plaintiff cannot tax as part of the costs of an action the fees of experts called to prove his claim; witness fees in respect of such experts may be taxed, reserving to the plaintiff the right to claim as part of his damages the fees which he has paid. *Crawford* v. *City of Montreal*, Q. R. 19 S. C. 323.

False Affidavit of Increase—*Taxation — Setting Aside Certificate — Affidavit — Information and Belief — Refusal to Make Affidavit — Compulsory Examination.*] —The English practice requiring proof of actual payment of witness fees as a condition precedent to their being allowed on taxation of costs, should be followed. Where on an affidavit that witness fees have been actually paid they are allowed on taxation without objection on the ground of falsity of the affidavit, the proper mode of attacking the allowance is by an application by way of motion to the Court, and not by way of review of the taxation. On such an application, an affidavit of information and belief, stating the grounds thereof, is sufficient foundation for a motion to set aside the certificate of taxation and refer it back to the taxing officer to ascertain whether or not at the time of the taxation the witness fees in question had in fact been paid. There is authority under Rule 267 of the Judicature Ordinance (C. O. 1898 c. 21) to order a person who has refused to make an affidavit to attend for examination under oath. *Grindle* v. *Gillman*, 4 Terr. L. R. 180.

Female Witnesses.]—Witness fees may be taxed in respect of women who are witnesses, at the same rates as men. *Hersey* v. *Chapman*, 6 Q. P. R. 319.

Parties.]—A witness subpœnaed but not called by the party who has subpœnaed him cannot be allowed for on taxation against the opposite party without his consent. 2. A party called as a witness is regarded as an ordinary witness and has the right to tax a fee for himself. *Royal Electric Co.* v. *Dupéré*, Q. R. 19 S. C. 29.

Revision — *Commissioner — Foreign Commission — Fee Charged.*]—Taxation of witness fees will be revised on petition to a Judge, if good ground is shewn. 2. There is no tariff of charges for commissioners executing commissions outside of the province. 3. A fee of $50 for a commission in an action of the first class is not excessive. *Hersey* v. *Chapman*, 6 Q. P. R. 273.

Revision.]—Where it is admitted that a witness complained of the insufficiency of the amount of his taxation, and it is established that he was examined as an expert, he is entitled to have his taxation revised after judgment rendered, and this with costs against the party who subpœaned him, although judgment was in favour of such party. *Guinea* v. *Campbell*, Q. R. 22 S. C. 262.

Revision—*Professional Person.*] — The taxation of a witness by the prothonotary

is subject to revision by the Judge in the same way as the taxation of costs. 2. A professional man (e.g., a member of the Bar), not called as an expert witness, is only entitled to $1 a day and expenses. *Gardner* v. *Marchildon*, 5 Q. P. R. 323.

Taxation of — Counsel fees—Delay at trial. *John Abell Co.* v. *Long*, 1 W. L. R. 24.

Taxation of—*Effect of—Action for.*]—The taxation of a witness fee in a cause is equivalent to a judgment in favour of the witness, and such judgment may be enforced against the party who has subpœnaed the witness. A fresh action does not lie to recover the amount; the witness has simply to issue an execution. *Paradis* v. *Labbé*, 4 Q. P. R. 415.

Taxation of—*Execution for—Action by Witness.*]—A witness, whose witness fees have been taxed in an action, has, according to Art. 336, C. P., the right to an execution for the amount taxed against the party who subpœnaed him, but he has not the right to bring an action for such amount. *Paradis* v. *Labbé*, Q. R. 21 S. C. 211.

Taxation of—*Motion to Revise.*]—The taxation of a witness being, under Art. 336, C. C. P., equivalent to a judgment on which he is entitled to sue out execution, the Court has no authority to revise or reduce such taxation. *Lessard* v. *Meunier*, Q. R. 20 S. C. 337.

Taxation of—*Motion to Revise—Time.*]—The taxation of the fees of a witness who is heard in open Court, takes place in the presence of the Court, and constitutes a judgment which may be executed in the manner and after the delay prescribed by the Court (Art. 335, 336, 370, C. C. P.) And even if such taxation were considered a judgment by the prothonotary, and not by the Court, in this case the application to revise was made too late, the time for objection being while the taxation was being effected. *Campeau* v. *Ottawa Fire Ins. Co.*, Q. R. 20 S. C. 239, 4 Q. P. R. 197.

Taxation of—Payment—Affidavit of increase — Travelling expenses — Railway passes.— *Kerr* v. *Canadian Construction Co.*, 5 O. W. R. 168.

Taxation of — *Plaintiff Coming from Abroad to Give Evidence—Travelling Expenses — Subsistence Money — Plaintiff Remaining after Trial.*]—Appeal by defendants from taxation by the deputy clerk of the Crown at Hamilton of plaintiff's costs of the action, in respect of the allowance of plaintiff's travelling expenses from England to Toronto to attend the trial for the purpose of giving evidence on her own behalf and in returning to England, and of the further allowance to her of subsistence money at the rate of $1.25 a day, from 24th September, 1904, to 9th April, 1905, during which time the plaintiff remained in Ontario, so as to be here to give evidence at a new trial, should it be so ordered by the Divisional Court. Appeal allowed as to the travelling expenses of plaintiff in coming from England to give her evidence on her own behalf and of returning to England, and the per diem allowance for the time necessarily occupied in doing so, but not for subsistence money after the trial, as there would have been no difficulty in her returning to Toronto in time for the new trial if one had been ordered. *Tattersall* v. *People's Life Insurance Co.*, 6 O. W. R. 284, 10 O. L. R. 537. See also 5 O. W. R. 307, 6 O. W. R. 756, 9 O. L. R. 611.

Taxation of — *Revision.*]—The taxation of a witness constitutes a judgment in his favour which entitles him to execution against either of the parties; it is copied in the bill of costs, but not taxed with it, and cannot be revised on a motion for the taxation of the bill without notice to the witness. Campeau v. Ottawa Fire Ins. Co., 4 Q. P. R. 197, followed. *Magann* v. *Grand Trunk R. W. Co.*, 4 Q. P. R. 348, Q. R. 21 S. C. 72.

XII. Other Cases,.

Added Defendants—Unnecessary Parties. *Gurney* v. *Tilden*, 1 O. W. R. 207.

Amendment after Inscription.] — A defendant who amends his pleas after the cause has been inscribed for enquête et mérite must pay the difference between items 7 and 8 of the tariff. *Union Bank of Halifax* v. *Vipond*, 3 Q. P. R. 490.

Appeal on Merits where only Costs Involved. *Holmes* v. *Town of Goderich*, 1 O. W. R. 367, 814.

Appeal to Court of Appeal—Parties —Added plaintiff. *Murray* v. *Wurtele*, 1 O. W. R. 298, 353.

Appeal—*Trifling Success.*]—A defendant appealed to the Superior Court in review from a judgment against him for the recovery of $115.55, and succeeded in reducing the amount of the judgment, but only by $5:—Held, that he was entitled to the costs of the appeal against the plaintiff. *Gamache* v. *Déchene*, 3 Q. P. R. 390.

Appeal to Court of Review—*Discretion of Trial Judge.*]—The Court of Review (Quebec) will not alter the order as to costs of the Judge of first instance, unless the latter has made an unreasonable use of the discretion which the law allows him. *In re Hurtubise and Birks*, Q. R. 26 S. C. 137.

Appeal to Privy Council—*Costs Incurred in Canada—Taxation—Order for — Rules 818, 1255.*]—Appeal by plaintiffs from an order of Falconbridge, C.J., upon a petition of defendants, directing that it should be referred to the senior taxing officer to ascertain the amount to which the petitioners were entitled under the terms of the order of the Privy Council of 10th December, 1901, with reference to the costs incurred in Canada in relation to an appeal to the Judicial Committee, and directing plaintiffs to pay to defendants the costs of the petition and reference:—Held, dismissing the appeal with costs, that rule 1255 (818a) simply gives effect to R. S. O. 1897, Ch. 48 s. 7, and does not carry the procedure beyond what is therein provided for. It is a rule

of procedure and applies, but even without Rule 1255, plaintiffs are entitled under the above Act and Rule 818, to have the costs ascertained "as if the decision had been given in the Court below." *Earle* v. *Burland*, 5 O. W. R. 629, 9 O. L. R. 663; see also 1 O. W. R. 527, 2 O. W. R. 769, 3 O. W. R. 702, 23 Occ. N. 276, 24 Occ. N. 355, 8 O. L. R. 174.

Application to Stay Actions Against Administratrix—Ascertainment of assets of estate—Payment of creditors—Costs of actions. *Rat Portage Lumber Co.* v. *Martin* (N.W.T.), 2 W. L. R. 85.

Arbitration under Railway Act — Taxation by Judge. *Re Parks and Lake Erie and Detroit River R. W. Co., Re McAlpine and Lake Erie and Detroit River R. W. Co.*, 1 O. W. R. 484.

Defence to Criminal Charge—*Acquittal—Action Against Prosecutor for Costs—Taxation by Judge.*]—The plaintiff had been criminally prosecuted by the defendant for a libel, and had been acquitted by the verdict of a jury. At the time the verdict was given no demand was made for costs against the prosecutor; and the plaintiff afterwards brought this action to recover the costs of his defence to the criminal proceedings. The Judge who tried this action ordered that the costs in question should be taxed by the Judge who had presided at the criminal trial, and this having been done, the action again came on for hearing:—Held, that the plaintiff could claim his costs and disbursements against the defendant by an ordinary action, although he had not asked costs at the time the verdict was rendered. 2. That the Judge who had presided at the criminal trial could not, even after such trial, tax the costs. *Murray* v. *Hughes*, Q. R. 19 S. C. 367.

Dismissal of Action—*Costs of Declinatory Exception—Bringing in Guarantor.*]—A plaintiff whose action has been dismissed with costs, "except, however, the costs occasioned by the appel en guarantie," is nevertheless responsible for the costs of the declinatory exception taken by the principal defendant, whose action en guarantie has also been dismissed, for the purpose of bringing in his guarantor. *Robert* v. *Rocheleau*, 4 Q. P. R. 39.

Extra-judicial Seizure Under Chattel Mortgage — Statutory limitation of costs—Contract to avoid—Penalty—Recovery by action of excessive costs charged and deducted. *Yukon Hardware Co.* v. *McLennan* (Y.T.), 2 W. L. R. 294.

Fisheries Act — *Conviction—Penalty—Remission by Minister of Crown—Power to Remit Costs—Magistrate—Mandamus.*]— R. was convicted under s. 18 of the Fisheries Act, as amended by the Act of 1898, and fined $20 and costs. Both fine and costs were remitted under s.-s. 6 of s. 18, which provides that "persons aggrieved by any such conviction may appeal by petition to the Minister of Marine and Fisheries, who may remit penalties and restore forfeitures under this Act." G., the prosecutor, applied to the convicting magistrate for a warrant of distress for the costs, contending that the Minister of Marine and Fisheries had no power to remit the costs. The magistrate refused to issue the warrant, and a mandamus was moved for:—Held, by Tuck, C.J., Hanington and McLeod, JJ., that the Minister had no power to remit the costs, and it was the duty of the magistrate to issue the warrant of distress for their recovery, and that the mandamus should go:—Per Barker and Gregory, JJ., that, the penalty having been remitted, the magistrate had no power to proceed to collect the costs; or, at all events, his right was so doubtful that the Court, in the exercise of its discretion, should refuse the mandamus. Per Landry, J., that the term "penalties" in the section included costs as well as fine, and the Minister therefore had power to remit the costs. The Court being thus equally divided, the rule for the mandamus dropped. *Ex. p. Gilbert*, 36 N. B. Reps. 492.

Judgment after Third Trial—*Costs of Previous Trials—Counsel Fee — Order for Judgment—Form of.*] — On a motion by the plaintiff for an order for judgment on the verdict of the third trial of the action, a question arose as to the right to the costs of the former trials, and also as to the form of the order, the question of damages having been referred to a special referee:—Held, that the plaintiff was entitled to an order for an interlocutory judgment, in the form in Chitty's Forms. 2. That a counsel fee could not be fixed. The former rule as to costs of the previous trials is not now law. It seems to have been a Rule of Court, Hilary Term, 1853, and there was also an express Rule in the C. L. P. Act, 1854. Creen v. Wright, 2 C. P. D. 354, and Field v. Great Northern R. W. Co., 3 Ex. D. 262, make the costs of the former trials the plaintiff's costs. *Bartlett* v. *Nova Scotia Steel Co.*, 25 Occ. N. 130.

Leave to Appeal as to—Ex parte application—Discretion of trial Judge—Scale of costs. *Hennbecker* v. *McNaughton*, 2 O. W. R. 1064.

Mechanic's Lien—Tender—Payment into Court—Taxing officer—Practice. *Nixon* v. *Betsworth*, (Man.), 2 W. L. R. 570.

Money in Court—Legacy—Mental competency of legatee—Payment out of costs of parties to action—Intervention of official guardian. *Ramsay* v. *Reid*, 2 O. W. R. 720, 4 O. W. R. 113, 6 O. W. R. 114.

Mortgage Action — Redemption—Costs of appeal in former action—Attempt to add to claim—Dismissal without costs. *Nelson* v. *Nelson*, 2 O. W. R. 956, 3 O. W. R. 884.

Motion for Summary Judgment. *Lawrence* v. *Smith*, 2 O. W. R. 521.

Motion to Stay Proceedings upon Judgment at Trial Pending Appeal—Costs in cause. *Stonor* v. *Lamb* (Y.T.), 2 W. L. R. 514.

Offer to Suffer Judgment by Default—*Time of Offer.*]—An action for false imprisonment was entered for trial at the Carleton Circuit, which opened on the 24th April, 1900. The trial actually took place on the 24th and 25th April, the first and

second days of the Circuit. On the 17th April, seven days before the trial began, and eight before the jury found their verdict, the defendants filed and served an offer and consent to suffer judgment by default, under 60 V. c. 24, S. 185, for the sum of $75, the same amount as the jury gave as damages in their verdict:—Held, that, as the plaintiff, under s. 185, is entitled to ten days to determine whether or not she will accept the offer, if the defendants see fit to delay making their offer until less than ten days before the trial and verdict, they are not entitled to have advantage as to costs of the provisions of s. 184; and therefore the plaintiff was entitled to costs of the trial. *Sharp* v. *Woodstock School Trustees*, 21 Occ. N. 56.

Order for, after Judgment—*Mortgage — Disclaimer — Defence.*]—The plaintiff brought an action against the defendant as mortgagee, and asked that the defendant should be ordered to abandon or to pay the debt of the plaintiff, with costs against the defendant personally if he contested the action. The defendant did contest the action; judgment was against him upon his defence; but it only ordered him to abandon, or to pay the debt, principal, interest, and costs, in default of abandoning within the time fixed. The defendant then abandoned, and the plaintiff made a motion for an order upon the defendant personally for costs:—Held, that the plaintiff was entitled to such order, although final judgment had been rendered. *Marchand* v. *Chaput*, Q. R. 19 S. C. 322.

Partnership Action. *Youngson* v. *Stewart*, 2 O. W. R. 112, 270.

Partnership Action.—Dissolution —Deduction from assets—Indebtedness of plaintiff to defendants—Set-off. *Bockfinger* v. *Murray* (Y.T.), 1 W. L. R. 260.

Payable by which Party — *Contested Collocation.*]—The costs of a contestation of a report on distribution will be awarded against the defendant when the circumstances of the case shew that such contestation has been provoked rather by his fault than by the error of the other parties. *Belgarde* v. *Carrier*, 3 Q. P. R. 513.

Receiver — Partnership — Advance by Partner—Priority. *Merritt* v. *Nissen*, 1 O. W. R. 456.

Referee's Report—*Exceptions.*]—Where exceptions to a referee's report were allowed in part, no costs to either party were allowed. *Lawton Saw Co.* v. *Machum*, 21 Occ. N. 133, 2 N. B. Eq. Reps. 191.

Right to—Dismissal of action for seduction—Death of plaintiff's daughter—Discretion—Dismissal without costs. *Hiscock* v. *McMillan*, 2 O. W. R. 913.

Setting Aside Regular Judgment by Default—*Terms—Appeal.*]—The defendant was permitted (30 N. S. Reps. 393) to supplement his affidavits and renew an application to set aside a judgment against him in a County Court for default of plea. He thereupon filed an affidavit disclosing a good defence on the merits, and renewed his application, which the plaintiff opposed. The Judge of the County Court, being of the opinion that the plaintiff, in opposing the application, acted unreasonably and oppressively, set aside the judgment with costs to be paid by the plaintiff:—Held, that he erred in doing so; that the order must be so far modified as to give the plaintiff the costs of the judgment, and execution if any, and the defendant the costs only occasioned by the plaintiff opposing the renewed application; that, the judgment having been regularly entered, the defendant's application was to the indulgence of the Court, and could only be allowed on payment of costs thrown away. *Piper* v. *King's Dyspepsia Cure Co.*, 20 Occ. N. 407, 33 N. S. Reps. 278.

Supreme Court of Canada—*Execution —Leave.*]—Where a judgment of the Supreme Court of Canada has been certified to the clerk of the Court below, as provided by R. S. C. c. 105, s. 67, it becomes a judgment of the Court below, and it is not necessary to obtain leave to issue an execution to enforce the payment of costs awarded to the applicant by such judgment. *Ex. p. Jones*, 20 Occ. N. 87, 35 N. B. Reps. 108.

Third Party — Dismissal of action — Plaintiff ordered to pay costs—Discretion—Appeal. *Russell* v. *Eddy*, 5 O. L. R. 379, 2 O. W. R. 164.

Third Party—Indemnity—Extent of Liability—Court of Appeal—Time for disposing of costs—Several appeals. *Gaby* v. *City of Toronto*, 1 O. W. R. 440, 606, 635, 711.

Trial—Motion for judgment. *Lachance* v. *Lachance*, 1 O. W. R. 518, 778.

COUNCIL.

See MUNICIPAL CORPORATIONS.

COUNCIL OF CONCILIATION.

Default in Summoning—*Exception—Statute — Judicial Notice.*] — An exception upon the ground of default to summon a council of conciliation, is not answered by the production of defences on the merits. The statute requiring such a council, being of public order, may be invoked at any time, and the Court is bound even to invoke it upon its own motion. *Fortin* v. *Vaillancourt*, 6 Q. P. R. 66.

COUNCILLORS.

See MUNICIPAL CORPORATIONS.

COUNSEL FEES.

See COSTS—SOLICITOR.

COUNTERCLAIM.

See PARTIES—PLEADING—SALE OF GOODS.

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I. BRITISH COLUMBIA—COUNTY COURTS.

Attachment of Debts—*Summons.*]—A garnishee summons in a County Court may be issued based on a default summons as well as on an ordinary summons. *Jowett* v. *Watts*, 24 Occ. N. 36, 10 B. C. R. 172.

Equitable Jurisdiction — *Action for Rent—Void Lease.*]—It is part of the equitable jurisdiction of the Court to enforce payment of rent when the lease is void, and when the value of such lease, if valid, would exceed $2,500, a County Court has no jurisdiction. *British Columbia Board of Trade Building Assn.* v. *Tupper*, 8 B. C. R. 291.

Jurisdiction—*Discovery — Oral Examination.*]—A County Court Judge has no jurisdiction to grant an order for an oral examination for discovery except in the case of a failure to answer interrogatories. *Roberts* v. *Fraser*, 22 Occ. N. 438, 9 B. C. R. 296.

Practice—*Setting Aside Judgment—New Trial.*]—A County Court Judge has no power to grant a new trial merely because he is dissatisfied with the verdict; he is to be guided in granting a new trial by the same principles as the full Court:—Held, on the facts, that there was evidence to support the verdict, and a new trial should not have been granted. *Hutchins* v. *British Columbia Copper Co.*, 23 Occ. N. 340, 9 B. C. R. 535.

Right of Crown to Choose Forum——It is a prerogative right of the Crown to bring a suit in a County Court, even though as between subject and subject such Court would not be open by reason of the defendant not residing or the cause of action not residing within the territory of such Court. *Rex* v. *Campbell*, 8 B. C. R. 208.

Stay of Proceedings—*Mining Jurisdiction—Prohibition.*] — On an application for prohibition:—Held, allowing the application, that s. 34 of the County Courts Act, which provides, inter alia, that if any action of tort the plaintiff shall claim over $250, and the defendant objects to the action being tried in the County Court, and gives certain security, the proceedings in the County Court shall be stayed, applies to proceedings in the County Court, under the mining jurisdiction of that Court. *Muirhead* v. *Spruce Creek Mining Co.*, 24 Occ. N. 414, 11 B. C. R. 1.

Territorial Jurisdiction—*Judgment by Default—Application to Set Aside and for Leave to Defend—Waiver.*]—In a plaint in the County Court of Yale it appeared that the defendants resided in Vancouver, outside the county of Yale, and the plaintiff's claim was described as being "against the defendants as makers of a promissory note for $179.12 dated 12th March, 1902, payable two months after date." Judgment for the plaintiff was signed in default of a dispute note, but afterwards the defendants filed a dispute note (what it contained was not shewn), and applied to the Judge to have the judgment set aside and for leave to defend on the merits. On the hearing of the application it appeared that the Court had jurisdiction, as the note sued on was produced on affidavit, and it shewed on its face that it was made and payable within the county of Yale:—Held, that County Court process should shew jurisdiction on its face, but the defendants, by filing the dispute note, and applying for leave to defend on the merits, had waived their right to object to the jurisdiction. *Beaton* v. *Sjolander*, 23 Occ. N. 161, 9 B. C. R. 439.

II. BRITISH COLUMBIA — SMALL DEBTS COURTS.

Jurisdiction—*Judgment Debtor — Committal — Notice of Motion — Solicitor — Waiver.*]—A notice by a judgment creditor's solicitor of an application to a magistrate of a Small Debts Court for an order to

commit a judgment debtor because of failure to pay instalments ordered to be paid on the return of a judgment summons, is a nullity. —A judgment debtor by appearing pursuant to such notice does not waive his right to object at any stage. *In re Waxstock*, 9 B. C. R. 433.

III. British Columbia—Supreme Court.

Full Court—*Motion for Judgment—Reference by Trial Judge.*]—At the conclusion of the trial of an action for damages for personal injuries, the trial Judge did not see fit to enter any judgment on the findings of the jury, but left the parties to move the full Court as they might be advised. Both parties accordingly moved the full Court for judgment, the arguments being confined to the question of the liability of the defendant company:—Held, per Walkem, Drake, and Irving, JJ., that the full Court is an appellate Court and has no jurisdiction to hear a motion for judgment on the findings of a jury referred to it by a trial Judge. Per Martin, J. (dissenting), that, as the question of jurisdiction was not raised by counsel nor by the Court, the case should be dealt with on its merits, and that judgment should be entered in favour of the defendant company. *McKelvey* v. *Le Roi Mining Co.*, 22 Occ. N. 42, 8 B. C. R. 268.

Full Court—*Place of Sitting.*] — Held, Drake, J., dissenting, that special sittings of the full Court may be held either at Victoria or Vancouver to hear appeals in actions, irrespectively of where the writs of summons were issued. *Yale Hotel Co.* v. *Vancouver, Victoria, and Eastern R. W. and Navigation Co., Grand Forks and Kettle River R. W. Co.* v. *Vancouver, Victoria, and Eastern R. W. and Navigation Co.*, 9 B. C. R. 66.

Rule Nisi to Quash Conviction — *Forum.*]—The full Court will not hear a motion for a rule nisi to quash a conviction; the motion should be made to a single Judge. *Rex* v. *Tanghe*, 24 Occ. N. 198, 10 B. C. R. 297.

IV. Manitoba—County Courts.

Jurisdiction—*Title to Land—Gravel on Highway—Municipal Corporations—Costs.*] —1. A claim of a municipality for damages for the taking by a railway company of sand and gravel from alleged highways and allowances for roads in the municipality, not in its actual possession or occupation, if disputed, raises a question of the title to a corporeal hereditament within the meaning of s. 59 of the County Courts Act, R. S. M. c. 33, and the jurisdiction of the County Court to adjudicate on such claim is ousted when such a question of title is bona fide raised, notwithstanding the provisions of ss. 615 and 644 of the Municipal Act, R. S. M. c. 100, giving the right of possession of such roads to the municipality and power to pass by-laws for preserving or selling timber, trees, stone, or gravel on any of such roads.—2. Under the enactment substituted for s. 315 of the County Courts Act by 59 V. c. 3, s. 2, an appeal to this Court lies from the decision of a County Court Judge on the question of jurisdiction as well as from all other decisions in actions in which the amount in question is $20 or more. Fair v. McCrow, 31 U. C. R. 599, and Portman v. Patterson, 21 U. C. R. 237, followed.—3. Although the action in the County Court failed for want of jurisdiction, the plaintiff should be ordered to pay the costs of it under s. 1 of c. 5 of 1 Edw. VII. and also the costs of the appeal. *Municipality of Louise* v. *Canadian Pacific R. W. Co.*, 22 Occ. N. 124, 14 Man. L. R. 124.

V. New Brunswick—City Court.

Fees — *Control Over, by City Council — Commissioner—Servant of Crown.*]—G., having applied to the commissioner of the City Court of Moncton for a summons, was refused unless he first paid the fee for the issuing thereof. Relying upon a recommendation in a report of the finance committee of the city council of the said city, which was received and adopted by the council, G. then moved the Court for a rule nisi calling upon the commissioner to shew cause why a mandamus should not issue to compel him to issue the summons without the fee being paid or tendered in advance. The recommendation was as follows: "Your committee would recommend that hereafter any and all claims within the jurisdiction of said Court may be sued and judgment therein taken without the payment of costs in advance, but that the same be retained out of the first moneys collected on the judgment:"—Held, that, as the commissioner was an appointee and servant of the Crown, and in no way responsible to the city or under its direction or control, it could not by resolution create any duty or obligation upon the commissioner to issue the summons without the fee therefor being prepaid. 2. That the report and its adoption amounted to nothing more than a recommendation to the commissioner, which he was at liberty to act upon or not according to his discretion. *Ex p. Grant*, 35 N. B. Reps. 45.

Judgment of—*Estoppel by—Review by County Court—Action against Bail—Jurisdiction of Supreme Court—Relief of Bail.*]—The Supreme Court has jurisdiction to try an action against bail given in a cause originating in an inferior Court, and has power to give such relief to the bail as justice may require. The former practice of the King's Bench in England of refusing to try such actions and of compelling them to be brought in the inferior Court has never been followed in this province.—The judgment of an inferior Court is not conclusive as between the parties and their privies upon the question of jurisdiction; therefore, where an action was brought in the Supreme Court against bail given in a cause, which had been commenced and tried in the City Court of Saint John, and the defendant by plea denied the jurisdiction of that Court, and at the trial gave evidence in support of his plea:—Held, that the defendant was not estopped by the judgment of the City Court from offering such proof, and that, as the plaintiff had chosen to rely entirely upon the estoppel, he must fail. The fact that the judgment relied upon by way of estoppel had been affirmed upon review by a County Court Judge made no difference. *Jack* v. *Bonnell*, 35 N. B. Reps. 323.

VI. New Brunswick—County Courts.

County Court Judge—*Order on Review from City Court—Certiorari.*]—If an order made by a County Court Judge on Review from a City Court is manifestly wrong, it will be set aside on certiorari, notwithstanding that the Judge had jurisdiction. *Rex* v. *Forbes, Ex p. Bramhall*, 36 N. B. Reps. 333.

Jury—*Questions Left—Verdict—Duty of Judge.*]—Section 158 of the Supreme Court Act, N. B., 60 V. c. 24, authorizing the Judge on the trial of a cause to direct the jury to answer questions submitted, and enter a verdict on the answers given, applies to County Courts. When this course is adopted, it is the Judge's duty to enter the verdict for the party in whose favour the questions are answered. *Steeves* v. *Dryden*, 35 N. B. Reps. 555.

Jury — *Questions — Verdict — Supreme Court Act.*] — Section 158 of 60 V. c. 24 (New Brunswick Supreme Court Act), providing that the Judge, instead of directing the jury to give either a general or special verdict, may submit questions of fact and enter a verdict on the questions answered, applies to the County Courts. *Read* v. *McGivney*, 36 N. B. Reps. 513.

Motion to Set Aside Verdict—*Grounds—Appeal—Nonsuit.*]—On a motion against a verdict in a County Court, it is not necessary to serve a statement of the grounds of the motion and the authorities relied upon. —The Supreme Court, on appeal, may order a nonsuit to be entered, though no leave has been reserved at the trial. *Miller* v. *Gunter*, 36 N. B. Reps. 330.

New Trial—*Damages—Consent to Reduction.*]—The power of ordering a new trial, unless the plaintiff consents to a reduction of the damages, is vested in the Judges of the County Courts under s. 68 of the County Courts Act. *Vanbuskirk* v. *Vanwart*, 36 N. B. Reps. 422.

Review from Justice's Court—*Territorial Jurisdiction.*]—A Judge of a County Court has jurisdiction to hear a case on review from a Justice's Court though the case was tried in a county for which he is not the County Court Judge. Rex v. Wilson, Ex p. Irving, 35 N. B. Reps. 461, explained and commented upon. *Ex p. Graves*, 35 N. B. Reps. 587.

VII. New Brunswick—Probate Court.

Powers of Judge — *Order for Sale of Land to Pay Debts — Administration of Estate—Accounts — Deficiency of Personalty —Ascertainment — Appeal—Status of Appellant—Order Extending Time.*]—A Judge of Probate is not warranted in granting a license to sell real estate to pay debts, unless he is judicially satisfied by proof, and finds the amount of the personalty and the amount of the debts, and thus ascertains what the deficiency is. A bald adjudication that there is a deficiency based on a list of attested accounts, and the evidence of the petitioner that they were filed against the estate, is not sufficient. A party aggrieved by a decree of a Judge of Probate may appeal therefrom, although he did not appear in the Court below. An order extending the time for appeal made ex parte is not a nullity, and, if not set aside, the Court will hear an appeal taken under it. *In re Welch*, 36 N. Reps. 628.

VIII. New Brunswick — Small Debts Court.

Review—*Affidavit — Agent of Party—Amount Involved—Forum for Review—Finality of Order.*]—The affidavit that substantial justice has not been done, made on review proceedings from a judgment of the Small Debts Court of Fredericton, may be made by the attorney or agent of the party reviewing under 45 V. c. 15, s. 1. There is no authority under C. S. N. B. c. 60, or amending Acts, to review the finding of a justice or the jury on a question of fact where the amount involved in the suit does not exceed $40 in debt and $8 in tort. The Judges of the Supreme and County Courts are of co-ordinate jurisdiction in matters of review under c. 60, and orders made within their authority are final. *Rex* v. *Wilson, Ex p. McGoldrick*, 36 N. B. Reps. 339.

IX. North-West Territories — Supreme Court.

Admiralty Jurisdiction — *Maritime Lien.*]—The Supreme Court of the North-West Territories has concurrent jurisdiction with the Exchequer Court of Canada in Admiralty matters, inasmuch as the Court of Chancery in England had on the 15th July, 1870, concurrent jurisdiction with the Court of Admiralty. *Kelly* v. *Alaska Mining and Trading Co.*, 4 Terr. L. R. 18.

Jurisdiction—*Stated Case — Lieutenant-Governor.*]—Case stated by the town corporation and the Attorney-General for the North-West Territories for the opinion of the Court, pursuant to s. 250 of the Judicature Ordinance, respecting a matter in difference between the corporation and the Lieutenant-Governor in Council of the North-West Territories as to by-law No. 183 of the town. Quære, whether the Court had power to entertain the stated case, the Lieutenant-Governor in Council not being a proper party to a cause or matter, and there being no legislation in the Territories casting upon the Court the duty of advising the Executive. *In re Town of Edmonton*, 21 Occ. N. 100.

X. Nova Scotia—County Courts.

Judge—*Substitute — Authority.*]—Johnston, Co.J., of District No. 1, being unable through illness to attend to his judicial duties, designated Savary, Co.J. of another district, to act in his place and stead, under s. 12 of c. 9 of the Nova Scotia statutes of 1889, which empowers a Judge, when unable to act by reason of illness, etc., to call in and designate any other County Judge,

and provides that "such Judge, so called in and designated as aforesaid, shall have the same power as the regular Judge of such Court would otherwise have had." Savary, Co.J., heard the application in this case, and reserved his decision. Johnston, Co.J., died, and after his death Savary, Co.J., gave judgment granting the application:—Held, that he had power to do so. *In re Gough*, 21 Occ. N. 92.

Transfer of Action to Supreme Court —*Affidavit of Merits — Insufficiency.*]—The plaintiff, upon affidavit of his own, made application for the transfer of the cause from a County Court to the Supreme Court. As to the merits he simply stated that he had a good cause of action on the merits, without setting forth the facts upon which he based his action:—Held, that the requirements of s. 43 of the County Courts Act, R. S. N. S. c. 156, were not complied with, and the application must be dismissed with costs. *Sproule* v. *Ross*, 21 Occ. N. 395.

XI. Nova Scotia—Divorce Court.

Jurisdiction — *Restitution of Conjugal Rights—Alimony—Court of Appeal—Quorum —Amendment—Powers of Provincial Legislature—Statute.*]—The Court for Divorce and Matrimonial Causes in Nova Scotia has jurisdiction in respect to a suit for the restitution of conjugal rights, and can order alimony for the wife pendente lite.—An amendment altering the quorum of the Court of Appeal, making it unnecessary for the Judge Ordinary to sit as a member, is within the jurisdiction of the provincial legislature.—Such intention is clear from reading the Act, as originally printed (Acts of 1866, c. 13, s. 6) and as reprinted in the appendix to the Revised Statutes (4th series) c. 126, appendix A. *King* v. *King*, 37 N. S. Reps. 204.

XII. Nova Scotia—Probate Court.

Jurisdiction — *Gift—Determination as to—Parties—Evidence — Administration.*]—In settling an estate in the Probate Court the Judge, at the instance of next of kin of deceased, undertook to dispose of the sum of $1,000 which the administrator—a brother of deceased—contended had been given him by deceased, two years before her death, as a gift for his two sons. Evidence was tendered by the administrator to shew that the money had been invested for the two boys, by paying off a mortgage, and that the fact of the investment had been communicated to the donees:—Held, that the Judge had power to hear and consider evidence at any time before making his final decree, and that he was wrong in refusing to receive the evidence tendered. Per Townshend and Ritchie, JJ., that the Judge went beyond his jurisdiction in dealing with and deciding the question of gift or no gift, where the rights of third parties had intervened who were not before him, and to compel the appearance of whom he had no process; and his decree must be set aside. In re Ralston Estate, 2 Thom. 195, and In re McNutt Estate, 24 N. S. Reps. 264, distinguished. Per Graham, E.J., and Weatherbe, J., that the administrator's two sons being necessary parties to any litigation to determine whether the amount in controversy belonged to them or not, and the Court of Probate having no jurisdiction over them under the statute relating to that Court, the appeal should be allowed with costs, and the consideration of the accounts adjourned until the ownership of the money was decided in a proper action. *In re Wheelock Estate*, 33 N. S. Reps. 357.

XIII. Ontario—County Courts.

Appeal from Master's Report in County Court Action—Forum—Prohibition. *Re Crossman* v. *Williams*, 4 O. W. R. 14.

Jurisdiction — Attachment of debts — Assignment of moneys due—Claimant—Issue —Amount involved—Equitable relief—Prohibition—Transfer to High Court. *Re Williams* v. *Bridgman*, 4 O. W. R. 53, 232.

Jurisdiction—Consent—Prohibition. *Re Greenwood* v. *Buster*, 1 O. W. R. 225.

Jurisdiction—*Equitable Relief—Amount in Controversy—Judgment Creditor—Setting Aside Chattel Mortgage — Prohibition.*] — Where the plaintiff, having recovered judgment for $92.05 and costs against the defendant in a Division Court, brought an action in a County Court to set aside as fraudulent as against him a chattel mortgage for $520 made by the defendant:—Held, on motion for prohibition, that the subject-matter involved was the amount due on the judgment—it not being alleged or proved that there were any other debts of the defendant than that due to the plaintiff; and the County Court had jurisdiction by virtue of s. 22 (13) of R. S. O. 1897 c. 55. Forrest v. Laycock, 18 Gr. 611, followed. Dominion Bank v. Heffernan, 11 P. R. 504, and Re Lyons, 10 P. R. 150, distinguished. *In re Thomson* v. *Stone*, 22 Occ. N. 327, 412, 4 O. L. R. 333, 585.

Jurisdiction — Subject-matter — Setting aside chattel mortgage—Claim of judgment creditor. *Re Thomson* v. *Stone*, 1 O. W. R. 509, 4 O. L. R. 333, 585.

XIV. Ontario—District Courts.

Jurisdiction—Counterclaim — Work and labour—Amount — Deterioration — Damages —Set-off—Costs. *Breese* v. *Clark*, 1 O. W. R. 825.

Jurisdiction—*Recovery of Land — Mortgages — Injunction — High Court Action — Multiplicity.*] — The plaintiffs, being mortgagees of land, issued out of the District Court for the district in which the land was situated a writ of summons indorsed with a claim to "recover possession" of the land, "and for an order that the defendants do forthwith deliver up possession" thereof, describing the land:—Held, that the indorsement was one under Con. Rule 138, and that it was for "the recovery of land situate in the district," within the meaning of R. S. O. 1897 c. 109, s. 9, s.-s. 2 (d).—Independent Order of Foresters v. Pegg, 19 P. R. 80, distinguished.—The fact that the plaintiffs had also brought an action in the High Court for a declaration of right in regard to the same

land, in which they might have claimed the same relief as in the other action, was not a ground for enjoining the plaintiffs from proceeding in the District Court. *Central Trust Co. of New York* v. *Algoma Steel Co.*, 23 Occ. N. 329, 6 O. L. R. 464, 2 O. W. R. 875.

XV. Ontario—Division Courts.

Action against Executors de son Tort—*Ascertainment of Amount Involved—Jurisdiction—Declaration of Representation—Prohibition.*] — Motion by defendants for prohibition to a Division Court. The action was brought against defendants as executors de son tort, to recover the amount of $165.97 on an account rendered, and damages against defendants for wrongfully interfering with and selling and otherwise converting the chattels and effects of the deceased:—Held, that the defendants had so intermeddled with the estate of deceased as to render them liable as executors de son tort, although acting with good intent and at the request of the widow of the deceased. The amount sued for brings the case within the enlarged jurisdiction of the Division Courts under R. S. O. 1897 c. 60, s. 72, and a question arises under s-s. (d), "Where the amount, or original amount of the claim, is ascertained by the signature of the defendant or of the person whom, as executor or administrator, the defendant represents:" — Held, defendants could not represent deceased until they had been declared by the Court to be executors. It is not the intention of the statute that in one and the same proceeding the declaration is to be made which alone could make a defendant liable, and before that point is reached defendant is not to be clothed in advance with the representative character so as to confer jurisdiction on the Court to make the declaration and pronounce the judgment against him. Order granted for prohibition without costs. *Re Dey* v. *McGill*, 6 O. W. R. 329, 10 O. L. R. 408.

After-judgment Summons—*Committal —"Ability to Pay"—Prohibition.*] — Judgment was recovered at the trial by the plaintiff in a Division Court action, no order being at that time made for payment in instalments. Subsequently the defendant was examined upon an after-judgment summons, and was ordered to pay $15 a month. Default having occurred, he was again brought before the Judge on a shew cause summons and committed to gaol for twenty days:—Held, that it was to be assumed, in the absence of evidence to the contrary, that there had been a finding on proper evidence of the existence of the conditions justifying the making of an order of committal; and that prohibition would not lie. Judgment of Anglin, J., 3 O. W. R. 725, affirmed. Per Meredith, C.J.—"Ability to pay" in s-s. 5 of s. 247 of the Division Courts Act, R. S. O. 1897 c. 60, covers the case of a dishonest debtor who can by working earn the means to pay the debt, and contumaciously refuses to do anything. Per Anglin, J.—An order for committal is not made as punishment for disobedience of a specific order for payment and in the nature of a committal for contempt, but is granted as a punishment of the fraudulent conduct of the debtor in having refused or neglected to pay the judgment debt, though having had the means and ability to pay. It is therefore not necessary before a committal order can be made that there should be an order on after-judgment summons and disobedience of that order. The judgment itself is sufficient foundation for the order to commit. *In re Kay* v. *Storry*, 24 Occ. N. 313, 8 O. L. R. 45, 3 O. W. R. 784.

Attachment of Debts—Remuneration of alderman — Public policy — Time of service. *Wickett* v. *Graham*, 2 O. W. R. 402.

Execution against Lands — *Previous Nulla Bona Return — Bailiff — Particular Court.*]—Since the revision of the statutes in 1897 incorporating s.s. 5 of s. 8 of 57 V. c. 23 (O.) into s. 230 of c. 60 of R. S. O. 1897, it is not necessary to have a nulla bona return made by a bailiff of the Division Court in which the judgment was recovered before an execution against lands can be issued—a return of nulla bona by a bailiff in such Division Court being sufficient. Burgess v. Tully, 24 C. P. 549, and Jones v. Paxton, 19 A. R. 163, discussed. Judgment of Ferguson, J., 3 O. W. R. 74, reversed. *Turner* v. *Tourangeau*, 24 Occ. N. 350, 8 O. L. R. 221, 4 O. W. R. 12.

Garnishee Resident Out of Province — *"Carrying on Business" in Province — Person Transacting Business as Agent for Another—Garnishee Submitting to Jurisdiction—Assignee of Fund Garnished Intervening — Status of Intervener.*] — Appeal by primary creditors in a garnishee matter from order and judgment of the presiding Judge determining that the garnishee, R. A. Newman, who resided in Detroit, Michigan, but was alleged to carry on business at Windsor, Ontario, was not subject to be made a party to garnishee proceedings. The garnishee's wife owned in her own right property in the county of Essex, some of which was rented. The garnishee acted as agent for his wife in managing her property, and he employed a solicitor practising in Windsor to collect rents and superintend repairs, make leases, etc. The garnishee entered into a contract in his own name, with the primary debtor for the building by the latter of a house on the property of the garnishee's wife, upon which $667.09 remained due to the primary debtor. The latter was indebted to a number of persons. The solicitor before mentioned, as solicitor for all these creditors, except one McKee, took garnishee proceedings under s. 190 of the Division Courts Act, and accepted service for Newman, the garnishee. McKee (a creditor having an equitable assignment of the debt from the primary debtor) intervened and contested the right to take these proceedings, on the ground that Newman neither resided nor carried on business within the jurisdiction of the 7th Division Court. The garnishee by his attorney admitted that he carried on business in the said county, and he voluntarily submitted to the jurisdiction of the Court. He also admitted that he was indebted to the primary debtor in a certain sum, and he was willing to abide by the decision of the Judge of the Court:—Held, per Britton, J., and Falconbridge, C.J., reversing the trial Judge, that McKee had failed to shew "any just cause why the debt sought to be garnished should not be paid over or applied in or towards the satisfaction of the

claim of the primary creditor." Appeal allowed with costs. Street, J., dissenting. *Nelson* v. *Lenz*, 6 O. W. R. 21, 9 O. L. R. 50.

Garnishment of Married Man's Wages—*Exemption—Evidence of Marriage—Repute—Prohibition.*]—In an action in a Division Court, where the Judge held that evidence of repute was not sufficient to prove that a primary debtor was a married man, and so entitled to the $25 exemption provided for by R. S. O. 1897 c. 60, ss. 180, 181:—Held, that the Judge did not decide upon a state of conflicting facts, but upon a theory that the best evidence must be given, and that it was a wrong assumption in point of law, and prohibition should be ordered. Elston v. Rose, L. R. 4 Q. B. 4, followed. *In re Rochon* v. *Wellington*, 23 Occ. N. 69, 5 O. L. R. 102, 1 O. W. R. 805.

Judgment by Default—"*Money Demand*"—*False Representations—Prohibition.*]—An action in a Division Court in which the particulars described the plaintiff's claim as for "money received by the defendants for the use of the plaintiff, being money obtained from the plaintiff by the defendants by false representations," is an action for a "money demand" within s. 113 of the Division Courts Act, R. S. O. c. 60; and a motion for prohibition against proceedings upon a judgment entered in default of a dispute notice was refused. *In re Mager* v. *Canadian Tin Plate Decorating Co.*, 24 Occ. N. 59, 7 O. L. R. 25, 2 O. W. R. 1114.

Judgment—Notice — Waiver — Acquiescence—Laches—Prohibition—Costs. *Re Bosbridge* v. *Brown*, 2 O. W. R. 863.

Judgment, Clerical Error in—*Jurisdiction to Correct—Prohibition—New Trial—Consent.*] — Judgment upon promissory note for $70. By a mere slip, the Judge in making his minute of the judgment wrote "judgment for deft.," instead of "judgment for plffs." About three weeks afterwards the Judge's attention was called to the mistake and he corrected it, the solicitors at the trial consenting. Immediately after the trial defendant was notified by his solicitors of the result, and told him that there was not much use in applying for a new trial. Defendant then retained a new solicitor, who without informing himself of the facts of the case, moved for prohibition. Motion dismissed with costs. *Re North American Life Assurance Co.* v. *Collins*, 5 O. W. R. 342, 9 O. L. R. 579.

Judgment Summons — *Form of Affidavit—Prohibition.*]—An affidavit, by a plaintiff in a Division Court action desiring to issue a judgment summons, stating that "the sum of $65.10 of the said judgment remains unsatisfied, as I am informed and believe," the judgment being for more than $65.10, is not such an affidavit as is required by s. 243 of the Division Courts Act, R. S. O. 1897 c. 60, and prohibition will lie to restrain proceedings upon a judgment summons issued pursuant to such an affidavit. Friendly v. Needler, 10 P. R. 267, distinguished. *In re Barr* v. *McMillan*, 24 Occ. N. 90, 7 O. L. R. 70, 672, 3 O. W. R. 189, 297.

Jurisdiction—Action for declaration of right to rank on insolvent estate—Prohibition. *Re Bergman* v. *Armstrong*, 4 O. L. R. 717, 1 O. W. R. 799.

Jurisdiction—Amount in dispute—Claim for price of horse—Sale by wrongdoer—Contract or tort—Prohibition. *Re Mount* v. *Mara*, 2 O. W. R. 501.

Jurisdiction—Amount involved—Action for tort—Prohibition—Costs of motion for. *Re Brandon* v. *Galloway*, 1 O. W. R. 677.

Jurisdiction—Amount involved—Balance of unsettled account over $400—Prohibition. *Re Manning* v. *Gorrie*, 5 O. W. R. 788.

Jurisdiction—*Amount over $100—Ascertainment—Necessity for Extrinsic Evidence—4 Edw. VII. c. 12, s. 1 (O.)—Application of Pending Action—Prohibition.*]—Motion by defendant for prohibition to a Division Court upon ground that the Court had no jurisdiction, the amount in question being over $100, and not ascertained by the signature of the defendant:—Held, that other and extrinsic evidence beyond the mere production of the document and the proof of the signature to it would have to be given to establish the claim of the plaintiff. The amending provision contained in 4 Edw. VII. c. 12, s. 1, must be regarded as being declaratory and inapplicable because these proceedings were launched in the Division Court before the Act was passed. Order made for prohibition. *Re Thom* v. *McQuitty*, 4 O. W. R. 522, 25 Occ. N. 42, 8 O. L. R. 705.

Jurisdiction—*Amount over $100—Extrinsic Evidence — Promissory Note — Indorser.*]—Motion by plaintiffs for an order in the nature of a mandamus to the junior Judge of a County Court to compel him to try an action in a Division Court. The action was brought against the indorser of a promissory note to recover the amount of the note, which was more than $100:—Held (5 O. W. R. 420), that extrinsic evidence would have to be given by plaintiffs to enable them to succeed upon their claim, namely, evidence of dishonour and notice, and that, therefore, the amount sued for (being over $100) was not ascertained by the signature of defendant within the meaning of s. 72 of the Division Courts Act, as amended by 4 Edw. VII. c. 12, s. 1 (O.). Motion refused. Appeal by plaintiffs on grounds that the amending Act is merely a legislative declaration in favour of the narrower interpretation theretofore placed upon s. 72, and that it was not the intention of the legislature to take away the jurisdiction of the Division Court, unless it was necessary for plaintiffs to give evidence of the kind pointed out in Kreutziger v. Bro. 32 O. R. 418, for the purpose of establishing their claim. Appeal allowed and order made for plaintiffs. *Re Slater* v. *Labercc*, 5 O. W. R. 539, 9 O. L. R. 545.

Jurisdiction—*Ascertainment of Amount over $100—Proof of Breach of Undertaking.*]—The defendant gave two notes for $75 and $62 respectively on a form which contained an undertaking to give further security, and in the event of default in giving the security that the notes might be treated as due. The plaintiffs demanded further security, and, not receiving any, brought an action on the notes before the time mentioned in them for their maturity had expired:—Held, that, notwithstanding the plaintiff had to prove a breach of the undertaking to give security before he could recover on the notes, the Division Court had jurisdiction to entertain the action.

Petrie v. Machan, 28 O. R. 642, followed in preference to Kreutziger v. Brox, 32 O. R. 418. *McCormick Harvesting Machine Co.* v. *Warnica*, 22 Occ. N. 158, 3 O. L. R. 427.

Jurisdiction — Attachment of debts — Chattel mortgagee — Seizure and sale — Proceeds in hands of bailiff—Prohibition. *Re Tomlinson* v. *Hunter*, 2 O. W. R. 948.

Jurisdiction—*Dividing Cause of Action —Division Courts Act, s. 79 — Promissory Note — Including in Larger Claim — Proof against Insolvent Estate.*] — The defendants, becoming insolvent, made an assignment for creditors, and the plaintiffs proved their claim upon a certain promissory note and other notes, and in respect of an open account for goods sold, for a lump sum, upon which they were paid a dividend. The plaintiffs had no security for their claim:—Held, that the remedy upon the promissory note in question was not extinguished, and the plaintiffs could sue in a Division Court for the amount of it as a separate cause of action, giving credit for a proportionate part of the dividend paid, without offending against the provisions of s. 79 of the Division Courts Act, R. S. O. 1897 s. 60, forbidding the dividing of a cause of action. *Harvey* v. *McPherson*, 23 Occ. N. 260, 6 O. L. R. 60, 2 O. W. R. 251, 511.

Jurisdiction—*Evidence—Nonsuit — Appeal—Termination of Action—Mandamus.*]—The plaintiff claimed $212 for wages, and gave credit for payments thereon, suing for a balance of $58. The defendant, by counterclaim, alleged a large account of $744.58, and claimed a balance in his favour of more than $100. The Judge entered a nonsuit after hearing the evidence of one witness, who disclosed the nature of the account:—Held, that the Judge at the trial having found that the evidence given shewed that the case was beyond the jurisdiction of a Division Court, and ruled that further evidence should not be given, and the plaintiff having submitted to this and a judgment of non-suit, with costs, having been entered, and the plaintiff having moved to set aside the nonsuit and for a new trial, which motion was refused, an application for a mandamus did not lie. Regina v. Judge of Southampton County Court, 65 L. T. N. S. 320, distinguished. That the plaintiff had no right of appeal in this case under the Division Courts Act might be a defect of legislation, but it did not enlarge the remedy by mandamus:—Held, also, following Williamson v. Bryans, 12 C. P. 275, that mandamus does not lie where there is nothing pending before the Court below. *In re Ratcliffe* v. *Crescent Hill Timber Co.*, 21 Occ. N. 234, 1 O. L. R. 331.

Jurisdiction—*Foreign Defendant — Service on—Form of Summons—Prohibition.*]—Section 87 (1) of the Division Courts Act, R. S. O. 1897 c. 60, which provides that an action may be brought in a Division Court, notwithstanding that the residence of the defendant is out of the province, applies as well to foreigners as to British subjects. No practice being provided therefor by that Act, by s. 312, the practice of the High Court under Con. Rules 103 and 312 is to apply. The form of summons issued in this action was held to be a compliance with such rules. Decision of McMahon, J., 3 O. W. R. 585, affirmed. *In re Coy* v. *Arndt*, 24 Occ. N. 336, 8 O. L. R. 101, 3 O. W. R. 585, 658.

Jurisdiction — *Foreign Garnishee.*] — The primary creditor and the primary debtor resided within the jurisdiction, but the garnishee resided in British Columbia, and did not carry on business in Ontario. At the hearing the garnishee appeared by his agent, and raised no objection to the jurisdiction. The debtor disputed the creditor's claim, and the jurisdiction, and the Judge on the latter ground refused to proceed:—Held, that the Judge was right. The principle upon which a defendant in an action who is not subject to the jurisdiction confers it by appearing, has no application to a garnishee proceeding under the Division Courts Act. Such a proceeding is a species of execution designed to enable a creditor to reach property of his debtor not exigible in the ordinary way, and from the nature of the thing it is to be expected that it would be confined to cases where the garnishee is resident in Ontario or might be sued therein; and, moreover, the language of the Act clearly confines the right to that class of case. McCabe v. Middleton, 27 O. R. 170, distinguished. *In re Wilson* v. *Postle*, 21 Occ. N. 382, 2 O. L. R. 203.

Jurisdiction—Lease — Covenant to leave in repair — Breach—Damages—Prohibition—Transfer to High Court. *Re Powell* v. *Dancyger*, 1 O. W. R. 63.

Jurisdiction—*Proof of Contract—Lease —Company—Prohibition.*]—In an action for breach of contract brought in a Division Court, in order to give the Judge jurisdiction to determine the action on the merits, the fact of the making of the contract and its breach within the jurisdiction, must first be established. Where, therefore, after a valid lease of certain premises held by a company had been duly put an end to, and the key delivered up to the landlord, the company's agent, without any authority from the company, orally agreed with the landlord for the renewal thereof for the year at an increased rent, and received the key, but the company refused to agree to the lease, when the key was handed back to the landlord, and no actual occupation of the premises by the company took place:—Held, that no contract was proved, of which a breach had arisen within the jurisdiction of the Court; and prohibition was therefor properly granted. Decision of Anglin, J., 3 O. W. R. 589, affirmed. *In re Wilkes* v. *Home Life Association of Canada*, 24 Occ. N. 339, 8 O. L. R. 91, 3 O. W. R. 675, 744.

Jurisdiction — *Rent—Costs.*] — Rent payable under a lease of land is an incorporeal hereditament, and where the right or title to it comes in question, a Division Court has no jurisdiction to entertain an action to recover it, even where the amount in question is only $60; and therefore this action was properly brought in a County Court, and the successful plaintiff was entitled to costs on the scale of such Court. *Kennedy* v. *MacDonnell*, 21 Occ. N. 233, 1 O. L. R. 250.

Jurisdiction—*Splitting Cause of Action —Mortgage—Interest Post Diem—Damages —Prohibition.*]—The plaintiffs on the 2nd November, 1901, brought an action in a Division Court for one year's interest due the 1st February, 1901, and for interest on that interest, amounting together to $81.50,

due on a mortgage, principal of which was overdue:—Held, that the interest sued for, being interest post diem, was not due the plaintiff qua interest, but was recoverable only by way of damages, and the case did not come within the provisions of s. 79, s.-s. 2, of the Division Courts Act, R. S. O. c. 60:—Held, also, that the plaintiffs, if entitled to recover interest from the 1st February, 1900, were entitled to recover as their damages interest down to the date of the issue of the summons, so that the sum to which they were then entitled would be about $140, which sum was divided for the purpose of suing in the Division Court, and that is forbidden by s. 79; and prohibition was granted. *In re Phillips* v. *Hanna*, 22 Occ. N. 209, 3 O. L. R. 558, 1 O. W. R. 245.

Jurisdiction—Territory—Action on two promissory notes — "Contract"—Prohibition — Omission to record evidence. *Union Bank of Canada* v. *Cunningham*, 1 O. W. R. 432.

Jurisdiction—Territorial—Cause of action — Contract by telegraph — Prohibition. *Re Glanville* v. *Doyle Fish Co.*, 2 O. W. R. 616, 823.

Motion for Immediate Judgment — *Service with Summons—Time—Holidays — Enlargement—Waiver.*]—A special summons issued out of a Division Court was served on Friday the 8th November, returnable on the following Tuesday, the 12th, and with it was served a notice of motion for immediate judgment, also returnable on the 12th:—Held, that the notice was properly served, for there is nothing in s. 116 of the Division Courts Act, R. S. O. 1897 c. 60, which requires that, before such notice is given, the time for the filing of a dispute notice should have first expired:—Held, also, that there was two clear days' notice of the motion, for the King's birthday and Sunday, which intervened, would not be excluded. Con. Rule 343, whereby, where the time is less than six days, Sundays and holidays must be excepted, does not apply to Division Courts, and no similar provision is contained in the Division Courts Act or Rules; but, in any event, the objection was cured by an enlargement procured by the defendants on the return day until the next day, which had the effect of giving the defendants two clear days irrespective of such holiday. Quære, whether an order made upon a motion of which two clear days' notice had not been given, would be valid. *In re McKay* v. *Talbot*, 22 Occ. N. 115, 3 O. L. R. 256.

Prohibition—Verification of documents — Affidavit of defendant—Acknowledgments given for liquors drank in a tavern—Discrediting affidavit—Findings of Judge in inferior Court. *Re Peine* v. *Hammond*, 2 O. W. R. 1118, 3 O. W. R. 70.

Removal of Plaint into High Court —Question involved—Paternity of illegitimate child. *Re Brooks* v. *Hubbard*, 4 O. W. R. 264.

Right to Jury—*Claim—Counterclaim—Amount—Prohibition.*]—The plaintiff sued in a Division Court for $14 for rent; and the defendant, besides filing a dispute notice, counterclaimed for $60 damages for tort, and asked for a jury, but the County Court Judge refused to place the case on the list for trial by jury. On an application for prohibition:—Held, that the filing of the counterclaim did not entitle the defendant to have the plaintiff's claim tried by a jury; but s. 160 of the Division Courts Act, R. S. O. 1897 c. 60, did entitle him to that right in respect to his counterclaim; and prohibition as to the latter was directed to issue, subject to the right of the Judge to order that the counterclaim be the subject of an independent action under Division Court Rule 108. *In re Fraser* v. *Ham*, 24 Occ. N. 233, 7 O. L. R. 449, 3 O. W. R. 447.

Service of Summons—*Right of Plaintiff to Serve—Right of Bailiff—Mandamus to Clerk.*]—Plaintiff moved for mandamus to compel a Division Court clerk to deliver the summons and copy to the plaintiff instead of the bailiff of the Court, to have it served. Motion refused (6 O. W. R. 146) on grounds that plaintiff had no such right in a Division Court case as is accorded to plaintiffs in the High Court and County Courts. Appeal by plaintiff from above order dismissed with costs. *Wilson* v. *McGinnis*, 6 O. W. R. 397, 10 O. L. R. 98.

Territorial Jurisdiction—*Cause of Action—Flooding Land—Erection of Dam — Prohibition.*]—In a Division Court action the plaintiff's claim was for damages for injuries caused to his lands, which were situate within the limits of the division in the Court of which his action was entered, by reason of their having been overflowed and his crops damaged by waters alleged to have been unlawfully brought by the defendants to and cast upon his lands. The backing of the water was alleged to have been caused by a dam which the defendants had erected on their own lands, situate beyond the limits of such Court:—Held, that the erection of the dam was part of the cause of action, and therefore the whole cause of action did not arise within the jurisdiction of the Division Court in which the action was brought; and prohibition was ordered. *In re Doolittle* v. *Electrical Maintenance and Construction Co.*, 22 Occ. N. 136, 3 O. L. R. 460, 1 O. W. R. 202.

Territorial Jurisdiction — *Garnishee —No Garnishable Debt—Conferring Jurisdiction—Costs.*] — Where an action is entered under s. 190 of the Division Courts Act in the division where the garnishee resides, the primary debtor residing in another and disputing the jurisdiction of the Court — there is jurisdiction to give judgment against the primary debtor, even where the action is dismissed as against the garnishee. In re Holland v. Wallace, 8 P. R. 186, and In re McCabe v. Middleton, 27 O. R. 170, considered. Semble, that if a primary creditor, for the purpose of obtaining a judgment against the primary debtor in a Court of his own choosing, names a friend as garnishee, the Judge may properly take that into consideration under his power over costs under s. 213 of the Act. *Lented* v. *Congdon*, 21 Occ. N. 160, 1 O. L. R. 1.

Title to Land—Trial—Prohibition—Certiorari. *Re Waring* v. *Town of Picton*, 2 O. W. R. 92.

XVI. Ontario—High Court of Justice.

Divisional Court—Composition of—Two or three Judges. *Minns* v. *Village of Omemee*, 1 O. W. R. 90, 362.

Divisional Court—*Reference of Motion to—Power of Master in Chambers—Agreement of Parties.*]—The Master in Chambers has no power to refer a motion before him to a Divisional Court, but the Court may properly hear a motion so referred, if both parties agree to its being heard. *Rushton* v. *Grand Trunk R. W. Co.*, 23 Occ. N. 295, 6 O. L. R. 425, 2 O. W. R. 654.

Divisional Court—*Single Judge—Proper Forum—Special Case — Arbitration Act — "Opinion" — "Final Decision."*]—A single Judge has no jurisdiction to pronounce the opinion of the Court upon a special case stated by arbitrators pursuant to s. 41 of the Arbitration Act, R. S. O. 1897, c. 62. The effect of cl. (*a*) of s.-s. 1 of s. 67 of the Judicature Act, R. S. O. 1897 c. 51, and of Rule 117, is to require that such a case be heard before a Divisional Court, as being a proceeding directed by statute to be taken before the Court, and in which the decision of the Court is final. "The opinion of the Court" is a "decision," though not a binding adjudication as to the rights of parties or a decision amounting to a judgment or order; and it is a "final decision" because it is the end of the proceeding and cannot be reviewed by an appellate Court. *In re Geddes and Cochrane*, 21 Occ. N. 436, 2 O. L. R. 145.

Proper Forum—*Application for Mandamus to Justice of the Peace—Judge in Court — Divisional Court.*]—The order absolute which may be granted by the High Court under s. 6 of the Act to protect Justices of the Peace and others from Vexatious Actions, R. S. O. 1897 c. 88, is not final, but is appealable, and the application for such order is therefore to be heard before a single Judge, sitting as the High Court, and not before a Divisional Court. *In re Rex* v. *Meehan*, 22 Occ. N. 133, 3 O. L. R. 361, 1 O. W. R. 136, 248.

XVII. Ontario — Surrogate Courts.

Grant of Administration—*Applications in Different Courts.*]—Where applications for letters of administration to the estate of a deceased person are made in more than one Surrogate Court, preference will be given to that made by the person nearest in the order in which administration is usually granted; and in this case jurisdiction to proceed was conferred on the Surrogate Court in which application was made by the mother of the intestate, against that on behalf of creditors, in another county. *In re Tougher*, 22 Occ. N. 98, 3 O. L. R. 144.

Guardian—*Passing Accounts—Interest.*]—There is no authority in the Judge of a Surrogate Court to pass the accounts of a guardian of an infant appointed by such Court. Section 18 of 63 V. c. 17 (O.) does not apply, such guardian not being a trustee within the meaning of the section:—Held, also, that, under the circumstances of this case, six per cent. interest was a fair rate to charge the guardian on the moneys in his hands. *Murdy* v. *Barr*, 21 Occ. N. 526, 2 O. L. R. 310.

XVIII. Quebec—Circuit Courts.

Establishment of New Court—*Pending Proceedings—Opposition.*] — Where an action was begun and judgment given in it before the statute of 1893 establishing the new Circuit Court for the district of Montreal, the filing of an opposition to the judgment after that statute should be authorized by a Judge of the new Circuit Court, and not by a Judge of the Superior Court. *Kollmeyer* v. *Donohue*, Q. R. 19 S. C. 65.

Evocation to Superior Court—*Pleading.*]—An action brought in a Circuit Court upon promissory notes may be evoked by the plaintiff to the Superior Court when the defendant pleads that those notes were given in part payment of a thing sold by the plaintiff, for over $100, and that the sale is null, the thing sold being defective and valueless. 2. Par. 3 of art. 1130, C.P., is not limitative, but simply provides for a special case. *Tufts* v. *Dalton*, 3 Q. P. R. 523.

Evocation to Superior Court — *Practice.*]—The Superior Court cannot remit a cause to the Circuit Court merely because the party asking to have it brought up to the Superior Court has not inscribed upon his evocation; the evocation must be unfounded. *L'Association des Barbiers de la Province de Québec* v. *Lizotte*, 4 Q. P. R. 70.

Exclusive Jurisdiction — *Action for Taxes—School Taxes.*]—In a suit in the Superior Court to recover municipal taxes to an amount exceeding $100, accompanied with a demand for school taxes, a declinatory exception asking the dismissal of that portion of the demand which is for school taxes, on the ground that the Circuit Court has exclusive jurisdiction, will be maintained, notwithstanding art. 170, C. C. P., it being impossible in such a case to transmit the whole record to the Circuit Court. *Township of Dudswell* v. *Quebec Central R. W. Co.*, 19 S. C. 116.

Exclusive Jurisdiction—*Transfer from Superior Court—Amount in question—Landlord and Tenant—Repairs — Cancellation of Lease—Damages—Costs.*]—An action between landlord and tenant in which the tenant demands repairs, or in default the cancellation of the lease, and in either event $12.50 for damages, is of the exclusive competence of the Circuit Court, and the incompetence of the Superior Court being ratione materiæ, the Court should of its own motion send the cause before the competent tribunal. 2. In this case the action of the plaintiff having been declared ill-founded by the tribunal of first instance, the plaintiff should bear the costs of contestation in the Superior Court as well as the costs of review, although the incompetence of the tribunal was not pleaded. *Lafranchise* v. *Caty*, Q. R. 19 S. C. 185.

Jurisdiction—*Action to Cancel Lease—Remission to Circuit Court.*]—An action in which a tenant demands the cancellation of a lease as a rent of $168, and $85 for damages, is of the competence of the Circuit

Court, and will be removed to that Court from the Superior Court upon a declinatory exception. *Grosbois* v. *Bienville*, 4 Q. P. R. 409.

Jurisdiction—*Amount in Controversy—Addition of Taxed Costs—Subsequent Costs—Fi. Fa. Lands—Seizure and Sale—Hypothecary Creditor.*]—The Circuit Court sitting at Montreal cannot prosecute, against immovables, the execution of its judgment for a sum not exceeding $40, and the want of jurisdiction in that respect is absolute and material. 2. The taxed costs of the action allowed by the judgment may be added to the amount recovered so as to make up the sum exceeding $40; but subsequent costs, that is, costs of a fi. fa. goods, or the expense of such a writ, or the expense of an execution on growing crops, or the expense of a return of nulla bona, may not be added. 3. The clerk of the Circuit Court, in such a case, has no authority to issue a fi. fa. lands, and such a writ is therefore void. 4. The seizure and sale of the defendant's immovables, in virtue of such a writ, are void. 5. An hypothecary creditor of the execution debtor, who has had no knowledge of the seizure or sale, and who is prejudiced by it, has a right to obtain, by petition, the avoidance of the sale and setting aside of the writ. *Masson* v. *Dansereau*, Q. R. 18 S. C. 141.

Removal of Cause From—*Benefit Society—Future Rights of Member.*] — An action for the recovery of benefits from a charitable association by one of its members may be removed to the Superior Court, such action having an effect on the future rights and interests of the plaintiff, and deciding for the future his status as a member of the association. *Gagné* v. *Victoriaville Society of St. John Baptist*, 4 Q. P. R. 382.

Removal of Cause From—*Amount in Controversy—Future Rights.*]—An action to recover an alimentary pension of $2.25 a week, for 47 weeks, may be removed from the Circuit Court to the Superior Court, the judgment to be rendered in such action being one which will affect the future rights of the parties. *Roach* v. *Duggan*, 4 Q. P. R. 289.

Removal of Cause From—*Jurisdiction of Court — Rescission of Lease — Future Rights.*]—There may be evocation when a Circuit Court is competent. If it was not competent, there would be no ground for evocation, but for declination. 2. An action by which the plaintiff claims the rescission of a lease, and $99 for damages and rent due, is within the competence of the Circuit Court. 3. Where the lease is of a flour mill, and a saw mill, and the rent is to be paid half out of the products of the mills, and the lease has still three years to run, and it appears in the action that the half of the products which belongs to the defendant for the three years yet to run represents the value of more than $100, the defendant has the right to have the case removed to the Superior Court, inasmuch as his future rights in question are of greater value than $100. *Morneau* v. *Verret*, Q. R. 20 S. C. 399.

Territorial Jurisdiction—*Cause of Action—Promissory Note.*]—In an action upon a promissory note dated at Montreal, and made payable at Montreal, although really signed at Quebec, where the defendants have their domicil, the whole cause of action arises in the district where the note is made payable, especially where the arrangement by which the note was given in part payment of an anterior debt was entered into at Montreal. *Lévesque* v. *Roy*, 3 Q. P. R. 369.

Territorial Jurisdiction — *Defamation —Place Where Letter Received.*]—An action based upon a letter containing defamatory words sent from the district of Three Rivers to the address of a person living in the district of Arthabaska, where the letter is received and read, may be brought in the latter district. *Marcotte* v. *Thérien*, Q. R. 22 S. C. 315.

Territorial Jurisdiction—*Place of Sale of Goods.*]—A sale of goods in genere is made at the place where the goods have been weighed, counted, or measured, and an action based on a sale may be begun at the place where such operation has taken place. *Gravel* v. *Durocher*, 4 Q. P. R. 435.

XIX. QUEBEC—COMMISSIONER'S COURT.

Procedure—*Commissioner Sitting During Part of Hearing—Married Woman Defendant—Authorization.*] — Where the husband of a woman separate as to property, being summoned alone before a Commissioner's Court, appears before that Court and pleads not the want of authorization, but other grounds of defence, his appearance and plea are equivalent to acts of authorization of his wife as a party before the Court. 2. A cause which has been completely heard by one Commissioner only, can be adjudged only by him, although another Commissioner has also sat through a part of the hearing. *Rex* v. *Warren*, Q. R. 25 S. C. 78.

XX. QUEBEC—COURT OF KING'S BENCH.

Quorum of Judges—*Judgment — Jurisdiction.*] — Article 1241 C. P. Q., permits four Judges of the Court of King's Bench, Quebec, to give judgment in a cause heard before five, when the fifth Judge, after hearing the case argued, excused himself as disqualified: Davies and Nesbitt, JJ., contra. *Angers* v. *Mutual Reserve Fund Life Association*, 35 S. C. R. 330.

See APPEAL.

XXI. QUEBEC—RECORDER'S COURT OF MONTREAL.

Jurisdiction — *Salary — Forfeiture — Certiorari.*] — The Recorder's Court of the city of Montreal has jurisdiction to entertain a cause in which salary is claimed, and this although the contract contains clauses providing for forfeiture of a certain amount in case of default in execution of the contract. 2. The Superior Court cannot upon certiorari take cognizance of a question of law concerning the retention, as in a case of forfeiture, of a certain part of a salary, the question not having been raised before the Recorder's Court. *Société Anonyme des Théatres* v. *Fouquet*, 5 Q. P. R. 248.

XXII. QUEBEC—SUPERIOR COURT.

Case Reserved — *Verdict of Jury.*]—Held, by Lemieux, J., that the Superior Court in Review has absolute and unrestricted power to judge of the merits of a cause which has been reserved, without regard to the verdict of the jury: Art. 496, C. P. C. *Ferguson* v. *Grand Trunk R. W. Co.*, Q. R. 20 S. C. 54.

—Circuit Court—*Transfer of Action from —Validity of—Inscription.*] — When an action is transferred by the Circuit Court to the Superior Court under art. 171, C. P., an inscription for judgment upon the validity of such transfer cannot be had under art. 1130, C. P., as on an évocation. *Westmount School Commissioners* v. *Mallette*, 7 Q. P. R. 43.

Inscription in Review—*Appeal—Tutors —Authorization.*]—An application for review is an appeal within the meaning of art. 306, C. C.; and, therefore, an inscription before the Court of Review made by tutors, without the authorization of a Judge or of the prothonotary upon the advice of a family council, is illegal and void. *Beaumont* v. *Lamonde*, 6 Q. P. R. 6.

Jurisdiction—*Action against Executor —Domicil of Deceased—Place of Service.*]—An action brought in respect of a succession against a testamentary executor, as such, is of the exclusive competence of the Court of the district where the testator had his domicil at the time of his decease, and cannot be brought in the Court of a district where he chanced to be temporarily at the time of his death. The service on the executor should be made in the district where he has his business office. Article 94, C. P. C., applies to purely personal proceedings as to which the Code contains no special or exceptional provision; the proceedings relating to successions are indicated in arts. 1362 et seq.; and, therefore, the tribunal of the place of decease and of the place where the property of the succession is situated has, to the exclusion of all others, save in certain cases here inapplicable, jurisdiction over the proceedings. *Béchard* v. *Bernier*, Q. R. 17 S. C. 540.

Jurisdiction — *Action for Negligence— Death of Child in another Province—Residence of Company—Attornment to Jurisdiction.*]—The father and mother can in their personal names sue the author of their son's death, either under the laws of Manitoba or under the laws of Quebec. The defendants having a place of business in the city of Montreal, having accepted the jurisdiction and pleaded to the merits, the laws of Quebec must be applied when the question involved relates to procedure. *Boon* v. *Canadian Northern R. W. Co.*, 7 Q. P. R. 239.

Jurisdiction—*Amount Involved—Charge on Land.*]—An action by which an amount less than $100 is claimed, but in which a claim is also made to have certain immovables charged with payment of that sum, and to have the defendant ordered to give up the lands in default of paying the amount, is an action which must be brought in the Superior Court, whatever be the amount claimed. *Syndics of the Parish of St. Paul de Montreal* v. *Suburban Land Co. of Montreal*, 6 Q. P. R. 444.

Jurisdiction—*Cause of Action—Place of Hiring—Wrongful Dismissal.*] — Where an employee, hired in the province of Ontario to work in the district of Pontiac, alleged that he had been wrongfully discharged in the latter district, and suffered damage from frost bites, etc., while on his way back from the shanties where he had been working, the whole cause of action did not arise in the province of Quebec. *Landry* v. *Hurdman*, Q. R. 25 S. C. 378.

Jurisdiction — *Circuit Court — Amount Involved—Arrearages of Annual Settlement.*] —A Circuit Court held at the chief town of a district is not competent to entertain a personal action for $12 for arrearage of an annual settled rent. 2. The Superior Court is competent to entertain such an action, which may, therefore, originate in a Superior Court. *Lebel* v. *Langlois*, Q. R. 22 S. C. 239.

Jurisdiction—*Contract—Sale of Goods —Place of Making.*] — Although offers to purchase goods may be sent by letter or telegram from the province of Ontario, such offers are to be deemed to be made as to the vendor at the place where they are received, and the contract then becomes completed there by their acceptance. Wherefore the Courts of the place of acceptance, which, in this case, was also the place of delivery of the goods, are competent to entertain an action for the recovery of the price of such goods. *Timossi* v. *Palangio*, Q. R. 26 S. C. 70.

Jurisdiction Over Foreign Defendant —*Property in District—Writ of Summons— Absence of Allegation of such Property— Waiver by Plea—Examination of Defendant —Questions as to Property.*]—A non-resident defendant may be sued in a district where he owns shares of stock, and against residents of which he has claims, such claims and stocks constituting property in that district within the meaning of art. 94, C. P., s. 4. 2. Although the plaintiff should regularly, in order to make the jurisdiction of the Court, by reason of the defendant having property in the district, appear on the face of action as instituted, have set forth in the writ of declaration that the defendant had property in the district, yet if the defendant, by his exception, tenders an issue to the plaintiff as to the existence of such property, by alleging that he does not come under any of the provisions of art. 94 which would justify the institution of the action before the Court seised therewith, and moreover meets the allegation of the plaintiff's answer, in which it is formally stated that the defendant has property in the district, not by any objection thereto as being made in the answer, but by a denial of its truth, he must be held to have waived any objection based upon the absence of allegation of said fact in the writ or declaration. 3. The defendant has no right to object to cross-interrogatories on a commission rogatoire tending to elicit evidence of property of his in the district. *McCurry* v. *Reid*, 4 Q. P. R. 261.

Jurisdiction — *Replevin of Shares in Foreign Company—Parties within Jurisdiction.*]—The Superior Court at Montreal is competent to order a saisie-revendication of

shares of the capital stock of a foreign company, when the plaintiff and the defendant, as well as a third person who is detaining the share certificates, are domiciled at Montreal; and the foreign company cannot demand, by declinatory exception, the discharge of the seizure. *Kinsela* v. *Kinsela*, Q. R. 25 S. C. 270, 6 Q. P. R. 137.

Order of Judge—*Place of Making.*]—Held, per Blanchet, J., that a notice given to the opposite party of the presentation of a petition to a Judge, elsewhere than at the chief place of the district, and an order made upon such petition, are illegal and void. *Connolly* v. *Stanbridge*, 4 Q. P. R. 186.

Removal of Action from Circuit Court—*Future Rights.*]—Under Art. 55, C. P., an action for $99 begun in the Circuit Court in respect of matters which might affect future rights, cannot be removed to the Superior Court. *Roy* v. *Ferland*, Q. R. 23 S. C. 1, 5 Q. P. R. 188.

Removal of Action from Circuit Court — *Landlord and Tenant — Rental Value.*]—A tenant to whose demand his landlord pleads that the rental value of the demised premises is not that alleged in the declaration, cannot have the case removed from the Circuit Court to the Superior Court. *Shearer* v. *Marks*, Q. R. 22 S. C. 472, 5 Q. P. R. 304.

Removal of Action from Circuit Court — *Motion — Declaration—Future Rights.*]—There is no ground for removing a cause from the Circuit Court to the Superior Court except in the cases provided for in Art. 49, C. P. 2. When the ground for removal does not appear by the demand, the declaration for removal must allege, and must be accompanied by documents or a deposition establishing prima facie, that the action is removable. 3. Removal of a cause is granted only where there are future rights relating to the party who makes the motion for removal. *Corporation D' Aqueduc de Richmond* v. *Johnson*, Q. R. 22 S. C. 65.

Removal of Action from Circuit Court — *Municipal Taxes—Appeal—Future Rights.*]—There is no appeal from a judgment rendered by the Circuit Court in a municipal matter, and, therefore, a defendant, sued for municipal taxes, cannot, even if his defence effects future rights, have the case removed into the Superior Court. *Town of Nicolet* v. *Imperial Oil Co.*, 5 Q. P. R. 205.

Removal of Action from Circuit Court—*Stage of Cause.*]—A defendant who wishes to have a suit removed into the Superior Court, must do so before filing his defence on the merits. *Commissioners of Railways at the Barriers of Montreal* v. *Penniston*, 5 Q. P. R. 445.

Removal of Action from Recorder's Court—*Notary—Agent for Sale of Land.*]—A notary, sued for having acted as agent for the sale of immovables, cannot before the trial demand by certiorari the removal of the cause from the Recorder's Court of Montreal to the Superior Court, the proof of the agency for the sale of immovables and the nature of the transaction being within the competence of the Recorder's Court. *Laliberté* v. *City of Montreal*, 5 Q. P. R. 395.

Removal of Cause into — *Action for Fine—Practising as Advocate.*]—A defendant, sued in the Circuit Court by the Bar of Montreal for the recovery of a fine of less than $100 for the illegal exercise of the functions of an advocate, who pleads that he is a member of an association of licensed accountants, and that such association has a tariff for legal collections, may have the cause removed to the Superior Court. *Bar of Montreal* v. *Duff*, 5 Q. P. R. 125.

Removal of Cause into—*Action for Removal—Decision on—Judgment — Inscription.*]—A party may proceed to judgment by way of inscription or motion in causes removed into the Superior Court; but if the party wishes to have a decision upon the validity of the removal, it is always necessary to mention it in the inscription or the notice of motion. *Roach* v. *Duggan*, 5 Q. P. R. 43.

Stenographers — *Appointment—Prothonotary — Interference by Court.*] — The prothonotary of the Superior Court is the person who alone has the choice of stenographers to take down the evidence in causes tried before the Superior Court and in appealable causes tried before the Circuit Court, the competence of such stenographers having been first established by examinations taken before a committee of the Bar named by the district council; and the Court has no jurisdiction to interfere in a matter so purely discretionery, and to order the prothonotary to insert upon his list the name of the stenographer to whom the Bar council has granted a certificate of competence. *Perrault* v. *Turcotte*, Q. R. 23 S. C. 436.

Summary Procedure — *Action for Wages and Damages.*]—An action for the recovery of wages accompanied by a claim for damages sustained by the plaintiff by the loss of his luggage, which was to have been conveyed by his employers, and for damages sustained by the plaintiff on his return from the defendants' timber limits, may be brought under the summary procedure. *Charron* v. *Gillies*, 7 Q. P. R. 146.

Territorial Jurisdiction — *Action for Cancellation of Deeds—Mis-en-cause—Domicil of Parties.*]—An action for the cancellation of certain deeds and for an account of the profits made thereunder, in which the inheritor for life is brought in as mis-en-cause, that he may be deprived of the possession of the property in question and ordered to furnish security, or to allow the inheritance to be placed in sequestration, is a mixed action, where the inheritor, mis-en-cause, is in reality a defendant, and may be launched indifferently in either the district where the defendant or that where the mis-en-cause is domiciled. *Resther* v. *Hébert*, 7 Q. P. R. 89.

Territorial Jurisdiction — *Action for Moneys Advanced to Agent.*]—An action by a merchant to recover moneys advanced to his commission agent for purchases which were not made, must be brought in the Court of the defendant's domicil, where the contract was completed and the advances made, and where the purchases were to be made. *Archambault* v. *Laroche*, 7 Q. P. R. 165.

Territorial Jurisdiction—*Cause of Action—Contract—Sale of Goods.*]—In an action for the price of goods based upon a sale made by a travelling salesman of the plaintiff, the whole cause of action arises at the place where the sale is made, and not at the domicil of the plaintiff, the merchant who receives the order. *Ferronerie du Canada Cie.* v. *Delorme*, 6 Q. P. R. 215.

Territorial Jurisdiction—*Cause of Action — Promissory Note.*]—An action upon promissory notes dated at Montreal and made payable at Montreal, but really made in the district of Beauce, where the defendant has his domicil and where he has been served with process, is not well begun in the district of Montreal, and the record will be transferred upon exception taken to the jurisdiction, to the Court of the district of Beauce. *Lapierre* v. *Beaudoin*, 3 Q. P. R. 386.

Territorial Jurisdiction — *Contract of Correspondence — Sale of Goods—Transfer to Proper District.*]—A plaintiff complaining that a specific article delivered to him by the defendant, in pursuance of a contract by correspondence, and forwarded to a customer of the plaintiff, does not conform to the order, cannot bring his action in the district of the domicil of the customer, who refuses to accept the article. 2. In a case where an article sold is refused by the purchaser, who puts it at the disposition of the vendor and claims damages from him, such article does not constitute property so as to give jurisdiction to the Court of the district where it is. 3. Semble, that, whatever may be the judrisdiction of the Courts in the matter of contracts by correspondence, if the defendant demands the transfer of the record from the district where the article in question is, to that from which the order was sent, such transfer will be granted. *Forman* v. *United Electric Co.*, 4 Q. P. R. 148.

Territorial Jurisdiction—*Contract — Place of Making.*]—When a commercial traveller makes a sale on condition that it is approved by his employer, and it is so approved, the sale is to be considered as made in the place where the order is taken and not in the place where it is approved. *Rock City Tobacco Co.* v. *Girard*, Q. R. 26 S. C. 453.

Territorial Jurisdiction—*Contract — Place of Making—Agreement for Maintenance.*]—When a son in consideration of a conveyance to him of certain land by his father and mother has agreed to support them for the remainder of their lives, a suit against him by one who has performed the obligation in his place, ought, supposing it to be well founded, to be brought at the place where the contract was made, and not at the place where such services were rendered. *Théoret* v. *Brunet*, 7 Q. P. R. 138.

Territorial Jurisdiction—*Contract — Place of Making—Election of Domicil.*]—An action cannot be tried before the Court of the district where the contract was made, if the parties, in their contract, have elected domicil in another district, and agreed that all suits at law arising therefrom should be tried in the latter district. *St. Laurent Laiterie Co.* v. *Coté*, 6 Q. P. R. 153.

Territorial Jurisdiction — *Contract—Sale of Goods—Place of Making.*]—Action cannot be brought in the Court of the place where the order for goods was accepted, where it appears that the person who accepted on behalf of the defendant had not due authority to do so, and the defendant has repudiated the order, especially if the order did not constitute a complete contract of sale. *Superior* v. *Columbia Phonograph Co.*, 7 Q. P. R. 211.

Territorial Jurisdiction — *Contract—of Hiring—Place of Hiring.*]—An action for damages by a day labourer against his employer for wrongful dismissal, loss of salary and time, and suffering, may be begun in the district in which the agent of the employer engaged the plaintiff. *Pepin* v. *Turner, Lumber Co.*, 5 Q. P. R. 178.

Territorial Jurisdiction—*Exception to —Transfer or Dismissal.*]—A defendant who objects to the jurisdiction of the Court should ask for the transfer of the action to the competent tribunal, if such exists. He may ask for the dismissal of the action, if he deposit the amount claimed, but if he prays for the dismissal of the action without making such deposit, his motion déclinatoire will be declared irregular and dismissed with costs. *Beauport Brasserie Co.* v. *Belisle*, Q. R. 18 S. C. 433.

Territorial Jurisdiction — *Foreign Defendant—Administration of Foreign Estate—Place of Service—Property in Jurisdiction.*]—A defendant who is a foreigner may be ordered to render an account of the property of an inheritance originating in a foreign country, before the Court of the district where process in the action has been served upon him, and wherein it is alleged he has property. *Debigaré* v. *Debigaré*, 7 Q. P. R. 179.

Territorial Jurisdiction — *Place of Contract — Promissory Notes.*]—A plaintiff suing on several promissory notes may bring his action in the district where one of the notes is dated, even when this note is in renewal of a previous note made, like the others sued upon, in a different district, that in which the defendant resides, in payment of the price of goods sold in the latter district. *Guertin* v. *Roy*, 6 Q. P. R. 206.

Territorial Jurisdiction — *Place of Contract—Mandate—Principal and Agent.*]—A mandatary who sues his principal for indemnity against expenses which he has incurred in the execution of his mandate, may begin his action in the district where the contract of mandate was made. 2. When a person instructs another person to intrust a mandate to a third person, the contract of mandate with the third person is considered to have been made, not at the place where the instructions were given, but at the place where the instructions executed and the mandate intrusted to the agent. *McDonald* v. *Rainville*, Q. R. 24 S. C. 133.

Territorial Jurisdiction — *Pleading — Exception—Reply to—Motion to Strike Out.*]—The fact that the cause of action arose in the district in which the action has been begun should appear in the declaration, and, if that is denied, the plaintiff

cannot, in his reply to an exception to the jurisdiction, allege additional facts to support the jurisdiction. Quære, whether a motion to strike out a party of the reply to an exception is subject to the same delay and formalities as of the reply to an exception is subject to the same delays and formalities as preliminary exceptions. *Merchants Bank of Halifax* v. *Graham*, 4 Q. P. R. 55.

Territorial Jurisdiction—*Promissory Note.*]—An action on promissory notes dated at one place and made at another, cannot be brought, in the absence of other circumstances giving jurisdiction, in the Court of the district where they were dated. *Cardinal* v. *Pichet*, 7 Q. P. R. 147.

Territorial Jurisdiction — *Right of réméré—Situation of Land.*]—An action by which a creditor claims, among other things, to exercise the right of réméré, which his debtor, now deceased, had reserved to himself, may be begun in the district in which the immovable which is subject to the right of reméré, is situated. *Boisclair* v. *Proteau*, 5 Q. P. R. 81.

Territorial Jurisdiction — *Service of Writ of Summons—Bailiff—Residence of Defendants.*]—The service upon a defendant in the district of St. Hyacinthe by a bailiff of such district of a writ addressed to one of the bailiffs of the district of St. Francois, is void. 2. The real defendants cannot be taken away from the jurisdiction of the tribunal to which they are amenable by adding a defendant with the sole object of being able to cite the real defendants before another tribunal. *Gagnon* v. *O'Bready*, Q. R. 18 S. C. 283.

COVENANTS.

See LANDLORD AND TENANT—LIS PENDENS —MORTGAGE—PRINCIPAL AND SURETY.

COVENANTS IN RESTRAINT OF TRADE.

Breach—*Dissolution of Partnership—Use of Firm Name—Soliciting Customers—Advertisement — Colourable Imitation—Injunction.*]—On the dissolution of a co-partnership under the name of "M. Bros. & M.," the defendant sold his interest to the plaintiff, including the right to the use of the firm name, and covenanted that the plaintiff should have the right to carry on business under that name, and that he (the defendant) would not interfere with the plaintiff's use of such name. Subsequently the defendant commenced business under the name of "M. Bros. & Co.," and published in an advertisement addressed to his "old customers" as well as to "any new ones who may favour me with their patronage," in which he stated that he had merely sold his interest in the retail store in H., and that he would continue to wholesale pianos, etc., from his warehouse there:—Held, that the name adopted by the defendant was calculated to deceive persons into the belief that they were dealing with the plaintiff; that it was a colourable imitation of the name under which the plaintiff was doing business, and that it was a violation of the contract that the defendant would not in any way interfere with the use of such name by the plaintiff; and that the advertisement contained misrepresentations and concealments, and was calculated to deceive the public into the belief that he represented the business of the old firm; and the plaintiff was entitled to an order restraining the defendant from using the name adopted by him, and from soliciting the old customers of the firm. *McDonald* v. *Miller*, 37 N. S. Reps. 46.

Breach—Engaging in business — Carrying on business—Evidence—Onus—Business carried on in name of another. *Kerr* v. *Bowden* (N.W.T.), 1 W. L. R. 28.

Breach—*Injunction—Damages — Waiver —Assignment of Covenant.*]—The defendant covenanted with the plaintiff that he would not directly or indirectly engage in the drug business in a certain village, or within a radius of ten miles therefrom, during a term of five years, and that he would not open or have part in a third or further drug store during a term of ten years. The plaintiff sold his share in the drug business to the defendant, and actively promoted a partnership between him and his (the plaintiff's) son which was continued for some months, when the defendant sold out to his son. The plaintiff afterwards acquired the business and sold it to his co-plaintiff, by bill of sale, reciting the covenant, and extended its benefit to the purchaser, and covenanted with him to save him harmless from a breach of the covenant by the defendant. In an action to restrain the defendant from carrying on a third drug store which he had opened:—Held, that for the first five years there were two concurrent severable covenants, and that while the plaintiff might by his conduct have waived a breach of the first, not to enter into business during the five years, he had not waived any breach of the second, not to open or have part in a third store:—Held, also, that the covenant was assignable, and that the right to enforce it did not terminate by reason of the plaintiff having gone out of business; and an injunction was granted restraining the defendant from opening, carrying on, or having part in, a third store for the ten years. *Berry* v. *Days*. 23 Occ. N. 221, 5 O. L. R. 629, 1 O. W. R. 809, 2 O. W. R. 384.

Carrying on Business—Advertising — Breach. *Johnston* v. *Macfarlane*. 1 O. W. R. 287.

Construction of Covenant—Territorial limit—"In." *Wilcox* v. *Calver*, 2 O. W. R. 108.

Dissolution of Partnership — *Agreement Not to Engage in Competing Business —Breach—Interlocutory Injunction.*] — A partnership existed between members of the plaintiff company and the defendant for the purpose of carrying on a general tobacco business. Upon the dissolution of this partnership the plaintiff company was incorporated, the business being transferred to it, and the former partners binding themselves not to enter in any other business or to compete with the company. Subsequently defendant withdrew from the company, being paid in stock both for his share in the partnership, for his goodwill, and for his

refraining from competing with the company. The defendant afterwards established a small business almost next door to the plaintiff company's place of business, the new business being carried on in the name of his brother, J. Granda, although the latter was at that time in Spain, and knew nothing about the matter until his return. The plaintiff company applied for an interlocutory injunction restraining the defendant from buying tobacco or otherwise taking part in a business of the new concern:—Held, that the defendant had violated his undertaking by making purchases for J. Granda. Interlocutory injunction granted. Cook v. Briscbois, 2 Q. P. R. 162, followed. *Granda Hermanos y Co.* v. *Granda*, 23 Occ. N. 118.

Dissolution of Partnership—*Continuance of Business—Customers—Advertising — Name—Injunction.*]—The plaintiff and defendant carried on business in the city of Halifax, under the firm name of Miller Bros. & Macdonald. In 1902 the partnership was dissolved by agreement, whereby all the interest of the defendant in the firm business was transferred to the plaintiff, "together with the goodwill, firm name," etc., and "including every matter and thing in which the co-partnership money of the said Miller Bros. & Macdonald has been placed or invested." It was also agreed that the defendant should not "carry on business under said name or in any way interfere" with the use of such name by the plaintiff. The defendant subsequently went into business as "Miller Bros. & Co.," and published a circular in the papers advertising the fact "for the benefit of my old customers:"—Held, that defendant was not at liberty to appeal to the customers of the old firm, nor to use a name so similar to the one prohibited; and an injunction was granted. *Macdonald* v. *Miller*, 23 Occ. N. 299.

Public Policy—Unreasonable restriction—Covenant not to engage in any business in named locality. *Latimer* v. *Fontaine*, (N. W.T.), 2 W. L. R. 191.

CREDITORS' RELIEF ACT.

See EXECUTION.

CRIMINAL CONVERSATION.

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CRIMINAL LAW.

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I. EVIDENCE.

Admissibility — *Confession — Employment of Detectives to Obtain.*]—The prisoner being suspected of having been guilty of the murder of G., but not being under arrest, detectives associated with him, worked themselves into his confidence, and, by representing to him that they were members of an organized gang of criminals engaged in profitable operations, induced him to seek for admission to their ranks. They then intimated to him that he must satisfy them that he was qualified for such admission by shewing that he had committed some crime of a serious nature, whereupon, according to their evidence, he asserted that he had killed G. as the result of an altercation. The detectives were not peace officers, no charge was then pending against the prisoner, nor did he know that the detectives were such:—Held, that an inducement held out to an accused person in consequence of which he makes a confession must be one having relation to the charge against him, and must be held out by a person in authority, in order to render evidence of the confession inadmissible; that both these grounds of objection were wanting in this case, and that, therefore, the evidence of the confession was rightly received. *Rex* v. *Todd*, 21 Occ. N. 417, 13 Man. L. R. 364.

Admissibility — *Conspiracy — Previous Acts of Accused.*]—The accused were charged with having conspired to fraudulently obtain from the Merchants Bank of Halifax various sums of money by certain false pretences. The Crown called as a witness the manager of another bank to prove that at the same period the accused obtained other sums from that bank in the same manner. Counsel for the accused objected to the admission of this evidence as being irrelevant, and as tending to prejudice the minds of the jurors by proving the prisoners to have committed a crime other than that with which they were then charged:—Held, that acts similar to those charged, but committed against other persons, might be proved in order to shew that at the time of the commission of the offence charged the accused knew that they were acting unlawfully. *Regina* v. *McCullough and McGillis*, 21 Occ. N. 306.

Admissibility—*Perjury — Judge's Notes of Perjured Evidence.*]—Held, that, on the trial of a charge of perjury, the production of a book purporting to contain full notes of the evidence taken by the trial Judge (who was proved to have actually taken notes) in the case in which the perjury was alleged to have been committed, and proved to be in the Judge's handwriting, and to be signed by him, afforded, in view of the N. W. T. Act, R. S. C. c. 50, s. 69, proper and sufficient evidence of the statement in respect of which the perjury was assigned. *Regina* v. *Mills*, 11 Occ. N. 28, 1 Terr. L. R. 297.

Admissions of Prisoner—*Confession—Constable—Caution.*]—The prisoner was arrested on a charge of stealing S.'s gun, and in answer to questions put to him by a constable, who did not caution him, he made certain statements; he was afterwards charged with the murder of S., and on his trial the Crown sought to put in evidence his answers:—Held, not admissible. *Rex* v. *Kay*, 11 B. C. R. 157.

By-law — *Copy—Costs—Time for Payment—Justice of the Peace.*]—A by-law of a town council which is not authenticated in accordance with the provisions of Art. 4380,

R. S. Q., cannot be admitted in evidence, and a copy which does not import that the original has been signed by the president and the secretary-treasurer cannot be made the basis of a prosecution. 2. A conviction by a justice of the peace which gives only eight days to a party to pay the costs which he is adjudged to pay, in contravention of Art. 4598, R. S. Q., will be quashed upon appeal to the Superior Court. *Tasse* v. *Beaubien*, 4 Q. P. R. 372.

Canada Evidence Act, 1893—*Husband and Wife—Competency of Witness—"Communication"—Statute — Privilege — Directions by Legal Adviser—Reference to Hansard Debates—Method of Interpretation.*]—Under the provisions of the Canada Evidence Act, 1893, the husband and wife of a person charged with an indictable offence is not only a competent witness for or against the person accused, but may also be compelled to testify; Mills, J., dissenting. Evidence by the wife of a person accused, of acts performed by her under directions of his counsel, sent to her by the accused to give the directions, is not a communication from the husband to his wife in respect of which the Canada Evidence Act forbids her to testify; Mills, J. dissenting. Per Girouard, J., (dissenting). The communications between husband and wife contemplated by the Canada Evidence Act, 1893, may be de verbo, de facto, or de corpore. Sexual intercourse is such a communication, and in the case under appeal neither the evidence by the accused that bloodstains upon his clothing were caused by having such intercourse at a time when his wife was unwell, nor the testimony of his wife in contradiction of such statement as to her condition, ought to have been received. Per Mills, J. (dissenting):—Under the provisions of the Canada Evidence Act, 1893, and its amendments, the husband or wife of an accused person is competent as a witness only on behalf of the accused and may not give testimony on the part of the Crown. Per Taschereau, C.J.:—The report of debates in the House of Commons are not appropriate sources of information to assist in the interpretation of language used in a statute. *Gosselin* v. *The King*, 23 Occ. N. 210, 33 S. C. R. 255.

Confession—*Admissibility—Statement to Person in Authority.*]—Several church choir boys were implicated in an alleged assault on a Chinese boy, and a few days later the rector of the church held an inquiry, and calling the boys separately into the vestry from another room where they were detained in charge of the verger he told them they were to speak the truth and that their statements were to be used for the purpose of that inquiry only. He took their statements in the presence of the bishop and the choirmaster. One of the boys was afterwards tried for assault:—Held, on the trial, that the rector was a person in authority, and the statement was not voluntary and so not admissible in evidence. *Rex* v. *Royds*, 24 Occ. N. 283, 10 B. C. R. 407.

Conspiracy — *Hypothetical Testimony — Fraud.*]—On a trial for conspiracy to defraud a railway company by fraudulently obtaining information of the secret audits about to be made and furnishing the same to conductors of cars to enable them to be prepared for the audits, proof that information of this nature might be given by one conductor to another for purposes other than to defraud the company, was properly excluded, because such evidence would be merely hypothetical, and could not disprove the object of the conspiracy, or throw any doubt on the evidence which had been adduced to shew the object which the parties had in view. Judgment in Q. R. 12 K. B. 368 affirmed. *Rex* v. *Carlin*, Q. R. 12 K. B. 483.

Depositions at Preliminary Inquiry —*Absence of Magistrate.*]—Depositions taken at a preliminary inquiry, in the absence of the magistrate before whom the case is proceeding, have no legal value whatever; and therefore the commitment by the magistrate of a prisoner for trial, the bill of indictment founded on his illegal commitment or on the illegal depositions, and the true bill and indictment reported by the grand jury, are null and void. *Rex* v. *Traynor*, Q. R. 10 Q. B. 63.

Depositions Taken at Preliminary Inquiry — *Incomplete Cross-examination—Waiver.*]—At a preliminary inquiry before a magistrate on a charge of indecent assault on a female, the latter's depositions were taken, the prisoner being represented by counsel, but before her cross-examination was concluded the proceedings were adjourned to a fixed date on account of her illness. Meanwhile, after consulting the county Crown attorney, the magistrate determined to send the case to Sarnia, and so telegraphed to the prisoner's counsel, asking a reply whether he would come up or not. Counsel replied that if the magistrate intended to send the prisoner to trial at any rate, it would be no use his coming, and accordingly he did not further attend the proceedings. On the day to which adjournment had been made, the magistrate went out to the residence of the witness, and obtained her signature to her depositions as already taken, neither the prisoner nor his counsel being present, and afterwards resumed the inquiry at his own office, the prisoner being present, but not the witness, and on the evidence already taken the prisoner was committed for trial. At the trial the witness was proved to be too ill to attend, and her depositions taken as above were tendered by the Crown and admitted:—Held, that, in view of s. 687 of the Criminal Code, the depositions were improperly received in evidence, the prisoner's counsel not ever having had a full opportunity of cross-examining the witness, and not having waived that right, as contended by the Crown. *Rex* v. *Trevanne*, 22 Occ. N. 385, 4 O. L. R. 475, 1 O. W. R. 587.

Foreign Language — *Translation — Documents — Extracts from Registers—Evidence of Bad Character.*]—A conviction for murder will not be set aside because the evidence of witnesses for the prosecution, given in a language of which the defendant was ignorant, was not translated to him, where he was defended by counsel speaking and thoroughly acquainted with the language of the witnesses, and where neither the defendant nor his counsel asked that the evidence be translated. 2. Section 19 of the Canada Evidence Act 1893, which requires that ten days' notice shall be given to the prisoner

before the trial, of the intention to produce certain documents, does not apply to certified extracts from the registers of acts of civil status, which were produced merely to explain the alias of the person killed. Such extracts are admissible without notice. 3. Evidence of bad character or of misconduct of the prisoner, not relevant to the issue before the Court, can only be introduced by the Crown in reply or rebuttal. The admission of such evidence as part of the case for the prosecution, before any evidence of good character has been adduced for the defence, is improper, irregular, and illegal, and constitutes sufficient ground for setting aside the conviction. The illegality is not covered by the failure of the prisoner or his counsel to object to the evidence at the time, or by the fact that his counsel cross-examined the witnesses on their statements. 4. Even after evidence of the prisoner's good character has been made by the cross-examination of Crown witnesses, the prosecution is only entitled to prove his general reputation and not particular acts of misconduct. *Rex* v. *Long*, Q. R. 11 K. B. 328.

Joint Indictment of Husband and Wife for Murder — *Evidence—Admission or Confession of Wife Implicating Husband —Admissibility in Whole—Caution to Jury —No Evidence against Husband — Counsel Representing Attorney-General — Right of Reply where Prisoners Adduce no Evidence.*] —Two prisoners tried jointly for murder of their infant son. The matron of the gaol gave as evidence the confession of the wife in the police station after being cautioned. Argued, the evidence could not be given at their joint trial as the husband was not there when confession was made. Falconbridge, C.J., admitted the evidence at the trial, but informed the jury it was not evidence against the male prisoner. At the request of the male prisoner the case was reserved for the opinion of the Court of Appeal upon the following questions: 1. Was the alleged statement of the female prisoner to the witness, the gaol matron, properly admitted as evidence, when the prisoners were tried together? 2. No evidence being adduced by either prisoner, had the counsel for the defence the right of reply? Falconbridge, C.J., ruling at trial that the counsel for the Crown, who claimed to be acting on behalf of the Attorney-General, had the right of reply:— Held, as to the first question, that the evidence was properly admitted, and as to the second question, until Parliament sees fit to withdraw the right of reply, the Crown, through its representative, can assert the privilege. And it must be left to counsel, in the judicious exercise of his discretion, to decide whether he will claim it. *Rex* v. *Martin*, 5 O. W. R. 317, 9 O. L. R. 218.

Perjury—*Indictment—Description of Offence — Improper Admission of Criminating Answers before Judicial Tribunal—Coroner.*] —A count alleging perjury before a coroner —omitting any reference to the coroner's jury—was held sufficient in view of s. 611, ss. 3 and 4, and s. 723, of the Criminal Code. A new trial was granted on the ground of the reception of evidence of an admission made by the accused in answer to questions put to him as a witness on the inquest before the coroner's jury, it being held that s. 5 of the Canada Evidence Act, 1893, compelled the witness to answer, and protected him against his answers being used in evidence against him in any criminal proceeding thereafter instituted against him other than a prosecution for perjury, in giving such evidence, and this without the necessity for the claim of privilege on the part of the witness. (But see now 61 V. c. 53, s. 1). *Regina* v. *Thompson*, 2 Terr. L. R. 383.

Perjury in Civil Action—*Depositions—Indictment—Form.*]—A person charged with perjury committed in a civil action is entitled to have in evidence those parts of his testimony in the civil action which may be explanatory of the statements in respect of which the perjury is charged. Where the indictment did not follow the statutory form, and laid the charge in an involved manner, but contained the essential averments, it was held sufficient, the unnecessary matter being considered surplusage. *Rex* v. *Coote*, 24 Occ. N. 257, 10 B. C. R. 291.

Proof of Alibi — *Misdirection.*]—Where the defence to a criminal charge is an alibi, it is misdirection to tell the jury that the onus is on the prisoner to prove it to their entire satisfaction, and to shew beyond all question or reason that he could not have been present at the commission of the crime. *Rex* v. *Myshrall*, 35 N. B. Reps. 507.

Right to Re-examine Witness.]—The right to re-examine follows upon the exercise of the right to cross-examine, and, even if inadmissible matter be introduced in cross-examination, the right to re-examine remains, and the rule holds good where the witness volunteers the statement. If it be desired to avoid re-examination upon such matter, it must be expunged at the instance of the party cross-examining; while it remains as part of the testimony, the right to re-examine upon it also remains. Ruling of Meredith, C.J., at the trial, reversed, and a new trial ordered. *Rex* v. *Noel*, 23 Occ. N. 283, 6 O. L. R. 385, 2 O. W. R. 488, 776.

Several Charges—*Hearing Evidence on Second before Deciding First—Conviction.*] —The prisoners were tried before the County Court Judge on two separate charges of receiving, on two separate days, stolen goods knowing them to be stolen, and of housebreaking and stealing on the second of two days. At the close of the case for the Crown on the first charge, on the 23rd December, the Judge found a prima facie case of receiving, and adjourned the case a week to let in evidence for the defence. Meanwhile he proceeded with the trial of the second charge, and remanded the prisoners for sentence. On the 30th December he tried them on the third charge, and acquitted them on it. On the 31st December he sentenced them on the first two charges. The Judge certified that he came to his finding on the first charge before hearing the second, and was not conscious of having been biassed on the latter, by the evidence given on the first:—Held, that, inasmuch as the circumstances of the three charges were altogether different as to time and place, and the only identity was in the persons charged, and in respect to the principal witness—and in view of what the learned Judge stated, and notwithstanding the expediency of not mixing up criminal charges—the convictions should be upheld. *Rex* v. *Bullock and Stevens*, 24 Occ. N. 9, 6 O. L. R. 663, 2 O. W. R. 436, 901.

Testimony of Accused—*Cross-examination—Previous Convictions.*]—An accused person, who on his trial for an indictable offence is examined as a witness on his own behalf, is, except so far as he may be shielded by some statutory protection, in the same situation as any other witness as regards liability to and extent of cross-examination, and may be cross-examined as to previous convictions. *Rex* v. *D'Aoust*, 22 Occ. N. 228, 3 O. L. R. 653, 1 O. W. R. 344.

II. Particular Offences.

Advertising Medicine Intended to Prevent Conception—*Evidence to Support Conviction—Functions of Judge and Jury—Acquittal—New Trial.*]—The evidence of the Crown, upon an indictment for an offence against s. 179 (c) of the Criminal Code, shewed that the defendant conducted a large business in various proprietary medicines, including a certain emmenagogue or medicine for stimulating or renewing the menstrual flow. This medicine was put up in boxes, in the form of tablets, and sold under the terms of an agreement, duly proved, between the defendant and the manufacturer. A box was produced as made up for the purpose of sale, with a brief printed description of the contents on the outside, across which a warning in red ink and large type was printed, not to use the tablets during pregnancy. Inside the box was a printed sheet or circular giving full directions for the use of the tablets; and a separate advertising circular referring to the tablets and describing their purposes and operation was also proved. In the "directions" there was this statement: "Thousands of married ladies are using these tablets monthly. Ladies who have reason to suspect pregnancy are cautioned against using these tablets." The Judge at the trial directed an acquittal, reserving a case for the Crown upon the question whether the evidence offered would support a conviction. A verdict of not guilty was accordingly returned:—Held, that the jury could have legitimately inferred from the language used that the tablets were thereby represented as a means of preventing conception; and therefore it would have been right to have left the case to the jury; and a conviction might have been supported. It is for the Judge to determine whether a document is capable of bearing the meaning assigned to it, and for the jury to say whether, under the circumstances, it has that meaning or not. The Court declined to direct a new trial. *Rex* v. *Karn*, 23 Occ. N. 219, 5 O. L. R. 704, 2 O. W. R. 335.

Alien Labour Act—*Written Consent of Judge to Prosecution—Requisites of Consent—Jurisdiction of Magistrate.*] — Appeal by defendant from a conviction by a magistrate (acting with the written consent of the junior Judge of the county of Carleton) for unlawfully and knowingly assisting the importation of an alien and foreigner into Canada under contract and agreement made previous to his importation to perform labour and services in Canada contrary to 60 & 61 V. c. 11 (D.), as amended by 61 V. c. 2 (D.), and 1 Edw. VII. c. 13 (D.):—Held, the written consent did not comply with the intention of the statute, as it should contain a general statement of the offence alleged to have been committed, mentioning the name of the person in respect of whom the offence is alleged to have been committed, and the time and place, with sufficient certainty to identify the particular offence intended to be charged. Conviction quashed. *Rex* v. *Breckenridge*, 6 O. W. R. 501, 10 O. L. R. 459.

Alternative Offences—*Summary Trial—Jurisdiction—Place of Imprisonment.*] — On application to discharge the defendant upon a writ of habeas corpus, it appeared that he was tried before the stipendiary magistrate for the city of Halifax, under the provisions of the Code relating to summary trials, and was convicted of the offence of stealing a quantity of whisky, of the value of $9, "in and from a certain railway building, to wit, a certain building," and was adjudged, for his said offence, to be imprisoned in the city prison, in the said city of Halifax, for the space of nine months. Under the Code, s. 351, every one is guilty of an indictable offence, and liable to 14 years' imprisonment, who steals anything in or from any railway station, or building, &c.:—Held, that there was but one crime charged, and that the place of detention was a proper place within the meaning of the law; Weatherbe, J., and Graham, E.J., dissenting. *Rex* v. *White*, 21 Occ. N. 310, 34 N. S. Reps. 436.

Arson—Intent to defraud insurance company — Evidence — Previous fire. *Rex* v. *Beardsley*, 5 O. W. R. 584, 805.

Assault — *Teacher and Pupil—Criminal Code—Punishment—Excess.*]—The Criminal Code, s. 55, authorizes parents, persons in the place of parents, schoolmasters, etc., to use force by way of correction towards any child, etc., under his care, "provided such force is reasonable under the circumstances," but by s. 58, "everyone by law authorized to use force is criminally responsible for any excess." The defendant, a teacher in one of the public schools, was charged before a magistrate with assaulting, beating, and illusing J. O., one of the pupils under his care, and was acquitted on the ground that there was no evidence of malice on his part or of permanent injury to the child:—Held, that the only question properly before the magistrate was whether the punishment was reasonable in the circumstances, or, in other words, whether there was excess; — Held, that there is no warrant in the Code for the test applied in the American case of State v. Pendergrass, 31 Am. Dec. 365, and adopted by the magistrate, that it is necessary for the prosecutor to prove either that the person inflicting the punishment was actuated by malice or that his act resulted in permanent injury to the child. *Rex* v. *Gaul*, 24 Occ. N. 135, 36 N. S. Reps. 504.

Assaulting Police Officer — *Arrest of Suspect—Resisting—Warrant.*] — Where the defendant, arrested by a provincial constable, who believed that a robbery had been committed, and that the defendant was one of the persons who committed it, and who, being asked to shew his authority, produced and read a warrant against F. E. and others, for breaking and entering a shop and stealing a quantity of goods therefrom, seeing that his

name was not mentioned in the warrant, resisted arrest, and in so doing assaulted a constable, and was tried and convicted for assaulting a police officer in the discharge of his duty, with intent to resist lawful arrest, it was held that the arrest could be justified under the statute, notwithstanding the insufficiency of the warrant. *Rex* v. *Sabeans*, 37 N. S. Reps. 223.

Bigamy — *Defence—Dissolution of Former Marriage — Decree of Foreign Court—Validity—Domicil.*]—Upon an indictment of the defendant for bigamy the defence was, that she had been divorced from her husband by the decree of a foreign Court:—Held, that the marriage being a Canadian one, and the domicil of both parties being in Canada, and not having been changed, although they both resided for a short time in the foreign country previous to the making of the decree, the marriage was not dissolved, and the defence failed. Magurn v. Magurn, 3 O. R. 570, 11 A. R. 178, and Lemesurier v. Lemesurier, [1895] A. C. 517, followed. *Rex* v. *Woods*, 23 Occ. N. 220, 6 O. L. R. 41, 2 O. W. R. 338.

Charging Crime—*Sufficiency of Charge —"Unlawfully did Steal."*] — The prisoner was summarily tried on the charge that he on a certain day "unlawfully did steal one piece of Oregon pine wood, of the value of $5.40, the property of His Majesty the King." The prisoner having been convicted, a case was reserved as to whether the charge on which he was tried was bad by reason of the omission to charge the offence as having been committed "fraudulently and without colour of right:"—Held, Weatherbe, J., dissenting, that the words "unlawfully did steal," in the charge, meant and included everything necessary to constitute the offence of theft or stealing as defined by s. 305 of the Code, and that the conviction, so far as this question was concerned, was right. *Rex* v. *George*, 35 N. S. Reps. 42.

Circumstantial Evidence—*Crown Case Reserved—Nature of—Weight of Evidence—New Trial.*]—The defendant was tried and convicted on a charge of theft upon evidence shewing that the prosecutor's money had been stolen; that the defendant was employed upon the same ship and slept in the same "square;" that the defendant had asked the prosecutor for a loan of money a day or two before and had been refused; that the defendant was seen with money in his possession on the day the prosecutor's was stolen; but no attempt was made to identify the money seen in the defendant's possession with that stolen, nor was it shewn that the defendant knew where the prosecutor kept his money; the defendant, however, made to a third person a false statement as to the source from which he got the money he had:—Held, Weatherbe, J., dissenting, that there was some evidence to support the conviction. 2. That a question reserved for the Court, "Whether the convicting Judge was justified in drawing from the facts stated a presumption sufficiently strong to justify him in adjudging the defendant guilty," was not a proper question to reserve; such a question could only come before the Court on a motion for a new trial. 3. Per Graham, E.J., that the case was one in which the Court should exercise its power under the Criminal Code, s. 746, to order a new trial. But per Meagher, J., that the remedy by case reserved and that by motion for a new trial were not open to the accused at the same time. *Regina* v. *McIntyre*, 31 N. S. Reps. 422; *Regina* v. *MacCaffery*, 33 N. S. Reps. 232.

Conspiracy — Preventing person from working at his trade—Sufficiency of evidence —Refusal to admit to trade union—Notification to employer — Discharge of workman. *Rex* v. *Day*, 6 O. W. R. 470, 577.

Conspiracy — *Trade Combination — Preventing or Lessening Competition—Criminal Code, s. 520 (d)—"Unduly"—Conviction—Evidence Justifying—Association of Traders —Constitution and By-laws — Limitation of Time for Prosecution—Continuing Offence—Appeal from Conviction — Cross-appeal by Crown.*] — Defendant was president of the Ontario Coal Association, an organization having as its object the protection of its members against the shipment of coal direct to consumers by producers. Members agreed not to sell coal for less than certain fixed prices, and not to buy nor sell with dealers in coal who sold direct to consumers, or who refused to maintain the prices fixed by the association. A claim for 50 cents per ton might be made against any member who made any irregular sales of coal, and the member was to be expelled from the association on refusal to pay the penalty so fixed. A membership list and a non-membership list were published by the association, which was sent to their wholesale friends so they might be on the lookout so as to guard against irregular shipments. There was evidence that coal dealers in Buffalo had refused to sell coal wholesale to non-members of the association in Ontario. Defendant was convicted under s. 520 (d) of the Criminal Code, which enacts that every one is guilty of an indictable offence, etc., who conspires, combines, etc., to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation, or supply of any article or commodity which may be a subject of trade or commerce. Defendant appealed to the Court of Appeal in the manner provided by s. 5 of 52 V. c. 41; and the Crown cross-appealed, seeking a conviction upon the other counts:—Held, (1) defendant was rightly convicted. The plain object of the association was to restrict and confine the sale of coal by retail to its own members, and to prevent anyone else from obtaining it for that purpose from the operators and shippers. (2) The objection that the prosecution was too late, and was barred by s. 930 of the Code failed, as the offence was a continuing one (and if applicable to indictable offences it did not apply):—Held, the cross-appeal of the Crown should be dismissed, as s. 5 of the Act only applied to an appeal from a conviction. *Rex* v. *Elliott*, 5 O. W. R. 163, 9 O. L. R. 648.

Conspiracy to Defraud—*Indictment — Overt Acts — Name of Person Defrauded — Preliminary Proof—Witness — Discrediting.*] In an indictment charging a conspiracy to defraud, it is not necessary to set out overt acts done in pursuance of the illegal agreement or conspiracy, nor is it necessary to name the person defrauded or intended to be defrauded. Before the acts of alleged conspirators can be given in evidence, there ought to be some preliminary proof to shew an acting together, but it is not necessary

that a conspiracy should first be proved. A party may not introduce general evidence to impeach the character of his own witness, but he may go on with the proof of the issue, although the consequences of so doing may be to discredit the witness. *Rex* v. *Hutchinson*, 11 B. C. R. 24.

Conversion of Chattel by Finder — *Pawning — Criminal Intent — Question for Jury.*]—The prisoner was convicted of stealing a watch. The evidence shewed that he found the watch, and a few hours afterwards on the same day pawned it for a small advance. The Judge told the jury that, if the prisoner found the watch, and afterwards disposed of it to his own use, he was guilty of theft; it made no difference whether he discovered the owner or not. He also told them that the raising of a temporary loan on anything found constituted a theft. The following questions were reserved for the opinion of the Court:—1. If the prisoner found the goods and afterwards disposed of them to his own use was he guilty of theft? 2. Does the raising of a temporary loan on anything found constitute theft? In answer the Court said: "Not necessarily as a matter of law. Whether or not the conversion by the finder to his own use of goods found by him is a guilty conversion is a question for the jury, upon consideration of all the circumstances. . . . The direction of the Judge to the jury in this case was equivalent to a direction that as a matter of law the accused was guilty; the finding was therefore rather a finding by the learned Judge than by the jury, and for that reason cannot be upheld." *Regina* v. *Slavin*, 21 Occ. N. 54.

Distributing Obscene Printed Matter —*Criminal Code, s. 179 (a)—Knowledge of Contents — Meaning of "Obscene."*] — Case reserved under s. 743 of the Criminal Code. Prisoner was indicted under s. 179 (a) for distributing obscene printed matter, "To the Public; The Evil Exposed; The Plot against Prince Michael Revealed." The Judge found the offence proved as charged, and reserved th following points for the opinion of the Court of Appeal: 1. Is the printed matter complained of obscene within the meaning of s. 179 (a) of the Criminal Code? 2. Did the prisoner, without lawful excuse, distribute such obscene printed matter? Held, affirming the conviction, that the word "obscene," as used in s. 179 (a) means the doing of any indecent act in a public place; s. 179 (b), publicly exhibiting any disgusting object; and s. 180 (c), transmitting by post any letter or circular concerning schemes devised or intended to deceive the public, or for the purpose of obtaining money under false pretences. This part of the Code strikes at conduct involving sexual immorality and indecency, and it is in that sense that the word is used in s. 179. The whole of the printed matter, disgusting as it is, is set forth in United States v. Mabs, 51 Fed. Rep. 41. *Rex* v. *Bearer*, 5 O. W. R. 102, 9 O L. R. 418.

Disturbing Public Meeting — *Municipal Election—Criminal Code.*]—Article 173 of the Criminal Code, which declares it an offence to disturb, interrupt, or disquiet any assemblage of persons met for religious worship, or for any moral, social, or benevolent purpose, by profane discourse, by rude or indecent behaviour, or by making a noise, does not apply to a meeting of electors called by one of the candidates during a municipal election. Articles 2946 to 2964, R. S. Q., sufficiently provide for the preservation of order at public meetings other than those mentioned in art. 173, Criminal Code. *Rex* v. *Lavoie*, Q. R. 21 S. C. 128.

Evidence—*Answers Tending to Criminate —Claiming Privilege*]—The prisoner, being a manager of a branch store for the sale of goods supplied by a factory of his employers, arranged with the checker at the factory to load certain goods on a waggon going to the branch store, without keeping the usual check on them which his employers' system demanded, and had the goods delivered to a customer of his branch:—Held, that he was properly convicted of theft as defined by the Criminal Code. If a witness when called upon to testify does not object to do so upon the ground that his answers may tend to criminate him, his answers are receivable against him (except in the case provided for by s. 5 of the Canada Evidence Act, 1893, as amended by 61 V. c. 53) in any criminal proceedings against him thereafter, but if he does object he is protected. *Rex* v. *Clark*, 22 Occ. N. 90, 3 O. L. R. 176.

Evidence—*Possession of Stolen Goods — Crown Case Reserved.*]—A Crown case was reserved to determine the question whether, when stolen goods are found in the possession of a prisoner, and he gives to those who find him a reasonable account of how he came by the goods, it is incumbent upon the prosecution at the trial to shew that the prisoner's account is untrue:—Held, that, in the absence of any evidence to shew that such account was in fact given, the Court was not in a position to determine the question reserved. *Regina* v. *McKay*, 34 N. S. Reps. 540.

Extradition — Fugitive Offenders Act—Forgery—Theft—Evidence—Prima facie case — Presumption — Identification—Judicial notice of statute. *Re Rowe*, 2 O. W. R. 962.

Extradition—Parent stealing his child—Foreign law—Divorce—Collusion—Contempt of Court. *Re Watts*, 1 O. W. R. 129, 133, 3 O. L. R. 279, 368.

False Pretences — *Evidence — Admissibility.*] — On an indictment charging the accused with having obtained goods by false pretences from a company named, with intent to defraud, so soon as it has been proved that he did the act charged, evidence of false representations made to persons other than the president and general manager of such company, on other and distinct occasions, is admissible, to shew that the accused, at the time he made the false representations to the president and general manager of the company, on whose information the prosecution was brought, was pursuing a course of similar acts, and to prove guilty knowledge of the falsity of the pretence charged in the indictment and the intention with which the act charged was done. *Rex* v. *Komiensky*, Q. R. 12 K. R. 463.

False Pretences — *Fraudulent Intent — Demand by Third Person.*]—A person who does not otherwise make a false representation himself, but who is present when it is

made, knows it to be false, and gets part of a sum of money obtained by such false pretence, is guilty of obtaining such sum of money by false pretences. *Regina* v. *Cadden*, 29 Occ. N. 185, 4 Terr. L. R. 304.

False Pretences — *Obtaining Execution of "Valuable Security"—Lien Note.*] — An ordinary "lien note" is a "valuable security" within the meaning of s. 360 of the Criminal Code. *Rex* v. *Wagner*, 5 Terr. L. R. 119.

False Pretences—*Obtaining Goods Unlawfully—Sale of Hired Goods—Nature of Offence.*] — Where the defendant hired a bicycle, of the value of $20, representing that he wished to use it to go to L., for the purpose of visiting his sister, and, instead of returning the bicycle, sold it to C.:—Held, that evidence which shewed these facts was not sufficient to support a conviction for having "unlawfully, and by false pretences, obtained from L. one bicycle, of the value of $20," the prosecutor not having been induced and not intending to part with his right of property in the goods, but merely with the possession of them, and there being no representation as to a present or past matter of fact. *Rex* v. *Nowe*, 36 N. S. Reps. 531.

Fortune Telling—*Criminal Code, s. 396.*] —Deception is an essential element of the offence of "undertaking to tell fortunes" under s. 396 of the Criminal Code; and to render a person liable to conviction for that offence there must be evidence upon which it may be reasonably found that the person charged was, in so undertaking, asserting or representing, with the intention that such assertion or representation should be believed, that he had the power to tell fortunes, with the intent in so asserting or representing of deluding and defrauding others. In this case the evidence set out in the report was held to be sufficient. *Rex* v. *Marcott*, 21 Occ. N. 431, 2 O. L. R. 105.

Fraudulent Packing—*Conviction for—Fruit Marks Act—"Faced or Shewn Surface."*]—The mere having in possession for sale packages of fruit fraudulently packed within the meaning of s. 7 of the Fruit Marks Act, 1901, 1 Edw. VII. c. 27 (D.), is an offence thereunder, though no one is imposed on thereby nor any fraud intended. Semble, that the "faced or shewn surface," within the meaning of the section, is not limited to the branded end of the package. *Rex* v. *James*, 1 O. W. R. 520, 22 Occ. N. 389, 4 O. L. R. 537.

Fraudulent Removal and Concealment of Goods — *Indictment — Date of Offence—Evidence of Similar Acts—Judge's Charge.*]—The accused were convicted by the jury at the trial on a count for concealing certain household goods for the purpose of defrauding the insurance company by which they had been insured, by representing that they had been destroyed by fire, and collecting the insurance money upon them; also on a count which alleged a removal of the goods on or about the 11th September, 1900, for a like fraudulent purpose. Both counts were framed under s. 354 of the Criminal Code, 1892. Evidence was given at the trial shewing the removal of some of the goods in question on the 13th August, 1900, and of others on the 11th September, and in his charge to the jury the trial Judge did not distinguish between the goods removed on 13th August, and those removed on 11th September, but left the case to them in such a way that they could convict on both counts or on either of them as to both sets of goods. In stating a case, the Judge certified that, in his opinion, the evidence of the removal of goods on the 13th August materially influenced the verdict of the jury:—Held, that the conviction of the accused on the count for concealment was right and should be affirmed, but that, although the evidence of the removal in August was probably admissible for the purpose of shewing a criminal intent in the September removal, yet the conviction for the removal should be set aside, on the ground of misdirection by the Judge in telling the jury that they could convict for the removal in August, as the trial might not have been a fair one. *Rex* v. *Hurst*, 22 Occ. N. 68, 13 Man. L. R. 584.

Fraudulent Sale — *Fraudulent Conversion — Indictment.*] — The defendant was indicted for theft. The indictment set out that, being intrusted by E. R. H. with a power of attorney, he did fraudulently sell certain bank shares belonging to said E. R. H., and did fraudulently convert the proceeds of the sale to a purpose other than that for which he was intrusted with the power of attorney. After the conviction the defendant moved in arrest of judgment because it was not stated in the indictment that the power of attorney was for the sale, etc., of any property, real or personal, as provided by art. 309, Criminal Code. The Judge reserved the question for the decision of the Court of Appeal:—Held, 1. That the indictment was sufficient, it not being necessary to describe the whole power of attorney; and, further, the alleged omission was only a part omission, and any defect resulting therefrom was cured by verdict. 2. The fraudulent sale and the fraudulent conversion did not constitute two offences, but one specific offence, viz., that of theft. *Regina* v. *Fulton*, Q. R. 10 Q. B. 1.

Gaming—*Keeping Common Gaming-house — Evidence of Offence — Occupant of Premises.*]—The evidence disclosed that two or three police officers saw several men in a stable sitting around a table, and one of the constables saw dice being thrown and heard somebody say "eleven wins;" and a constable said that, when the police entered the place, the men tried to get out and scattered the money that was on the table, and that the prisoner was in charge of the money on the table. The prisoner gave evidence on his own behalf, and also called witnesses to shew that the game they were playing was "poker." The prisoner said he saw no dice; that he did not own the place, nor did he act as banker at the game. Two of the witnesses for the defence said that a game of "craps" (played with dice) was going on at the same time, but in another room; and another witness for the defence said he had been in the place at other times and had seen the prisoner acting as banker at gambling games there:—Held, that this evidence went to shew that the place was used as a gaming house; and had there been any evidence that the prisoner was the owner, lessee, or occupier of the premises, there was ample evidence to shew that it was a place used for playing at games of chance, and so a common gaming-house.

But the prisoner denied being the keeper of the place, and, unless from the fact sworn to, that the prisoner was in charge of the money for the game, the evidence as to the person who kept the place was as strong against any of the others found there as against him: ss. 196 and 198 of the Code. *Rex* v. *Duffy*, 21 Occ. N. 477.

Goods under Seizure—*Innkeeper's Lien—Abandonment—Tender—Evidence.*] — An hotelkeeper who locks up the room of a guest containing the latter's luggage and effects, for non-payment of charges for board and lodging, and who notifies the guest thereof, and requires him to leave the hotel on the same day or pay the bill, thereby places the guest's luggage, etc., under "lawful seizure and detention," in respect of the landlord's common law lien; and the taking away of such luggage by the guest without the landlord's authority is "theft" under s. 306 of the Criminal Code. (But see now 63 V. c. 46, s. 3, sched.). The landlord does not, by afterwards granting permission to the guest to remove some specified articles, and by allowing him free access to the room for that purpose, abandon such seizure and detention as regards the other effects, and the owner who removes any luggage, as to which the permission does not extend, is guilty of "stealing" the same under s. 306 of the Criminal Code. The fact that the amount in respect of which a lien is claimed is in excess of the amount legally due does not dispense with the necessity of a tender of the amount legally due, nor invalidate the lien. Circumstantial evidence of theft. *Regina* v. *Hollingsworth*, 4 Terr. L. R. 168.

Housebreaking—*Breaking and Entering—Misdirection — New Trial.*] — The defendant was convicted under s. 410 of the Criminal Code for breaking and entering the dwelling house of D., with intent to commit an assault upon W. The only evidence of the breaking was that, immediately after the accused left the house, a window in the dining room and one in the back porch were found wide open, sufficiently to allow a person to pass through, that when the family retired on the previous night the window in the dining room was entirely closed, and the window in the porch open only a few inches and resting upon a can, and that plants growing below the porch window, which had not been disturbed the previous evening, were broken, as if they had been trodden upon. Apart from this evidence it was left uncertain by which window the accused entered. The trial Judge directed the jury that the lifting of the porch window from where it rested, as well as the lifting of the dining room window, was, under the Code, a "breaking" of the dwelling house:—Held, that the direction as to the lifting of the porch window was erroneous, and that the conviction must be set aside:—Held, that the prisoner should not be discharged, but that there should be a new trial. *Rex* v. *Burns*, 36 N. S. Reps. 257.

Illegal Fishing — *Fisheries Act — Evidence—Complaint—Indefiniteness—Conviction—Distress—Imprisonment.*] — Evidence that a person was seen on the river in a canoe between ten and eleven o'clock at night with the appliances commonly used in illegal salmon fishing, is, in the absence of any explanation of the situation and where the charge is not denied on oath, sufficient to justify a conviction for illegal fishing under the Fisheries Act. A complaint charging the accused with having been engaged in illegal fishing in contravention of the Fisheries Act is too indefinite to support a conviction for illegal fishing under the Act. Imprisonment may be adjudged under the Act for default in payment of a penalty imposed without awarding a distress. *Rex* v. *Fraser*, *Ex p. Dixon*, *Ex p. Lennon*, 36 N. B. Reps. 109.

Illegal Voting — *Municipal Elections — Indictable Offence — Information — Police Magistrate — Mandamus.*] — Voting in more than one ward at a municipal election by general vote, contrary to the provisions of 1 Edw. VII. c. 26, s. 9 (O.), is an indictable offence, and mandamus lies to a police magistrate having territorial jurisdiction, to compel him to consider and deal with an application for an information for such an offence. *In re Rex* v. *Meehan*, 22 Occ. N. 179, 3 O. L. R. 567, 1 O. W. R. 136, 248.

Importing Alien Labourer — "*Knowingly*"—*Conviction—Amendment — Evidence of Alienage—Person Born Abroad of British Parents.*] — Conviction of the defendant for that he did unlawfully prepay the transportation, and assist and encourage the importation and immigration of an alien and a foreigner from the United States into Canada under contract and agreement made previous thereto to perform labour and service in Canada by working at a factory, quashed as clearly bad on its face, inasmuch as the conviction did not state that the defendant "knowingly" did the acts charged, nor in fact did the information charge him with having "knowingly" done them, as required under 1 Edw. VII. c. 13, s. 3:—Held, also, that this omission from the information and conviction of one of the mere irregularity or informality or insufficiency within the meaning of s. 889 of the essential elements of the offence was not a Criminal Code. It was not a matter of form merely, but of substance, and a fatal and incurable defect in the conviction. Semble, also, that the person imported by the defendant was not an alien, but a British subject, the presumption from the only facts in evidence being that he was born of British parents residing in the United States. *Rex* v. *Hayes*, 23 Occ. N. 88, 5 O. L. R. 198, 2 O. W. R. 123.

Incest—Evidence—Destroyed letters—Inferences—Misdirection—Substantial miscarriage—New trial. *Rex* v. *Godson*, 1 O. W. R. 250.

Indecent Act—Criminal Code, s. 177 (b) —Conviction—"Wilfully," omission of—Habeas corpus—Amended conviction and commitment substituted — Refusal to discharge prisoner — Appeal to full Court. Manitoba. *Rex* v. *Barré* (Man.), 2 W. L. R. 376.

Indecent Act — *Information — "Unlawfully"—"Wilfully."*]—It is not sufficient, in an information laid under s. 177 of the Criminal Code, to allege the "unlawful" commission of an indecent act; it is essential that the accused be charged with having committed it "wilfully." A commitment based on an information which merely alleges that the act was committed "unlawfully" will be quashed and the prisoner discharged. *Ex p. O'Shaughnessy*, Q. R. 13 K. B. 178.

Keeping Bawdy House — *Criminal Code.*]—A female cannot be convicted of unlawfully keeping a bawdy house, under s. 198 or s. 783 of the Criminal Code, unless it is shewn that the house or room in question is occupied or resorted to by more than one female for purposes of prostitution. Singleton v. Ellison, [1895] 1 Q. B. 607, followed. *Rex* v. *Young*, 22 Occ. N. 211, 14 Man. L. R. 58.

Keeping Bawdy House — *Nature of Offence—Evidence—Criminal Code, s. 195.*]—1. A woman, living by herself in a house, cannot be convicted of keeping a bawdy house therein, unless it is shewn that one or more other women resort to it for purposes of prostitution. Rex v. Young, 14 Man. L. R. 58, and Singleton v. Ellison, [1895] 1 Q. B. 607, followed. 2. In order to support a conviction for keeping a bawdy house, it is not sufficient to shew the bad reputation of the house and its inmates and that men resorted to it in the night, but actual proof must be given of some act or acts of prostitution, though definite proof of one may be sufficient. Regina v. St. Clair, 3 Can. Crim. Cas. at p. 557, followed. 3. Section 195 of the Criminal Code, 1892, does not change the law, as it was before the Code, as to the essential ingredients of the offence of keeping a bawdy house, and is intended merely to define the nature of the premises within which a bawdy house may be kept, and not to state what acts constitute such keeping. *Rex* v. *Osberg*, 15 Man. L. R. 147, 1 W. L. R. 121.

Keeping Bawdy House—*Criminal Code, s. 195—What Constitutes Offence—Place of Resort for Prostitutes.*] — Crown case reserved. Magistrate found that a certain house was kept by defendant for the purposes of prostitution, but there was not sufficient evidence to shew that any other women resorted thereto for such purposes. The question reserved was whether, in these circumstances, the magistrate was right in convicting defendant under s. 195 of the Criminal Code, or whether he should have applied the ruling in Rex v. Young, 6 Can. Crim. Cas. 42, and acquitted defendant:—Held, Code has not changed the law as to what constitutes the offence of keeping a common bawdy house, and that a woman living by herself in a house cannot be convicted of the offence unless other women than herself resort to it for the purpose of prostitution. *Rex* v. *Mannix*, 6 O. W. R. 265, 10 O. L. R. 303.

Keeping Bawdy House—Offence—Conviction — Vagrancy — Criminal Code, s. 207. *Rex* v. *Leconte*, 6 O. W. R. 970.

Keeping Bawdy House — *Offence — Duplicity—Continuity.*]—The defendant was convicted by the stipendiary magistrate for the city of Halifax of the offence of "keeping a disorderly house, that is to say, a common bawdy house, on the 21st April, 1901, and on divers other days and times during the month of April, 1901," and was fined the sum of $54, and in default of payment of the fine, was adjudged to be imprisoned with hard labour for the term of four months:—Held, dismissing application for a habeas corpus, that the offence as charged did not constitute more than one offence; and that the word "keeping" implied a continuous offence. *Rex* v. *Keeping*, 34 N. S. Reps. 442. (See also *S. C.*, 21 Occ. N. 508, 34 N. S. Reps. 443n.)

Keeping Common Betting House — President of incorporated race association—Criminal Code, ss. 61, 197, 198—"Party to offence"—Lease of betting privileges—Knowledge and acquiescence of accused—Absence of participation. *Rex* v. *Hendrie*. 6 O. W. R. 1015, 11 O. L. R. 202.

Keeping Common Gaming House — Conviction — Evidence to sustain — Keeping for gain—Resort of persons to house—Game of chance. *Rex* v. *Mah Kee* (N.W.T.), 1 W. L. R. 37.

Keeping Common Gaming House — "*Gain*"—*Payment for Refreshments—Profit — Misdirection — Acquittal of Defendant — Crown Case Reserved—New Trial.*] — The defendant was indicted for keeping a common gaming house, contrary to ss. 196 (a) and 198 of the Criminal Code. The evidence shewed that the defendant was the manager of a cigar shop, in the rear of which was a room to which persons, chiefly customers, commonly resorted for the purpose of playing "poker." Out of the stakes on most of the hands a sum of five cents was withdrawn to cover the expenses of refreshments consumed by the players. No charge was made for the use of the room. The "rake-off" did not more than cover a fair price for the refreshments. The proprietor or manager derived an indirect advantage from the sale of cigars to the players, from 50 to 100 being sold to them in the course of a night's play:—Held, that "gain" may be derived indirectly as well as directly, that by what the defendant allowed to be done in the room mentioned, the profits of his usual business were increased more or less owing to the sale of the goods in which he dealt, and so he might be found to have kept the room for gain, though the gain was confined to the profits on the cigars which he sold to the players. The question of what is a keeping for gain ought not to be embarrassed by the consideration of whether the amount the defendant receives is an actual substantial profit to him over the price of the cigars which he sells and the refreshments which he furnishes to the players. The direction of the Judge at the trial to the jury, upon which the defendant was acquitted, was found to be wrong, upon a case reserved by the Crown, but the Court declined to order a new trial. *Rex* v. *James*, 2 O. W. R. 342, 23 Occ. N. 220, 6 O. L. R. 35.

Keeping Disorderly or Common Betting House—*Race track of Incorporated Association—Betting at.*]—The defendant was tried before a police magistrate upon a charge of keeping a disorderly or common betting house, found guilty, and convicted. A case was stated by the magistrate after leave granted, in which he reported that it was shewn that a house was kept and used for betting between persons resorting thereto and the keeper; that the accused appeared, and he found him to be the keeper; that the house was owned by a joint stock company, of which the accused was president, and was situated on the race track of an incorporated association; that there were about thirty persons betting with the accused and his assist-

ants, some on races then in progress in the State of New York, with which there was telegraphic communication, and others on races in progress on the local race track conducted by the company under an agreement with the association:—Held, that the offence was the keeping of a house for the purposes intended in s. 197 of the Code, and that the facts proved brought the accused within its danger, and he was rightly convicted:—Held, also, that s.-s. 2 of s. 204 of the Code stands by itself, and that the exception contained in it expressly limited to the first part of that section, and it should not be read into s. 197. *Rex* v. *Hanrahan*, 22 Occ. N. 228, 3 O. L. R. 659, 1 O. W. R. 346.

Keeping House of Ill-fame—Conviction—Evidence. *Rex* v. *Martin*, 1 O. W. R. 429.

Lottery—*Disposing of Property by Chance—Device—Verdict.*]—Upon a case reserved for the opinion of the Court as to whether the interposition of a condition that the winner of a prize in a lottery should shoot a turkey at fifty yards in five shots, or, if a lady, that she could choose a substitute to shoot for her, would prevent a conviction under s. 205 of the Criminal Code, 1892, it was stated that the evidence shewed that any person could easily shoot a turkey under the circumstances:—Held, that it was a question for the jury whether the making of that condition was intended as requiring a real contest of skill, or merely as a device for covering up a scheme for disposing of the property by lot; that the verdict of guilty involved a finding that it was merely a device; that the evidence set out in the case justified that finding; and that the conviction should be affirmed. *Rex* v. *Johnson*, 22 Occ. N. 125, 14 Man. L. R. 27.

Malicious Neglect to Provide Necessaries—*Child's Death — Want of Medical Aid—Aiding and Abetting.*] — The prisoner, an elder of the sect "Catholic Christians in Zion" or "Zionites," was indicted for aiding and abetting and counselling in his actions one who neglected to provide two of his young children under six years of age with medical attendance and remedies when sick with diphtheria. Both children died. The prisoner knew that the children had diphtheria, and knew that it was a dangerous and contagious disease; that the ordinary remedies would have prolonged their lives, and in all probability would have resulted in their complete recovery:—Held, that medical attendance and remedies are necessaries within the meaning of ss. 209 and 210 of the Criminal Code, and anyone legally liable to provide such is criminally responsible for neglect to do so. So also at common law. Concientious belief that it is against the teachings of the Bible and therefore wrong to have recourse to medical attendance and remedies is no excuse. *Rex* v. *Brooks*, 22 Occ. N. 105, 9 B. C. R. 13.

Maliciously Killing Cattle—*Rebutting Implied Malice—Mens Rea—Verdict—Refusal of Judge to Receive.*]—On a charge of unlawfully and maliciously killing cattle (under R. S. C. c. 43), it appeared that the animal was killed by the prisoners, when it was in a helpless and dying condition, and that the prisoners thought it was an act of mercy to kill it:—Held, that the killing was not malicious; that the implication of malice was rebuttable, and had been in fact rebutted, a mens rea on the part of the prisoners being disproved. Power of trial Judge to refuse a particular verdict considered. *Regina* v. *Mennel*, 1 Terr. L. R. 487.

Manitoba Grain Act—*Offences Against—Station Agent—Allotting Cars to Shippers.*]—Where a farmer who is not an elevator owner, lessee, or operator, has grain stored in a special bin in a farmer's elevator at a railway station where grain is shipped, and has also grain stored in another elevator at the same point, in common with other grain, for which he holds storage tickets, it is not a violation of the Manitoba Grain Act and amendments for the station agent to refuse to recognize the farmer as an applicant and to recognize his order in the order book for a car or cars to ship out his grain. 2. Where a farmer has made order for cars in the order book at the station, and all applicants for cars who had made order prior to his had each obtained one car, but not sufficient cars to fill the orders, while the farmer had not yet been allotted a car by reason of the shortage, and the agent out of the next cars which arrived refused to award him a car, but awarded them to those who had already received each one car, there was a violation of the Act. 3. Where each of the prior applicants had been supplied with one car at the time when the farmer gave his order, but on the day previous there had been a surplus of cars after each prior applicant had been given one, and such surplus was distributed among them, but their orders still remained unfilled, it was not a violation of the Act for each agent to allot to each of the prior applicants a car from a lot which arrived to be loaded on the day of the farmer's application, and to refuse him one. 4. Where a farmer who had grain to ship made order for one car in the order book, requiring it to be placed at the loading platform to be loaded, and the agent allotted a car each to the elevator companies having elevators at the point, but whose orders were subsequent to the farmer's and refused to allot him one, there was a violation of the Act. *In re Castle and Beniot*, 23 Occ. N. 143.

Manslaughter — *Endangering Human Life—Indictment of Corporation.*]—Under s. 213 of the Criminal Code a corporation may be indicted for omitting, without lawful excuse, to perform the duty of avoiding danger to human life from anything in its charge or under its control. The fact that the consequence of the omission to perform such duty might have justified an indictment for manslaughter in the case of an individual, is not a ground for quashing the indictment. As s. 213 provides no punishment for the offence, a corporation indicted under it is liable to the common law punishment of a fine. Judgment in 7 B. C. R. 247, 20 Occ. N. 289, affirmed. Regina v. Union Colliery Co., 21 Occ. N. 153, *S. C., sub nom Union Colliery Co.* v. *The Queen*, 31 S. C. R. 81.

Manslaughter—*Master and Servant — Negligence.*]—The deceased, a lad of about 15, was engaged by the prisoner as a farm-hand, on the terms of receiving for his work his board, lodging, and clothing. He died on the 14th February, after having been

in the prisoner's employment about nine months. Death was caused by the gangrenous condition of many parts of his body resulting from frost bites. He was in the habit of wetting his bed, and on this account was made to sleep in the stable, and had slept there for two or three months up to the 10th February. From the 1st to the 10th February the weather was excessively cold. The lad's fingers had been badly frozen at least three weeks before his death, and it was found that the prisoner must be taken to have known it for that length of time; nevertheless, he paid no attention to it till the 10th February. During the night of 9th-10th February, the deceased's feet were frozen solid to the ankles; this was discovered by the prisoner, who then took him to the house. It was found that the lad became so frozen, by reason of the earlier frost-bites rendering him unable to attend to himself properly, and his being left without assistance in the stable in excessively cold weather. The prisoner, on bringing the lad to the house, attended to him personally, asked a neighbour for a remedy for frost-bites, drove to a physician, got from him a prescription for frost-bites, but did not disclose to him the serious condition the lad was in. On and after the 10th February, the lad was helpless, and died on the 14th February. The prisoner had means to procure medical attendance:—Held, that, in view of the age of the deceased, the circumstances of the country, the fact of there being no provision for maintaining poor people, it was the duty of the prisoner, as master, towards the deceased as his servant, to have taken care of him, and that by his omission to do so he was guilty of gross negligence, to which the lad's death was attributable, and that, therefore, the prisoner was guilty of manslaughter. *Regina* v. *Brown*, 1 Terr. L. R. 475.

Manslaughter — *Parent's Omission to Provide Necessary Medical Treatment for Child—Legal Duty—Lawful Excuse—Religious Belief—"Necessaries" — Admission of Evidence — Judge's Charge.*]—The word "necessaries" in s. 209 of the Criminal Code, which enacts that "everyone who has charge of any other person unable by reason of detention, age, sickness, insanity, or any other cause, to withdraw himself from such charge, is under a legal duty to supply that person with the necessaries of life," includes proper medical aid, assistance, care, and treatment. And, therefore, where the jury found that the prisoner, a Christian Scientist, had without lawful excuse omitted to provide medical treatment for his infant child, under sixteen years of age, when it was reasonable and proper that such treatment should be provided, and that the child died from such neglect:—Held, that the defendant had been guilty of an indictable offence under s. 210 of the Code, which enacts that everyone who as parent, guardian, or head of a family, is under a legal duty to provide necessaries for any child under sixteen, is criminally responsible for omitting without lawful excuse to do so, etc. Remarks upon the Judge's charge as to "authorized" medical aid and upon the admission of evidence of cures believed to have been wrought by Christian Scientists, even as shewing good faith. *Rex* v. *Lewis*, 23 Occ. N. 257, 6 O. L. R. 132, 2 O. W. R. 290, 566.

Municipal Corporation — *Market Fees —Right to Possession.*]—The defendant, a market clerk in the employment of the city of Montreal, had collected divers sums from persons exchanging market stalls, by representing that these sums were due and payable to the city on the exchange of their stalls for others. No such sums were payable to the city, and none were paid over to the city by the defendant. On conviction of the defendant for theft from the city of Montreal:—Held, Bossé and Hall, JJ., diss., that the conviction could not be sustained. To constitute the offence of stealing, whether under s. 305, or 319 (a), or 319 (c), of the Criminal Code, there must be a right existing at the time of the taking, either to the ownership or to the possession of the property taken, which right the city of Montreal did not possess in the present case. *Regina* v. *Tessier*, 21 Occ. N. 48, Q. R. 10, Q. B. 45.

Murder—Absence of direct evidence — Corpus delicti—Presumption of death—Crown counsel—Right of reply—Comment on failure of prisoner to testify—Crown case reserved —New trial. *Rex* v. *Charles King* (N.W. T.), 1 W. L. R. 348, 576.

Murder—*Constructive Offence—Unlawful Purpose — Common Design — Evidence — Judge's Charge—Finding of Jury—Verdict—Mistrial.*]—The prisoner and two other men were in lawful custody in a cab, when loaded pistols were thrown in by an unknown person, and all three endeavoured to escape by using the pistols. In the struggle which ensued one of the constables in charge of the three men was shot and killed by one of the prisoners. The trial Judge told the jury that there was no evidence of common design up to the moment the pistols were thrown in, yet if at that moment, before the shot was fired that killed the constable, the three men resolved to escape from lawful custody, each was responsible for the acts of the other. The jury after some consideration asked the Judge to repeat his charge as to the resolution to escape, and he did so in different words. The jury did not agree as to whether the prisoner actually fired the shot which killed the constable, but found the prisoner guilty on what their foreman called the second "count," and their verdict was recorded with their consent as one of "guilty," with a clause added as to their inability to agree as to whether the prisoner fired the shot:—Held, having regard to the evidence and s. 61 (2) of the Criminal Code, that the offence being murder in the actual perpetrator, was murder in the prisoner, even if he were not the actual perpetrator. 2. That there was nothing in the charge nor in the subsequent instructions to the jury, both of which must be read together, of which the prisoner could properly complain. 3. That the finding of the jury was a proper one, and there was no mistrial. The foreman in speaking of "counts" was referring to the two branches of the case; but the verdict was that recorded and acknowledged. *Rex* v. *Rice*, 22 Occ. N. 225, 4 O. L. R. 223, 1 O. W. R. 399.

Murder—*Evidence—Dying Declaration—Indian Woman—Hearsay Evidence.*]—Before the death of an Indian woman, for whose murder the prisoner was being tried, a statement was obtained from her in the following

way. A justice of the peace swore an Indian to interpret the statement the woman was about to make; a constable then asked questions through the interpreter, and a doctor wrote down what the interpreter said the woman's answers were. The doctor and the justice of the peace then signed the statement. To some of the questions the woman indicated her answers by nodding her head. At the trial the statement was tendered as a dying declaration, and the doctor, the justice of the peace, and the constable identified the statement; the interpreter deposed that he interpreted truly, but he gave no evidence as to what the woman really did say:—Held, disapproving Regina v. Mitchell, 17 Cox C. C. 503, that the statement was admissible as a dying declaration; also that it had been properly proved. An Indian woman's statement that she thinks she is going to die is a sufficient indication of such a settled hopeless expectation of immediate death as to render the statement admissible as a dying declaration. A dying declaration may be obtained by means of questions and answers, and if it is reduced to writing it is sufficient if the answers only appear in the writing. *Rex* v. *Louie*, 23 Occ. N. 274, 10 B. C. R. 1.

Murder — *Evidence of Guilt—Continued Silence of Prisoner—Story in Witness Box —Inference — Judge's Charge—New Trial— Evidence in Rebuttal — Cumulative Testimony.*]—The prisoner, who was tried and convicted of murder, although he had ample time and opportunity to tell all he knew concerning the crime both to the authorities and others, maintained a complete silence respecting it, with the exception of some bald assertions of his innocence, until he went upon the witness stand at the trial to give evidence on his own behalf, when he admitted being present at the doing of the deed, but charged it upon one G., a young companion, who was with him, and who, before and at the trial, had alleged the prisoner's guilt. The Judge, in charging the jury, told them that they were entitled to take this continued silence of the prisoner into consideration, and after deciding whether or not such silence proceeded from a consciousness of guilt and a desire to spring a defence upon the Crown, which it might not be able to meet, they might therefrom draw an inference as to his guilt or innocence. He further instructed them that this continued silence of the prisoner was an element that might assist them in determining the amount of credence that ought to be given to the story told by the prisoner in the witness box:—Held, that the charge was correct in both respects; and even if erroneous, as in the opinion of the Court no substantial wrong or miscarriage had been occasioned thereby, such error was cured by proviso (f) of s. 746 of the Code. The witness G., in the original case of the Crown, swore that the murder had been committed about three o'clock in the afternoon, and that he and the prisoner were back in the city about five o'clock. The prisoner swore that the crime was not committed until about five o'clock, and that the clocks were striking six when he and G. were coming back to the city. The Crown, by permission, then called a witness to contradict the prisoner as to the time of G.'s return to the city: and the Judge allowed the prisoner's counsel to put in a witness in reply:—Held, that the evidence so put in by the Crown was contradictory; and further, as it was in the discretion of the Judge in what order he would receive evidence, and as the prisoner had had the opportunity of replying, of which he had taken advantage, that a new trial on the ground that such evidence was cumulative should be refused. *Rex* v. *Higgins*, 36 N. B. Reps. 18.

Murder — *Judge's Charge—Murder or Manslaughter — Benefit of Doubt.*]—Where the Judge in a trial for murder concludes his charge thus.—"The verdict of the jury is generally resumed in a few words, in the solemn words of guilty or not guilty," he is not supposed to direct the jury to bring in but one of the two verdicts of guilty or not guilty of murder, if in other parts of his charge he has sufficiently pointed out the distinction between murder and manslaughter, and instructed them as to their duty to find whether the prisoner acted with or without intent to kill. Where the Judge considers that no doubt exists, he is not obliged to instruct the jury that the prisoner is entitled to any doubt they may entertain, such a course being more likely to impede than to assist them in the discharge of their duty. *Rex* v. *Fouquet*, Q. R. 14 K. B. 87.

Murder—*Manslaughter — Definitions — Judge's Charge — Failure to Instruct Jury — Failure to Object to Charge — New Trial—Evidence—Rebuttal.*]—It is the duty of the Judge in a criminal trial with a jury to define to the jury the crime charged and to explain the difference between it and its cognate offences, if any. Failure to so instruct the jury is good cause for granting a new trial, and the fact that counsel for the accused took no exception to the Judge's charge is immaterial. 2. After the cases for the Crown and defence were closed, the Crown called a witness in rebuttal, whose evidence changed by a few minutes the exact time of the crime as stated by the Crown's previous witnesses and which tended to weaken the alibi set up by the accused:—Held, that to allow the evidence was entirely in the discretion of the Judge, and there was no legal prejudice to the accused, as he was allowed an opportunity to cross-examine and meet the evidence. *Rex* v. *Wong On and Wong Gow*, 24 Occ. N. 384, 10 B. C. R. 555.

Nuisance—*Indictment of Electric Railway Company—Endangering Lives of Public —Negligent Operation of Cars—Want of Proper Appliances—Fenders—Cars Running Reversely.*]—Case reserved by Chairman of the General Sessions of the Peace for the county of York, upon an indictment and conviction of defendants for a nuisance, consisting in the negligent operation of the cars, without proper appliances, etc., so as to endanger the lives and safety of His Majesty's subjects, etc. It was alleged that defendants were authorized to operate a street railway on certain streets in the city of Toronto, and in doing so were under a legal duty to take reasonable care and precaution to avoid endangering the lives and safety of the public, but without reasonable excuse neglected to take such precautions and did thereby endanger the lives and safety of the public and thereby committed a common nuisance. It was shewn that at one end of a double tracked street that there was used what is called a "Y," and the cars were backed on a single

track for about a quarter of a mile. There was no fender, headlight, nor gong used while backing this distance, which made it very confusing to persons crossing the street to tell which way the cars were going. Elizabeth Ward, in attempting to cross the street in the dark, was knocked down and killed by a car backing up this track:—Held, defendants were properly convicted, it being a common nuisance either at common law or under s. 191 and the first part of s. 192 of the Code. *Rex* v. *Toronto R. W. Co.*, 4 O. W. R. 277, 5 O. W. R. 621, 10 O. L. R. 26.

Obstructing Distress—*Onus on Crown to Prove Legality of Distress—Criminal Code, s. 144 (2).*]—Section 144 (2) of the Criminal Code enacts that everyone is guilty of an offence . . . who resists or wilfully obstructs any person . . . in making any lawful distress:—Held, that it devolves on the prosecution under this section to prove the existence of all the ingredients which go to make up the offence, one of which is the legality of the distress, as for example, in this case, that there was rent in arrear. It was necessary therefore for the Crown to shew that rent was due and in arrear. *Rex* v. *Harron*, 24 Occ. N. 10, 6 O. L. R. 668, 2 O. W. R. 903.

Obstructing Divine Service — *Indictment—Proof of Lawful Authority—Ownership of Church Building.*]—1. An indictment, under s. 171 of the Criminal Code, for unlawfully obstructing or preventing a clergyman or minister, by threats or force, in or from celebrating divine service or otherwise officiating in any church, chapel, &c., is sufficient without allegation that the clergyman or minister obstructed was, at the time of the offence, in lawful charge of the church, chapel, &c. 2. To support a prosecution under that section, however, it must be proved at the trial that the clergyman or minister obstructed was, at the time of the alleged offence, either the lawful incumbent of the church or was holding service with the permission of the lawful authorities of the church. 3. A church building erected by a congregation of one religious body remains the property of those who adhere to that body, although a majority of the congregation afterwards decides to join another or religious body, and assumes to appoint a clergyman or priest to hold services in the church, and those who are opposed to such appointment may lawfully prevent or obstruct the person so appointed from officiating in the church. *Rex* v. *Wasyl Kapij*, 15 Man. L. R. 110, 1 W. L. R. 130.

Obstructing Officer—*Seizure of Chattel—Conditional Sale.*]—The retaking of possession of a chattel by the vendors thereof under the provisions of a conditional sale agreement, is not a seizure within the meaning of the Criminal Code, s. 144, s.-s. 2 (b), so as to subject the purchaser of the chattel, who in good faith disputes the right to retake it, to the penalty prescribed in that sub-section. *Rex* v. *Shand*, 24 Occ. N. 125, 7 O. L. R. 190, 3 O. W. R. 293.

Obstruction of Highway—Conviction for—Weight of evidence—New trial—Direction to jury—Proof of original survey—Onus. *Rex* v. *Moyer*, 1 O. W. R. 780.

Obstruction of Officer of Law—*Bailiff—Executing Writ of Replevin — County Court — Absence of Jurisdiction.*]—Section 204 of the County Courts Act, R. S. M. c. 33, does not authorize the issue of a writ of replevin out of the County Court of any County Court division except that in which the goods to be replevied are situate. For the construction of the provision in that section as to the Court out of which the writ is to issue, it is proper to look at the prior enactments of which that section is a revision; and in that light the words "otherwise ordered" should be held to apply only to an order changing the place of trial and not to give power to order the issue of the writ out of the Court for any County Court division other than that in which the goods to be replevied are situate. An order of a County Court Judge for the issue of a writ of replevin out of such other County Court, and the writ issued thereunder, are wholly ultra vires and void, and afford no protection to the officer attempting to execute the writ; and the owner of the goods described in the writ cannot be convicted under s. 144 of the Criminal Code, 1892, for unlawfully obstructing or resisting the officer in the execution of his duty, because he by force prevented the bailiff from taking the goods under the writ. Morse v. James, Willes 122, followed. Parsons v. Lloyd, 2 W. Bl. 845, and Collett v. Foster, 2 H. & N. 360, distinguished. *Rex* v. *Finlay*, 21 Occ. N. 419, 13 Man. L. R. 383.

Ownership — *Evidence—Depositions of Witness at Preliminary Inquiry.*] — Held, Rouleau, J., dissenting, upon a Crown case reserved after a conviction for theft, that the production of the steer's hide with the prosecutor's brand and earmarks only upon it, and the evidence of the prosecutor that he had owned and had never parted with the steer from which the hide had come, were sufficient to justify the trial Judge in finding that the steer in question was the property of the prosecutor. (Sec. 63 & 64 V. c. 46, s. 707 A, and 1 Edw. VII. c. 42, s. 707 A.):—Held, per curiam, that evidence that a witness at the preliminary inquiry was a corporal in the N. W. M. Police, that he had been sworn in as a member of Strathcona's Horse, that he had left the post at which he had been stationed to join the latter force, and that, in the opinion of the deponent, if he had left the latter force he would have returned to such post, which fact would thereupon have become known to the deponent, was sufficient evidence of the absence of such witness from Canada to justify the admission as evidence at the trial of the deposition of such witness taken at the preliminary inquiry; and that the question was one to be decided by the trial Judge. *Regina* v. *Forsythe*, 4 Terr. L. R. 398.

Perjury—*Affidavit in Pending Civil Cause—Several Charges—Duty to Consider Affidavit as a Whole—Charge not in Information—Consent—Literally True Statement—Crown Case Reserved—Form of.*]—The defendant was convicted in a County Judge's Criminal Court on several charges of perjury, alleged to have been committed in connection with an affidavit sworn to in a cause pending in the Supreme Court. One of the charges was not contained in the information in the magistrate's Court, but was preferred by the

Crown prosecutor before the Judge of the County Court, without the latter having in any way expressed his consent to the preferring of the charge as required by the Code, s. 773. Another charge was that defendant falsely swore that a sum of money was not received by him, whereas it was received by the firm of which the defendant was a member. There was no allegation that the defendant, knowing that the money had been received, corruptly swore, etc., and the statement as sworn to appeared to have been literally true:—Held, that both convictions were bad, and must be set aside:—Held, also, that the different allegations being contained in the one affidavit, the Judge was wrong in considering each charge separately, without reference to the other allegations in the affidavit, and that he was bound to weigh the statements as a whole in arriving at a conclusion as to the guilt or innocence of the prisoner:—Held, also, that it was not competent for the Judge to submit a question as to whether there was legal evidence to sustain the conviction, and send up the evidence for review, but that he must state the effect of the evidence to support a certain charge and reserve the question as to its sufficiency in point of law:—Semble, that the charge of perjury should not have been brought during the pendency of the civil action in the Supreme Court. *Rex* v. *Cohn*, 36 N. S. Reps. 240.

Perjury—*Attempt to Incite—Bail — Recognizance—Jurisdiction of Justice of the Peace—Criminal Code.*]—A defendant charged with offering money to a person to swear that A., B., or C. gave him a certain sum of money to vote for a candidate at an election, was admitted to bail and the recognizances taken by one justice of the peace:—Held, that the offence was not an attempt to commit the crime of subornation of perjury, but something less, being an incitement to give false evidence or particular evidence regardless of its truth or falsehood, and was a misdemeanour at common law, and that the recognizance was properly taken by one justice, who had power to admit the accused to bail at common law, and that s. 601 of the Code did not apply. The common law jurisdiction as to crime is still operative, notwithstanding the Code, and even in cases provided for by the Code, unless there is such repugnancy as to give prevalence to the later law. *Rex* v. *Cole*, 22 Occ. N. 132, 3 O. L. R. 389, 1 O. W. R. 117.

Perjury—*Evidence of Clerk and Stenographer—Proof of Proceedings in which Offence Committed—Record Book — Imperfect Proof — New Trial—Substantial Wrong or Miscarriage.*]—Crown case reserved by the Chairman of the General Sessions of the Peace for the County of Brant. The prisoner was convicted for perjury. The only evidence was that of the Clerk of Assize, who swore the prisoner was called as a witness at a certain trial; and that as Clerk of Assize he had sworn the prisoner on said trial, and he produced his record book which he kept as Clerk of Assize, in which he had entered as a witness sworn on said trial the name of the prisoner, whom he identified as a witness who had been sworn by him; and that of the court stenographer as to the evidence the prisoner had given at the said trial:—Held, the law had simplified the proof in such cases under s. 691 of the Criminal Code, viz., "A certificate containing the substance and effect only of the indictment and trial for any offence, purporting to be signed by the Clerk of the Court or other officer having the custody of the records of the Court whereat the indictment was tried, would be sufficient proof of the crime for which the prisoner was tried. This was absent and the conviction was not according to law, since the crime was not legally proved. The saving clause (s. 746 of the Code that the conviction ought not to be set aside as no wrong or miscarriage had been done in the mistake), which was invoked by the Crown, did not apply and the conviction was reversed and a new trial granted. *Rex* v. *Drummond*, 6 O. W. R. 211, 10 O. L. R. 546.

Perjury—*Judicial Proceeding—De Facto Tribunal—Jurisdiction.*]—An information under R. S. Q. Art. 5551, for trespass upon lands in the county of Huntingdon, in the district of Beauharnois, was laid, heard, and decided before the recorder of Valleyfield, an ex officio justice of the peace within the whole district, but who did not reside in the county where the offence was charged to have been committed, and was, therefore, without jurisdiction to hear the case, as R. S. Q., Art. 5561, provides that such offences shall be cognizable only by a justice or justices resident within the county where the offence has been committed:—Held, affirming the judgment in Q. R. 11 K. B. 477, that the hearing of said charge by the recorder, acting as a justice of the peace having power to hear it, was a judicial proceeding within the meaning of s. 145 of the Criminal Code, and that the appellant was rightly convicted for perjury committed by him upon such hearing, notwithstanding that the recorder had no jurisdiction over the subject matter of the complaint. *Drew* v. *The King*, 23 Occ. N. 148, 33 S. C. R. 228.

Personation and Perjury — Acquittal on former charge—Trial for perjury—Identity of accused—"Autrefois acquit" — Res judicata—Nemo bis vexari — Criminal Code. *Rex* v. *Quinn*, 6 O. W. R. 1011, 11 O. L. R. 242.

Personation of Voter—"Referendum"—Ontario Liquor Act, 1902—Sentence — Police magistrate—Judicial discretion—Right of appeal—Mandamus—Status of applicant—Informant. *Re Denison, Rex* v. *Case*, 6 O. L. R. 104, 2 O. W. R. 152, 512.

Polygamy — *Indian Marriage.*]—An Indian who according to the marriage customs of his tribe takes two women at the same time as his wives and cohabits with them, is guilty of an offence under s. 278 of the Criminal Code. *Regina* v. "*Bear's Shin Bone*," 4 Terr. L. R. 173.

"Post Letter"—*Letter Handed to Postman.*]—Within the meaning of 52 V. c. 20, s. 2 (D.), a letter handed to a postman, in the post office itself, is a letter "confiée à la poste" (post letter), and where the postman steals such letter he may be convicted under s. 326 (c) of the Criminal Code. *Rex* v. *Trépanier*, Q. R. 10 K. B. 222.

Prize-fighting—*What Constitutes.*]—The defendants advertised a boxing exhibition,

which was held in a public hall, and was accompanied by all the particulars and circumstances of a prize-fight. Complainant submitted that the accused came within the provisions of the statute; and on behalf of the defendants it was contended that the encounter was merely a scientific boxing parade, and moreover a sham fight not forbidden by law:—Held, that, as the proof adduced established that the encounter in question was accompanied by all the circumstances and elements which constitute a prize-fight, the defendants committed an infraction of the law, Criminal Code, ss. 92-95, for which they must be found guilty. *Steele* v. *Maber*, Q. R. 19 S. C. 392.

Procuring Personation — Liquor Act, 1902—Ontario Election Act — Conviction. *Rex* v. *Coulter*, 6 O. L. R. 114, 2 O. W. R. 523.

Public Slander.]—Slandering a person in a public restaurant is not an offence under s. 207 of the Criminal Code. *Mercier* v. *Plamondon*, Q. R. 20 S. C. 288.

Rape — Attempt to commit—Failure of Crown to shew that prosecutrix not wife of prisoner—Objection—Leave to appeal. *Rex* v. *Mullen*, 5 O. W. R. 451.

Rape— *Evidence—Complaint—Particulars of—Interval—Civil Action — Relations with Accused after Offence.*]—1. On a trial for rape, the fact that the injured person made a complaint and the particulars or details of the complaint are admissible as evidence in chief for the prosecution to confirm the testimony of the injured person and disprove consent on her part; and among the particulars the name of the person whom she accused of the offence may be stated. 2. While the injured person should make her complaint as soon as possible after the commission of the offence, yet no specific time for such complaint being fixed by law, evidence may be admitted of a complaint made by her to her mother seven days after the offence; but the jury may and should weigh the interval which elapsed before complaint was made, when considering the probability of its truth. 3. Evidence that civil suits for damages based on the alleged commission of rape, have been instituted by the tutor of the injured person (a minor) on her behalf, and also by her mother, may be excluded as irrelevant on the trial for rape, unless it be first proved that the injured person and her mother had stated, or let it be inferred, that the accused was innocent of the offence charged, and that they had appeared to be desirous of extorting money from him. In such case, the fact that civil actions had been instituted would be corroborative evidence. Judgment in Q. R. 9 Q. B. 147 confirmed. 4. Evidence that the accused and the injured person were on friendly terms after the commission of the alleged offence, and that she angrily resented the interference of her mother when the latter wished to put an end to such intimacy, should have been admitted, such evidence being important to enable the jury to judge whether or not there was consent on the part of the person injured. Judgment in Q. R. 9 Q. B. 147 reversed. *Rex* v. *Riendeau*, Q. R. 10 K. B. 584.

Receiving Stolen Goods — *Conviction for—Charge of Theft.*]—Under s. 713 of the Criminal Code, a conviction for receiving stolen goods cannot be sustained where the charge was housebreaking accompanied with theft. *Regina* v. *Lamoureux*, 21 Occ. N. 49, Q. R. 10 Q. B. 15.

Receiving Stolen Property — *Indictment for—Prior Conviction for Stealing — Right to Inspect Information and Depositions.*]—By s. 11 of R. S. O. 1897 c. 324, "a person affected by any record in any Court in this province, whether it concerns the King or other person, shall be entitled, upon payment of the proper fee, to search and examine the same, and to have an exemplification and a certified copy thereof made and delivered to him by the proper officer." The applicant was committed for trial at the Sessions upon three charges of receiving cattle stolen from C. and two other persons, knowing them to have been stolen. At the previous Sessions three persons were convicted of having stolen cattle from C., one of whom and two others were also convicted at the same Sessions of having stolen cattle from S. No charge was pending against the applicant of having received cattle stolen from S.:—Held, that in such cases the question is whether the applicant would be affected by the records which he sought to examine, and that, while he might be so affected as regards the cattle stolen from C., and so entitled to the inspection asked for, he was not as regards those stolen from S. *In re Chantler and Clerk of Peace of Middlesex*, 24 Occ. N. 355, 8 O. L. R. 111, 3 O. W. R. 761.

Resisting Bailiff — Distress for rent — Necessity for proof of rent in arrear—Lawful distress—Rescue before impounding. *Rex* v. *Harron*, 2 O. W. R. 903.

Resisting Distress — *School Taxes — Evidence — Notices—Canada Evidence Act— "Proceeding."*]—On the trial of an accused on a charge of having unlawfully resisted and wilfully obstructed an official trustee of a school district in making a lawful distress and seizure, the production of the tax and assessment rolls of such school district, with entries thereon of the dates of the mailing of the notice of assessment, and of the tax notice to the accused, and of the posting of such tax roll, initialled with what purports to be the initials of the official trustee of such school district, is evidence of the mailing of such notices and of the posting of such tax roll. Such prosecution is a "proceeding" within the meaning of s. 2 of the Canada Evidence Act, 1893. *Rex* v. *Rapay*, 5 Terr. L. R. 367.

Seduction of Girl under 16—*Evidence — Corroboration — Functions of Judge and Jury.*]—In a prosecution under the Criminal Code, s. 181, for the seduction of a girl under 16, in addition to the evidence of the girl, evidence was given by other witnesses to the following effect:—That the accused and the girl were found in a house alone; that the accused came out partly dressed; that he was then leaving sheep (which were in his charge) unattended and refused to go with the witness to go where the sheep were; that before he was charged with any offence he stated to the witness "that he had been advised if he could get the girl away and marry her, he would escape punishment:" Held, that the girl was corroborated in some material particulars by evidence implicating the

accused, within the intention of the Criminal Code, s. 684. Semble, that the fact that the accused, in giving evidence on his own behalf, stated that he had first had connexion with the girl at a date after she had reached 16, while one of the witnesses for the prosecution stated that the accused, two months before that date, had admitted with reference to the girl that he had "got there," might, though this admission was made after the girl had reached 16, be taken into consideration with the other facts as tending to implicate the accused. Whether there is any corroborative testimony is a question for the Judge, but if there is any such testimony, the sufficiency of it, and the weight to be given it, is for the jury, unless of course the corroboration is so slight that it ought not to be left to the jury at all. *Regina* v. *Wyse*, 2 Terr. L. R. 103.

Seduction — "*Under Promise of Marriage*" — *Direction to Jury* — *Mistrial* — *New Trial.*] — The words "under promise of marriage" in 50 & 51 V. c. 48, s. 2, substituting a new section for R. S. C. c. 157, s. 4 (Criminal Code, s. 182), signify "by means of a promise of marriage." Where therefore the trial Judge directed the jury that the intention of the section was to impose a punishment for the seducing of young women under 21 by men over 21 to whom they were engaged, and the jury rendered a special verdict as follows: "The verdict is that the prisoner promised to marry F. S. in June, 1892, with the intention of carrying out his promise, but in November of the same year he seduced her, at the same time renewing his promise of marriage, and in our opinion no other man had connection with her:"—Held, that there had been a misdirection and therefore a mistrial; and a new trial was ordered. *Regina* v. *Walker*, 1 Terr. L. R. 482.

Selling Beverage in Bottle with Name of Another on it — *Unregistered Name*—*Criminal Code, s. 449 (b).*]—Defendant, a ginger ale and soda water manufacturer, filled four bottles having another like manufacturer's name permanently affixed thereon, and placed them upon the market for the purpose of sale. Defendant was convicted therefor under Criminal Code, s. 449 (b), which enacts that "Every one is guilty of an indictable offence who, (b) being a manufacturer, dealer, or trader, or a bottler, without the written consent of such person, trades or traffics in any bottle or siphon which has upon it the duly registered trade mark or name of another person, or fills such bottle or siphon with any beverage for the purpose of sale or trade. Defendant pleaded name not duly registered. Plea admitted:—Held, it was not necessary that such name should be registered as a trade mark, the object of the legislation evidently being to prevent, as far as possible, the easy commission of a fraud of that kind. In the French version of the Code the words are "la marque de commerce dûment enregistrée ou le nom d'une autre personne," which more plainly indicate that the words "duly registered" are confined to the trade mark and do not apply to the name; s.-s. 2 of s. 449 supports this construction. *Rex* v. *Irvine*, 5 O. W. R. 352, 9 O. L. R. 389.

Shooting with Intent—*Justification* — *Questions for Jury*—*Misdirection.*]—The defendant, who was employed as watchman and special constable, was in the act of arresting P. for committing a disturbance, when he received a blow from behind which cut his head. Turning, he saw M. immediately behind him, and, supposing him to be the person by whom the blow was struck, tried to arrest him. M. ran away, followed by the defendant, who had in his hand a small stick. Near the station of which the defendant was in charge, this stick was wrested from him by E. P., who had followed with a number of others, and, in the disturbance which followed, during which, according to the defendant, one of the persons present raised a stick in a menacing manner and threatened to smash his brains out, the defendant drew a revolver, and fired two shots, one of which struck E. P.:—Held, setting aside the conviction of the defendant for shooting with intent to do grievous bodily harm, that it was misdirection on the part of the trial Judge to charge the jury that there was no concerted attack upon the defendant, and no assault at the time the shots were fired, that the assault was over, and that those present were not within striking distance, these being questions for the jury. The assault upon the defendant having been admittedly committed without provocation, the questions for the jury were: (1) whether the defendant had any intention of causing grievous bodily harm, and if not, (2) whether he used any more force than was necessary:—Held, further, that, under the Code, s. 45, defendant being justified if the force used by him was not meant to cause death or grievous bodily harm, or was no more than was necessary for the purposes of self-defence, and there being evidence which, if believed, would have enabled the jury to find for the defendant, the trial Judge erred in charging the jury that there must be evidence that the defendant could not otherwise preserve himself from death or grievous bodily harm. *Rex* v. *Ritter*, 36 N. S. Reps. 417.

Theft—Conductor of train taking money from passengers and allowing free transportation—Jurisdiction of justices—Conviction—Suspended sentence—Costs. *Rex* v. *McLennan* (N.W.T.), 2 W. L. R. 227.

Theft—*Conversion*—*Misdirection.*] — The mere fact of a person converting to his own use goods found by him does not of itself as a matter of law make him guilty of theft. Where, on the trial of a charge of theft, the jury after retiring asked the question, "Does raising a temporary loan on anything found constitute theft?" and the Judge answered "Yes:" — Held, that the answer was equivalent to a direction that as a matter of law the accused was guilty, and was a misdirection. *Regina* v. *Slavin*, 35 N. B. Reps. 388.

Theft—Discharge of accused at preliminary inquiry—Subsequent committal by same magistrates—Indictment — Validity—Depositions at first inquiry not before grand jury. *Rex* v. *Hannay* (B.C.), 2 W. L. R. 543.

Theft—*Evidence*—*Onus.*] — On a charge of theft of goods from a store, evidence of the finding in the prisoner's house of the goods and of keys fitting the store doors, and of the fact that the goods were in the store exposed for sale at the time of the alleged theft and

had not been sold, is sufficient to put the onus upon the prisoner of accounting for his possession. In such circumstances, it is not necessary for the Crown to prove that the goods had not passed from the possession of the owners by some means other than sale. *Rex* v. *Theriault*, 11 B., C. R. 117.

Theft — Evidence of former offence — Acquittal—Judge's charge. *Rex* v. *Menard*, 2 O. W. R. 900.

Theft—*Juvenile Offender — Imprisonment —Warrant of Commitment—Defect—Amendment — Discharge.*] — The defendant was detained under a warrant of commitment from a magistrate, reciting a conviction of the prisoner before that magistrate, for the offence of fraudulently and without colour of right taking and converting to his own use one stove of the value of $5, the property of one W., with intent to deprive said W. absolutely of the said stove. A return to an order in the nature of a habeas corpus made under R. S. N. S. c. 181, shewed that the prisoner was detained under a warrant of commitment made the 9th January, 1903, a copy of which was annexed, and that he came into the custody of the keeper of the home, under said warrant, on said last mentioned day, and was detained on said warrant until the 22nd January, 1903, when, being still in custody, the magistrate caused to be delivered to the keeper of the home a certain other warrant of commitment, under which the prisoner had been detained ever since: — Held, ordering the discharge of the prisoner, that the return to the order was bad, because neither it nor the second commitment shewed that the magistrate intended to amend the first warrant, or substitute the second one for it. *In re Elmy* v. *Sawyer*, 1 A. & E. 843, followed. *Rex* v. *Venot*, 23 Occ. N. 71.

Theft—*Magistrate's Conviction—Juvenile Offender—Place of Imprisonment—Duration of Sentence — Discharge — Order for Further Detention—Circumstances.*] — The defendant, a youth of over 17 years of age, was charged before a magistrate with stealing a small sum of money out of the contribution box of a church. The magistrate's return shewed that the defendant pleaded guilty, and was committed for two years to the Provincial Reformatory. He was taken to the Reformatory and sent on to the Central Prison and kept there in custody under the warrant of commitment to the Reformatory. On a motion for his discharge on the return of a habeas corpus:—Held, that there had been a miscarriage of legal directions in sending a lad of over 17 years of age to the Reformatory and in sending him on a sentence of two years to the Central Prison. Held, also, that s. 785 of the Criminal Code is intended to comprehend summary trial "in certain other cases" than those enumerated in s. 783, and that when the offence is charged, and in reality falls under s. 783 (a), it is to be treated as a comparatively petty offence with the extreme limit of incarceration fixed at six months under s. 787:—Held, also, that, under the circumstances, this was not a case for further detention or the direction of further proceedings under s. 752; and an order for the defendant's discharge was granted. *Rex* v. *Hayward*, 23 Occ. N. 48, 5 O. L. R. 65, 1 O. W. R. 799.

Theft — *Post Letter and Money — Evidence — Confession — False Statements — Person in Authority — Decoy Letter — "Post Letter" — Addresses to Jury — Order of — Reply — King's Counsel Representing Attorney-General.*] — Prisoner convicted for stealing a post letter and of theft of money. At the trial the post office inspector was about to testify with respect to a statement or confession made to him by the prisoner, when counsel for prisoner objected, and was allowed to examine the inspector as to the circumstances in which the statement was made. Upon testimony thus elicited counsel for the prisoner contended that it was shewn that the statement or confession was not admissible, because it was made as he contended to a person in authority, and was procured by means of threats or inducements, or by false statements made by inspector to the prisoner. The statement was admitted in evidence. Counsel for prisoner also objected that the letter was not a post letter within the meaning of the Act 1 Edw. VII, c. 19, s. 1, it having been written by the inspector as a decoy. Prisoner called no witnesses and his counsel contended on that ground he had the right of reply. Trial Judge ruled against him and Crown replied:—Held, 1. That there was no evidence that the confession was obtained by means of threats or inducements held out, and evidence was properly admitted; 2. The letter in question was a post letter within the meaning of the Act; 3. Crown always had the right of reply if its representative saw fit to use it. See as to this last point, Rex v. Martin, 5 O. W. R. 317, 9 O. L. R. 218; Rex v. Ryan, 5 O. W. R. 125, 9 O. L. R. 137.

Unlawful Assembly—*Street Meeting—Conviction — Proof of Obstruction — Vagrancy.*]—The mere fact of holding a meeting in a street does not necessarily imply the impeding or incommoding of peaceable passengers, and proof of actual impeding or incommoding is essential to justify a conviction. 2. Article 207 of the Criminal Code does not apply to persons of general good character, but is intended to apply to loose, idle, and disorderly persons ("aux vagabonds, aux desœuvrés, ou aux débauchés.") *Rex* v. *Kneeland*, Q. R. 11 K. B. 85.

Unlawful Making Contracts for Sale of Stocks — *Keeping Common Gaming House — Stock Transactions on Margin — Agent for Broker — Evidence — Onus — Criminal Code—Aiding and Abetting.*]—Defendant was convicted upon charges of unlawfully making contracts purporting to be for the sale of stocks, goods, wares, or merchandise, in respect of which no delivery thereof was made or received, without the bona fide intention to make such delivery, with intent to make gain or profit by the rise or fall in price of the stocks, goods, etc., contrary to s. 201 of the Criminal Code, and of being a keeper of a common gaming house contrary to said section. The following were submitted for the opinion of the Court of Appeal:—1. Does the evidence given on behalf of the Crown prove an offence against sec. 201 of the Criminal Code, under which the indictment was laid? 2. Does the evidence shew that the contracts charged in the first and second counts of the indictment were made or authorized by defendant; and if the evidence shews that defendant had no interest in either of the transactions with which

he is charged in said counts except the payment of his commission, which was a fixed amount, and was payable to him whether the price of wheat or of the stock, the subject of such transaction, rose or fell or remained stationary, can the conviction upon such counts or either of them be sustained? 3. Does the evidence shew that the contracts charged in the first and second counts of the indictment were made within the Dominion of Canada and can the conviction upon said counts be sustained? 4. Was the evidence of J. G. Beaty and Clarence W. Cady, received by the County Court Judge upon the trial of the accused, admissible as evidence, and having been received should such conviction be sustained? 5. Could defendant properly be convicted of an indictable offence under s.-s. 3 of s. 201 of the Criminal Code? 6. Is defendant liable to a penalty or punishment in respect of an offence under s.-s. 3 of s. 201 of the Criminal Code, by virtue of s. 951 or otherwise, under the Code or under the common law. The evidence shewed that from the beginning of January, 1904, until the information was laid, some time after 1st March in the same year, defendant was occupying a room or office in the town of Niagara Falls, Ontario, in which he was carrying on a business under the name and style of Harkness & Co. The nature of the business was learned from a circular issued by defendant, a copy of which was put in as evidence. It was headed "Office of Harkness & Co., Brokers, Stocks, Grain, and Provisions." Defendant was not a member of the stock exchange at New York nor Chicago, and he did not deal directly with either of these cities. He claimed to be a branch or agency of a firm of operators known as Richmond & Co., whose head office was in Pittsburg, Pennsylvania, with a branch in Buffalo, N.Y. Defendant swore that he did not know whether any member of the firm of Richmond & Co. was a member of either of these exchanges. When giving orders the persons who dealt with defendant deposited with him sums of money, never exceeding a margin of 2 per cent. in the case of stocks or 1 per cent. in the case of grain or provisions, out of which the defendant received a commission from the Buffalo office. Each order was telgraphed to the Buffalo office, and the next day defendant handed to the customer a paper, signed "Harkness & Co., brokers," containing, amongst other things, a notification to the customer as follows: "Mr. ———, You have bought from Richmond & Co., Pittsburg, at the price named in this memorandum, for delivery on demand, subject to the contract and notice and provisions above and herein." In the margin appear the words: "I consent and agree to the contract expressed hereon." But the customer was not required or expected to sign, and apparently never did sign it. Save this document, there was no delivery, and it was proved that in answer to a question put to him by the Chief of Police, to whom he was explaining the nature of the business, defendant stated that he did not deliver goods or stock—the people did not do business that way. If the stocks, grain, or provisions held by the customer went up in price, he directed defendant to sell out and received back his deposit with the profit. If the price declined below the margin, the customer either put up a further deposit or let his first deposit go and bore the loss. Defendant remitted the amounts he received each day to Richmond & Co., Buffalo, who remitted to him the sums payable to customers on the result of transactions closed out during the day:—Held, with regard to defendant's position, that he is only an agent receiving a commission and is therefore not liable. Upon his own admissions his office is a branch of Richmond & Co.; he was engaged in soliciting, attracting, or inducing persons to deal with Richmond & Co. through him in illegal transactions, and, as the County Court Judge has found, he had a guilty knowledge of the nature of the dealings. There was no purchase shewn on the exchange for or on account of the customer. There was nothing but a contract or agreement with Richmond & Co., to which the defendant was a party, with knowledge of its real nature. The customer and Richmond & Co., through and by the aid of the defendant, have committed the offence prohibited by s. 201 (1) (b), and defendant has done acts for the purpose of aiding them to commit the offence and has abetted them in the commission of the offence. At common law one who aided and abetted in the commission of an offence thereby rendered himself liable as a principal. Then s. 61 of the Criminal Code expressly declares that every one is a party to and guilty of an offence who does or omits an act for the purpose of aiding any person to commit the offence or abets any person in commission of the offence. That is to say, by aiding or abetting in the commission of an offence, he becomes a party to and guilty of the same offence. Thus he becomes a party principal, and there appears to be no reason why he should not be indicted or charged as a principal under the Code. See Regina v. Campbell, 2 Can. Crim. Cas. 357. Upon the evidence it must be held that the contracts charged in the first and second counts of the indictment were made in Canada—according to the holding of the majority of the Ju'ges of the Supreme Court in Pearson v. Carpenter, 35 S. C. R. 380. The conviction of defendant under s.-s. (3) of s. 201 was properly made. By that sub-section it is declared that every office or place of business wherein is carried on the business of making or signing or procuring to be made or signed, or negotiating or bargaining for the making or signing of such contracts of sale or purchase as are prohibited by this section, is a common gaming house, and every one who as principal or agent occupies, uses, manages, or maintains the same, is the keeper of a common gaming house. All the questions should be answered in favour of the Crown, and the conviction should be affirmed. *Rex* v. *Harkness*, 6 O. W. R. 219, 10 O. L. R. 555.

Vagrancy — Conviction — Evidence — Habeas corpus—Discharge. *Rex* v. *William Collette*, 6 O. W. R. 746, 10 O. L. R. 718.

Watching and Besetting — Criminal Code, s. 523 (f)—Obtaining or communicating information. *Rex* v. *Burns*, 2 O. W. R. 1115.

Wilful Destruction of Fence—"*Colour of Right*" — *Conviction* — *Jurisdiction of Magistrate* — *Rejection of Evidence*—*Unregistered Plans.*]—The defendant was convicted under s. 507 of the Criminal Code for unlawfully and wilfully destroying or damaging a certain fence upon the land of the complainant. By s. 481 (2), there is no

criminal offence under s. 507 unless the act of damage is done "without legal justification or excuse, and without colour of right:"—Held, that "colour of right" means an honest belief in a state of facts which, if it existed, would be a legal justification or excuse. Upon the evidence in this case, there was on the part of the defendant such an honest belief, reasonably entertained, in the existence of a right of way over a lane on the complainant's land, as satisfied the terms of the statute, and rendered the conviction bad for want of jurisdiction:—Held, also, that the convicting magistrate erred in disregarding plans of the locus because they were not registered. Where lots are sold in sections pursuant to a plan of the whole made by or for the owner of the whole, according to which he sells the parts, the plan is good to establish such a lane among the different sub-owners, whether registered or not. *Rex* v. *Johnson*, 24 Occ. N. 267, 7 O. L. R. 525, 3 O. W. R. 221, 222.

Wounding with Intent to Disable—*Indictment—Proof of Lesser Offence—Verdict—Actual Malice—Criminal Code, ss. 241, 242.*]—Upon an indictment for wounding by shooting with intent to disable, under the Criminal Code, s. 241, the jury is properly instructed that if such intent is negatived the accused may still be convicted of the simple offence of wounding under s. 242, if the jury find that the accused pointed a loaded gun at another and fired it, and either knew or ought to have known that it was loaded. A verdict returned upon such indictment of "guilty without malicious intent" is a verdict of guilty of such lesser offence. To constitute the offence of wounding under s. 242, it is not necessary to prove actual malice; it is sufficient that the act was unlawful. As s. 109 of the Code declares that a person who without lawful excuse points at another person any firearm is guilty of an offence, the wounding resulting from the discharge of a firearm so pointed is an unlawful wounding within s. 242. Rex v. Slaughenwhite, 37 N. S. Reps. 382. Reversed by the Supreme Court of Canada, which held that a verdict of "guilty without malicious intent" is an acquittal. *Slaughenwhite* v. *The King*, 35 S. C. R. 607.

III. Procedure.

Appeal—*Leave—Acquittal by Magistrate—Application by Prosecutor—Perjury—Corroboration.*] — A motion by the prosecutor, under s. 744 of the Criminal Code (as amended by 63 & 64 V. c. 46), for leave to appeal from the decision of a police magistrate acquitting the defendant of perjury, and refusing to reserve for the opinion of the Court of Appeal the question whether there was corroborative evidence of the prosecutor in any material particular, and whether the magistrate exercised a legal discretion under s. 791 of the Code in declining to adjudicate summarily upon the case, and had jurisdiction to try the defendant, who was a client of the County Crown Attorney, in the absence of counsel for the Crown, was refused, under circumstances and for reasons appearing in the report. *Rex* v. *Burns*, 21 Occ. N. 202, 1 O. L. R. 336.

Appeal — *Leave — Forum.*]—Since the passing of 63 & 64 V. c. 46, s. 3, amending s. 744 of the Criminal Code, the accused may apply directly to the Court of Appeal to obtain leave to appeal. *Rex* v. *Trépanier*, Q. R. 10 K. B. 222.

Appeal — *Leave — Practice — Oath for Chinamen—Form of—Perjury — Confession—Threat or Inducement—Voluntary Confession—Judge's Ruling—Review.*]—The prisoner, a Chinaman, had been convicted of perjury:—Held, that leave to appeal to the Court of Criminal Appeal should not be lightly granted, and the representative of the Crown should be served with a notice of motion setting out the grounds of appeal.—Quære, whether the ruling of a Judge as to the admissibility of a confession is open to review by the Court of Criminal Appeal:—Held, on the facts, that before making his confession the prisoner was duly cautioned, and that the confession was admissible in evidence, although, on an occasion previous to his making it, an inducement may have been held out to him. When a witness without objection takes an oath in the form ordinarily administered to persons of his race or belief, he is then under a legal obligation to speak the truth and cannot be heard to say that he was not sworn. Perjury may be assigned in respect of statements given in evidence by a Chinaman, who was not a Christian, where the oath was administered to him by the burning of paper and an admonition to him "that he was to tell the truth, the whole truth, and nothing but the truth, or his soul would burn up as the paper had been burned." *Rex* v. *Lai Ping*, 25 Occ. N. 22, 11 B. C. R. 102.

Appeal—*Leave—Reserved Case—Grounds for Granting—Remarks of Judge—Prejudice—Jurors—Evidence.*] — Held, affirming the judgment in Q. R. 12 K. B. 368, that a verdict cannot be impeached in consequence of an observation made by the Judge presiding at the trial, unless such observation was calculated to influence the jury against the defendant; and, consequently, the fact that the Judge remarked to the defendant's counsel while the jury was being sworn, "if you continue to challenge every man who reads the newspapers, we shall have the most ignorant jurors selected for the trial of this cause," is not a proper ground for granting leave to appeal, such remark having no tendency to influence the jury against the defendant, and being without importance. 2. An observation by the Judge presiding at the trial of a criminal case, in his charge to the jury, to the effect that "about 40 or 50 witnesses had been examined for the purpose of establishing the defendant's good character, and that it was very strange that it should take 40 or 50 witnesses to establish it," is not an irregularity which can constitute a ground for granting leave to appeal, the presiding Judge having the right to express his opinion of the evidence, which, however, may or may not be accepted by the jury. The essential point is that the whole evidence be submitted to the jury, who decide finally as to the innocence or guilt of the accused. 3. An appeal from the verdict to the Court of King's Bench sitting in appeal lies only upon questions of law arising either on the trial or on any of the proceedings preliminary, subsequent, or incidental thereto, or ar-

ising out of the direction of the Judge. It follows that in cases such as the following, the right of appeal does not exist, viz., where it is alleged that one of the jurors was prejudiced against the prisoner; where it is alleged that the verdict was the result of an improper arrangement entered into between the jurors, these being questions of fact; or where it appears that no application was made to the trial Judge to reserve the question for the opinion of the Court of Appeal. *Rex* v. *Carlin*, Q. R. 12 K. B. 483.

Appeal — *New Trial—Jury—Conflict of Testimony — Perverse Verdict—Opinion of Trial Judge.*]—On a charge of theft a new trial was refused although the verdict was contrary to the view of the trial Judge, the evidence being conflicting, but the Court being of opinion that the verdict of guilty was one which reasonable men could properly find. In deciding the question of reasonableness of the verdict the opinion of the trial Judge is entitled to and ought to receive great weight; but it is not conclusive. *Regina* v. *Brewster* (*No. 2*), 2 Terr. L. R. 377.

Arrest of Prisoner in Foreign Country without Warrant — Detention and return to Ontario to answer charge of theft—Habeas corpus — Custody under oral remands—Justice of the peace—Jurisdiction —Police magistrate. *Rex* v. *Walton*, 6 O. W. R. 905, 11 O. L. R. 94.

Arrest under Warrant—*Escape—Right to Re-arrest under same Warrant.*] — The prisoner had been arrested at Amherst by one of the police of that town, under a warrant. After his arrest he escaped, and left the town for some weeks. When he returned he was re-arrested under the same warrant: —Held, that, at the most, the escape in this case was negligence on the part of the officer, and that he did not contemplate a voluntary abandonment of his prisoner, but negligently trusted to the latter's promise to surrender himself under the warrant; therefore, he might be re-arrested. *Rex* v. *O'Hearn*, 21 Occ. N. 355.

Bail—Estreat—Certificate of non-appearance — Informality — Criminal Code — Forms — Motion to vacate estreat—Delay— Action taken on certificate. *Rex* v. *May*, 5 O. W. R. 67.

Bail — Estreat—Motion to vacate—Delay—Adjournment of hearing without notice to sureties — Conflicting affidavits. *Rex* v. *Bole*, 5 O. W. R. 68.

Bail — *Estreat — Sittings of Court — Non-appearance—Notice.*] — In a recognizance of bail the expression "the next sittings of a Court of competent criminal jurisdiction," means the next sittings fixed by the Lieutenant-Governor in council in pursuance of the N. W. T. Act, s. 55. The fact that a special sitting was held in the interval pursuant to the N. W. T. Amendment Act, 1891, s. 12, s.-s. 2, for the trial of a designated prisoner confined in gaol and awaiting trial, did not affect the obligation of the accused to appear at the next sittings fixed by the Lieutenant-Governor. No notice to the bail of intention to estreat or to produce the accused is necessary. Regina v. Schram, 2 U. C. R. 91, and Re Talbot's Bail, 23 O. R. 65, followed. *In re McArthur's Bail* (*No. 1*), 2 Terr. L. R. 413.

Bail — *Right to—Discretion of Judge.*]— All Superior Courts of criminal jurisdiction, or one of their Judges, and also, in the province of Quebec, a Judge of the Superior Court, have authority to admit to bail persons accused of any crime whatsoever (including treason and capital offences), but as respects indictable offences which, before the enacting of the Criminal Code, were felonies, it is within their discretion to grant or refuse the application for bail. With respect to indictable offences which were formerly misdemeanours, the accused is entitled to be admitted to bail as a matter of right. 2. The propriety of admitting to bail for indictable offences which were formerly classed as felonies should be determined with reference to the accused person's opportunities for escape, and to the probability of his appearing for trial. To determine this point it is proper to consider the nature of the offence charged and its punishment, the strength of the evidence against the accused, his character, means, and standing. Where a serious doubt exists as to his guilt the application for bail should be granted. If, on the evidence, it stands indifferent whether he is guilty or innocent, the rule generally is to admit him to bail; but if his guilt is beyond dispute, the general rule is not to grant the application for bail unless the opportunities to escape do not appear to be possible, and it is consequently almost certain that he will appear for trial. The fact that the application for bail is not opposed either by the Attorney-General or the private prosecutor may also be taken into account by the Court or Judge. *Rex* v. *Fortier*, Q. R. 13 K. B. 251, 23 Occ. N. 115.

Comment of Crown Counsel on Failure to Call Wife of Accused—*Conviction Quashed—New Trial.*]—On the trial of the defendant on a charge of shooting with intent to kill, counsel for the Crown commented upon the fact that the defendant's wife, who had been a witness on the preliminary examination before the magistrate, was not called. On a Crown case reserved:—Held that the comment in question was not justified by the fact that it was made in reply to an explanation offered by counsel for the defendant to account for the omission to call the wife, and that the conviction must be set aside:—Held, that the defendant should not be discharged, but that there should be a new trial. *Rex* v. *Hill*, 36 N. S. Reps. 240.

Costs — *Private Prosecutor — Attorney-General—Nolle Prosequi—Effect.*] — Where a nolle prosequi has been entered by the Attorney-General, upon an indictment in the name of the King at the instance of a private prosecutor, and the accused is thereupon discharged, judgment is, within the meaning of art. 833 of the Criminal Code, given for the defendant, and he is entitled to recover costs from the private prosecutor. *Rex* v. *Blackley*, Q. R. 13 K. B. 472.

Crown Case Reserved—*Academic Questions.*]—The Court of Appeal should not be asked, by a reserved case, to solve questions on which the validity of a conviction does not necessarily depend. *Rex* v. *Woods*, 23 Occ. N. 220, 6 O. L. R. 41, 2 O. W. R. 338.

Crown Case Reserved—*Application for —Grounds — Misapprehension of Jurors—Statements by.*]—It is no ground for stating a reserved case, after a trial and conviction, that two of the jurors who joined in the verdict of guilty did so under a misapprehension; and it is contrary to principle to allow the statements of jurors, even under oath, to be used for the purpose of an application for a reserved case. *Rex* v. *Mullen*, 23 Occ. N. 169, 5 O. L. R. 373, 2 O. W. R. 181.

Crown Case Reserved — *Leave to Appeal.*]—Where there has been an acquittal, the trial Judge should leave the prosecutor to apply for leave to appeal, rather than reserve a case. *Rex* v. *Karn*, 23 Occ. N. 219, 5 O. L. R. 704, 2 O. W. R. 335; *Rex* v. *James*, 23 Occ. N. 220, 6 O. L. R. 35, 2 O. W. R. 342.

Crown Case Reserved — *Acquittal — Case Reserved at Instance of Crown—Insanity.*] — The defendant was indicted for theft under s. 305 (a) of the Criminal Code. The act of theft was admitted, but it was contended that there was evidence of insanity at the time the act was committed. The trial Judge charged the jury that there was no such evidence, and that the case did not come within s. 736 of the Code. The jury having found the prisoner not guilty, two questions were reserved for the opinion of the Court: (1) Whether there was evidence of insanity as required by s. 736. (2) If not, whether there should be a new trial. The Court was moved to quash the case reserved, on the ground that where there had been an acquittal the Crown could not have a case reserved or an appeal:—Held, that the motion must be dismissed, and the reserved case proceeded with, to ascertain whether there was evidence of insanity sufficient in law for submission to the jury. *Rex* v. *Phinney* (*No. 1*), 36 N. S. Reps. 264.

Crown Case Reserved—*Form of Charge —Theft — County Court Judge's Criminal Court — Court in Banco — Jurisdiction of Quorum.*] — The Supreme Court of Nova Scotia, composed of a quorum of four Judges only, has jurisdiction to hear and decide a Crown case reserved stated by the Judge of a County Court sitting in his Criminal Court. The prisoner was charged with unlawfully stealing goods, but the charge did not allege that the offence was committed fraudulently, and without colour of right:—Held, affirming the decision appealed from, that the offence of which the prisoner was accused was sufficiently stated in the charge. *George* v. *The King*, 35 S. C. R. 376.

Crown Case Reserved — *Jurisdiction—Question of Fact—Gaming.*]—The Court of King's Bench, sitting as a Court for the hearing of cases reserved by Criminal Courts, has jurisdiction only to pronounce upon a question of law, under facts proved, and mentioned in the reserved case. Consequently, where the question stated in the reserved case was whether the use of a particular apparatus constituted a mixed game of chance and skill, or only a game of skill, and did not submit the question whether, under facts proved, and stated in the reserved case, the game was one which came within the prohibition of the Criminal Code, the Court declared that it was without jurisdiction in the matter. *Rex* v. *Fortier*, Q. R. 13 K. B. 308.

Crown Case Reserved — *No Trial.*]—The accused was a letter carrier, and, being suspected of retaining letters containing money, a fictitious one was prepared, which, it was alleged, was afterwards found in his possession. He was arrested, and after a preliminary inquiry was committed for trial. At the trial counsel for the accused contended that the charge laid was not founded on the evidence adduced at the preliminary trial, inasmuch as the proof then taken did not shew that the document stolen was a post-letter which had been deposited in the post office, within the meaning of the amendment to the Post Office Act, 52 V. c. 20, s. 2, s.-s. 1, or of s. 326 (c) of the Criminal Code. The trial did not take place, but the trial Judge reserved the question thus raised for the opinion of the Court:—Held, that a question of law can only be reserved when there has been a trial and conviction. *Rex* v. *Trépanier*, 21 Occ. N. 248, Q. R. 10 Q. B. 175.

Crown Case Reserved—*Power of Magistrate.*]—The prisoner, with his own consent, was tried summarily before the stipendiary magistrate for the city of Halifax, under s. 786 of the Criminal Code, and was convicted of the offence of stealing property of the value of less than $10. At the trial, the magistrate, at the request of the prisoner, reserved a question for the opinion of the Court, under s. 742 and following sections of the Code:—Held, that, under s. 742 and following sections, a reserved case can be stated only by a Court, or a Judge having jurisdiction in criminal cases, or by a magistrate in proceedings under s. 785:—Held, that, as s. 785 had no application to the case in question, and the provisions of s. 900 of the Code had, admittedly, not been complied with, there was no proper case before the Court upon which the Court had authority to give an opinion. *Regina* v. *Hawes*, 33 N. S. Reps. 389.

Crown Case Reserved — *Weight of Evidence—Acquittal of Prisoner—Insanity.*]—The prisoner was indicted for theft and was acquitted on the ground of insanity:—Held, following R. v. McIntyre, 31 N. S. Reps. 422, that the trial Judge cannot reserve a case depending upon the weight of evidence, and that the question reserved, whether there was evidence of insanity as required by s. 736 of the Code, was within the principle decided; that the question of the weight of evidence is entirely for the jury; and that the provision for granting a new trial, where the verdict is against the weight of evidence, cannot be invoked on the part of the Crown. *Rex* v. *Phinney* (No. 2), 36 N. S. Reps. 288.

Election by Prisoner as to Trial—*Power of Prosecuting Officer to Receive—Depositions—Perusal of — Magistrate's Signature.*] — Where there is no Judge of the County Court residing in a county, the prosecuting officer or counsel appointed under the provisions of R. S. 1900 c. 165, s. 1, is empowered to take the election of a prisoner, under the Code, s. 766, to be tried before the Judge of the County Court. The power given to such officers to conduct all criminal business on behalf of the Crown includes all pro-

cess necessary to bring the prisoner to trial, and the making of his election is one necessary act in these proceedings. Where all the depositions, or copies thereof, taken against the prisoner, and returned into the Court before the trial, were handed to the prisoner's counsel for perusal:—Held, that it was no cause of complaint that the papers so handed were mixed up with other papers, there being no serious difficulty in understanding those applicable to the particular offence with which the prisoner was charged:—Held, also, that depositions to which the magistrate had affixed his signature were not to be rejected because such signature was possibly not placed in the most correct place. Quære, whether an indictment found by the grand jury should be quashed because depositions are improperly taken. The King v. Traynor, 4 Can. Crim. Cas. 410, questioned. *Rex* v. *Jodrey*, 25 Occ. N. 109.

Grand Jury — *Constitution of — Indictment.*]—A sheriff, when about to summon, pursuant to s. 48 of the Jurors' Act, one of the jurors drafted to serve on a grand jury, ascertained that the juror was demented and did not summon him:—Held, that the grand jury was not legally constituted, and that an indictment found by the jurors who had been summoned must be quashed. A motion to quash such an indictment is not an objection to the constitution of the grand jury within the meaning of s. 656 of the Criminal Code. *Rex* v. *Hayes*, 23 Occ. N. 342, 9 B. C. R. 574.

Grand Jury—*Constitution of—Qualification of Juror—Prejudice—Motion to Quash Indictment—Reserved Case.*] — An objection to the qualification of an individual member of a grand jury is not an objection to the "constitution" of the grand jury within the meaning of s. 656 of the Criminal Code, and so cannot be raised by motion to quash the indictment. The question as to whether or not a grand juror is prejudiced, is for the Judge of Assize to decide, and his decision cannot be reviewed on a stated case. *Rex* v. *Hayes*, 11 B. C. R. 4. See S. C., 23 Occ. N. 342, 9 B. C. R. 574.

Grand Jury—*Formation and Number—True Bill—Rejection.*]—Where eleven grand jurors answered their names when the roll was first called, but only ten were impanelled and sworn (one having failed to answer on the second calling), the grand jury was properly formed; and the accused, having suffered no prejudice thereby, cannot, on that ground, move for the rejection of the true bill found against him. *Rex* v. *Fouquet*, Q. R. 14 K. B. 87.

Grand Jury — *Indorsing Names of Witnesses on Indictment—Abortion—Form of Indictment.*]—The provisions of s. 645 of the Criminal Code, requiring the names of all witnesses examined by the grand jury to be indorsed on the bill of indictment, are directory only, and an omission so to indorse does not invalidate the indictment. An indictment under s. 273 of the Code charging accused "with unlawfully using on her own person . . . with intent thereby to procure a miscarriage" (without stating whose miscarriage) is sufficient. *Rex* v. *Holmes*, 22 Occ. N. 437, 9 B. C. R. 294.

Grand Jury—*Swearing in — Foreman—Omission to Initial Names of Witnesses — Effect on Indictment—Submission of Record —Depositions — Crown Case Reserved.*] — 1. It is essential that, at the time the foreman of the grand jury is sworn, the other jurors be present and hear the oath taken by their foreman. And, therefore, where it appeared that none of the other jurors were in the box at the time their foreman was sworn, that there was no certainty that the oath taken by him was heard by them, that the other jurors were only sworn, afterwards, to observe the same oath which their foreman had taken, and that objection was duly made by motion to quash, before the arraignment of the defendant, the indictment found by the grand jury was held to be null and void. 2. The omission by the foreman to initial the names of the witnesses examined before the grand jury, as required by law, is a fatal defect, and has the effect of annulling the indictment. 3. The submission of a record to the grand jury, in order that they may examine certain exhibits, and verify certain statements made by witnesses examined before them, is not a fatal irregularity, where it is proved that the decision of the grand jury was arrived at without reference to the depositions contained in such record. 4. The objections to the indictment above mentioned are proper grounds for a reserved case. *Bélanger* v. *The King*, Q. R. 12 K. B. 69.

Grand Jury—*Swearing—Examination of Witnesses—Petit Jury—Challenge — "Verificateurs."*] — It is not necessary that the accused should be present in Court during the swearing of the grand juries. 2. The grand jury may examine the Crown witnesses in whatever order they choose, and the examination of a single one of such witnesses is not an irregularity nor an illegality, where it is admitted that the witness was able to establish a complete admission on the part of the accused. 3. Since the coming into force of the Criminal Code, it is not necessary that the first juror sworn should be added to the board of verificateurs who are to pass upon the challenge of the second juror: s. 968, Criminal Code. *Rex* v. *Mathurin*, Q. R. 12 K. B. 494.

Indictment of Street Railway Company—Nuisance—Endangering lives of public—Removal from Sessions into High Court—Difficult questions of law. *Rex* v. *Toronto R. W. Co.*, 4 O. W. R. 277, 5 O. W. R. 621.

Indictment—*Particularity—Statement of Offence—Preferring of Indictment — Order — Grand Jury.*]—Where a person is charged with an offence, the indictment should describe it with such particularity as will enable the accused to know exactly what he has to meet. An indictment which stated the offence in the language of the section of the Criminal Code supposed to have been violated, without setting out the particular facts constituting the offence, was quashed, for want of particularity, and also because it was not preferred in accordance with s. 641 of the Code. The Attorney-General did not in person or even by his authority prefer the indictment, and the informal direction of a Judge to the foreman of the grand jury, recognized by a formal order after the indictment had actually been preferred, was insufficient. *Rex* v. *Beckwith*, 23 Occ. N. 307.

Indictment for Wounding with Intent and for Common Assault—*Motion to Quash — Jury — Peremptory Challenges.*]—The defendant was indicted under ss. 241 and 265 of the Criminal Code on two counts charging (1) that he in the city of Halifax on the 13th November, 1903, with intent to do grievous bodily harm to one W., did unlawfully wound the said W., and (2) that he did in the city of Halifax on the 13th November, 1903, unlawfully assault one W. After arraignment and before pleading to the indictment, the prisoner's counsel moved to quash it, on the ground that the clerk of the Crown had not sent the depositions taken on the prisoner's preliminary examination, before the grand jury of the county of Halifax, as required by s. 709 of the Criminal Code. When the jury were being sworn, the prisoner claimed the right to 16 peremptory challenges, on the ground that these counts would, before the Code, have been for a felony and misdemeanour respectively, and, as s. 626 (1) and (2) of the Criminal Code abrogated the common law rule as to their non-joinder, he was, under the above section, being tried on two indictments:—Held, that the indictment was properly found. 2. That the prisoner was entitled under s. 668 of the Criminal Code only to 12 peremptory challenges, being the largest number allowed him on the first count of the indictment, it not being necessary for the Crown to add a count for common assault in order to get a conviction for that offence, if the evidence warranted it. The prisoner was then tried and acquitted on both counts in the indictment. *Rex* v. *Turpin*, 24 Occ. N. 183.

Jury—*Exclusion of, during Inquiry as to Admissibility of Dying Declaration—Comment on Prisoner's Failure to Testify.*] — Motion for leave to appeal to the Court of Criminal Appeal:—Held, that the jury should not be excluded during the preliminary inquiry as to whether certain evidence is admissible as a dying declaration. 2. A prisoner at his trial has the option of making a statement not under oath or of giving evidence under oath. 3. A direction to the jury that an accused has failed to account for a particular occurrence, when the onus has been cast upon him to do so, does not amount to a comment on his failure to testify, within the meaning of s. 4, s-s. 2, of the Canada Evidence Act, 1893. *Rex* v. *Aho*, 25 Occ. N. 50, 11 B. C. R. 114.

Jury — *Polling — Separating — Refreshments.*]—In a prosecution for felony it is discretionary with the trial Judge to permit or refuse to allow the jury to be polled. The prisoner being convicted of felony, the circumstances that two of the jurors had during the trial, but before the Judge's charge, been allowed to separate for a short time from the other jurors in the custody of one of the constables who had been placed in charge of the jury, and during such separation to hold a short conversation, not referring to the cause, with a stranger to the proceedings, and to partake, at their own expense, of intoxicating liquor, insufficient in quantity to cause intoxication, were held not to constitute sufficient ground for discharging the prisoner, or for a new trial. *Regina* v. *McClung*, 1 Terr. L. R. 379.

Jury—*Right of Accused to Inspect Panel — Provincial Statute — Absence of Dominion Legislation—Criminal Procedure.*] — Appeal from order dismissing appellant's application for a mandamus to the sheriff of Middlesex commanding him to shew to appellant or his agent for examination the panel of jurors at the Middlesex Sessions, for the purpose of determining whether it would be necessary to strike a special jury for the trial of appellant upon a charge of receiving stolen cattle. Argued that s. 85 of c. 31 C. S. U. C. is still the law in criminal matters, because being matter of criminal procedure the Legislature had no power to pass 58 V. c. 15, s. 3 (O.), now R. S. O. 1897 c. 61, s. 94, imposing restrictions upon the disclosure of the names of the jurors and inspection of the panel, to relate to criminal matters:—Held, Osler, J.A., dissenting, affirming the judgment refusing the mandamus. *Re Chantler and Cameron*, 5 O. W. R. 574, S. C., sub nom. *In re Chantler*, 9 O. L. R. 529.

Motion for New Trial — *Leave*]. — A motion for a new trial in a criminal cause can be made before the Court of Appeal only upon leave therefor granted by the Court before which the trial has taken place. *Rex* v. *Fouquet*, Q. R. 14 K. B. 87.

Nuisance—*Prosecution — Municipal Corporation—Indictment—Preliminary Inquiry—Prohibition — Chancery Division.*] — 1. A prosecution of a municipal corporation for a nuisance in not keeping a public street in repair can only be by indictment, under s. 641, s-s. 2, of the Criminal Code. 2. A preliminary inquiry cannot be taken before a magistrate for the purposes of s-s. 2. 3. The Judges of the Chancery Division of the High Court of Justice for Ontario have jurisdiction at common law and by virtue of 28 V. c. 18, s. 2 (D.), in prohibition in criminal cases, notwithstanding that no Rules have been made under s. 533 (b) of the Code, and notwithstanding the provisions of s. 754. Motion for a rule nisi to set aside order of Ferguson, J., prohibiting a police magistrate from proceeding, refused. *In re Regina* v. *City of London*, 21 Occ. N. 71, 32 O. R. 326.

Preliminary Inquiry before Magistrate — *Discretion—Evidence—Re-opening.*] —In a criminal matter the preliminary enquête before the magistrate in respect of an offence which may be prosecuted by way of information, is not, properly speaking, the enquête of the complainant, but that of the magistrate. 2. At the time of the preliminary hearing, after the enquête of the prosecution has been declared closed, and nothing has been shewn against the accused, and even after the parties have been heard as to the legal effect of the evidence, the magistrate has a discretion to permit the prosecutor to re-open the enquête to make more ample proof. *Bélanger* v. *Mulvena*, Q. R. 22 S. C. 37.

Private Prosecutor — *Right to Take Part in Proceedings.*]—Held, on motion for a certiorari, that, though it is the right of everyone to make a complaint with a view to the institution of criminal proceedings, and also, under certain circumstances, to prefer a bill of indictment, yet the prosecutor is no party to the prosecution, and cannot insist that he, or counsel retained by him, shall aid in the conduct of the prosecution. *Rex* v. *Gilmore*, 23 Occ. N. 298, 6 O. L. R. 286, 2 O. W. R. 710.

Recognizance — *Estreat — Notice.*] — A recognizance was entered into by the defendant and his surety before a stipendiary magistrate, conditioned to keep the peace and to appear before the magistrate on a day named. The defendant failed to appear, and the recognizance was estreated without notice to the defendant or to his surety:—Held, per Graham, E.J., McDonald, C.J., concurring, following Regina v. Creelman, 25 N. S. Reps. 404, that notice was necessary, and that the order estreating the recognizance was improperly made:—Held, otherwise per Townshend, J., and Meagher, J., following the dissenting opinion in Regina v. Creelman. Regina v. Brooke, 11 Times L. R. 163, referred to and distinguished. Crown Rules 84, 86, and 87, and Criminal Code, ss. 916-922, discussed. *Rex* v. *Barrett*, 36 N. S. Reps. 135.

Restitution of Stolen Property—*Absence of Identification at Trial.*]—The prisoner was convicted for stealing from the person. At the trial the prosecutor testified that bank notes of the value of $70 were taken from him, and he gave the denomination of the notes, which included one for $20. Another witness testified that when the prisoner was arrested and brought to the police station she was searched and a $20 bank note and some smaller notes, amounting in all to $28, were found upon her. The money was not produced at the trial nor any evidence given to identify the notes found on the prisoner with the stolen notes. After the trial, upon the ex parte application of the prisoner, an order was made by a Judge in the County Court Judge's Criminal Court, directing that the money found on the prisoner should be restored to her. A motion was made to set aside the order, whereon judgment was reserved. The Judge died without delivering judgment. The motion was renewed before his successor, who dismissed the application to set aside the ex parte order, and made an order for restitution to the prisoner, on the ground that the money was not produced and identified at the trial as part of the stolen property. *Regina* v. *Haverstock*, 21 Occ. N. 482.

Suspended Sentence — *Estreating Recognizance—Locus Standi.*]—The defendant was in 1887 convicted of libel, and released from custody upon entering into a recognizance with sureties to appear and receive judgment when called upon. The private prosecutor obtained a rule nisi calling on the defendant to shew cause why he should not be ordered to appear at the next assizes to receive judgment, on the ground that he had failed to be of good behaviour since entering into the recognizance, by reason of his having published further libels:—Held, that it is only upon motion of the Crown in such cases that the recognizance of the defendant and his bail are estreated, or judgment moved against the offender:—Held, also, that, apart from this, under the circumstances, the prosecutor must be left to his remedy by action or indictment against the defendant in regard to the libels complained of. *Rex* v. *Young*, 21 Occ. N. 463, 2 O. L. R. 228.

Trial — *Juror — Order to Stand by—Time.*]—The direction to a juror to stand by is practically a challenge for cause, and therefore the order to stand by must be given at a time when a challenge could be made; and, inasmuch as the right to challenge must be exercised before the juror has taken the book in order to be sworn, the direction to stand by can only be given before the juror has received the book. *Rex* v. *Barsalou*, Q. R. 10 Q. B. 180.

Trial—*Jury—Influence Upon, by Judge's Remark—Conspiracy — Evidence —Reserved Case—Prejudice of Juror—New Trial—Affidavits—Misconduct.*] — A verdict cannot be impeached in consequence of an observation made by the Judge presiding while the trial was proceeding, unless such observation was calculated to influence the jury against the defendant; and consequently, a remark of the presiding Judge to the defendant's counsel while the jury was being sworn, that "if you continue to challenge every man who reads the newspapers, we shall have the most ignorant jurors selected for the trial of this cause," is not a proper ground for a reserved case, it having no tendency to influence the jury one way or the other. 2. On a trial for conspiracy to defraud a railway company by fraudulently obtaining information of the secret audits about to be made and furnishing the same to conductors of cars to enable them to be prepared for the audits, proof that information of this nature might be given by one conductor to another for purposes other than to defraud the company, was properly excluded, because such questions could not disprove the object of the conspiracy or throw any doubt on the evidence which had been adduced to shew the object which the parties had in view. 3. An observation by the presiding Judge, in his charge to the jury, to the effect that "about forty or fifty witnesses had been examined for the purpose of establishing the defendant's good character, and that it was very strange that it should take forty or fifty witnesses to establish it," is not an irregularity which can constitute a ground for granting a reserved case. 4. A new trial should not be ordered in consequence of remarks made by a juror tending to shew prejudice, unless it be shewn that he was so prejudiced as to be unable to give the defendant an impartial trial. 5. An application for a new trial on the ground of improper conduct of the jury must be supported by affidavits clearly setting forth the alleged irregularity, and, in the absence of full proof under oath, the presumption is that the jury properly performed its duty. 6. The affidavits of jurors are not admissible to impeach their finding, but are admissible to support and confirm the presumption that the proceedings of the jury were correct, and that there was no misconduct. *Rex* v. *Carlin*, Q. R. 12 K. B. 368.

Trial—*Jury—Right to—Assault—Criminal Code.*]—A person charged with assault occasioning actual bodily harm contrary to s. 262 of the Criminal Code is not entitled under s. 67 of the North-West Territories Act, to be tried with the intervention of a jury. Section 66 extends to all minor offences included in the several offences specifically enumerated therein. *Rex* v. *Hostetter*, 5 Terr. L. R. 363.

Trial—*Offence Other than that for which Prisoner Committed.*]—Held, that, notwithstanding the provisions of s. 773 of the Criminal Code, 1892, a Judge should not,

against the wish of a prisoner, give his consent, at the trial before him without a jury which the prisoner has elected to take, to any charge being preferred in the indictment unless it is clear that, while it may be more formally or differently expressed, it is substantially the same charge as the one on which he was committed for trial. *Rex* v. *Carriere*, 22 Occ. N. 187, 14 Man. L. R. 52.

Trial—*Place Other than Court House.*]—At the trial of an indictable offence the presiding Judge has the power to order the Court to be adjourned to a place in the county other than the Court house, for the purpose of allowing the jury to hear the evidence of a witness who was unable through illness to leave his home. *Rex* v. *Rogers*, 36 N. B. Reps. 1.

Trial—*Right of Jury—Stealing Cattle.*]—Although the punishment which may be awarded on a conviction for stealing cattle is greater than that which may be awarded on a conviction for stealing certain other classes of property, a person charged with having stolen cattle the value of which does not, in the opinion of the trial Judge, exceed $200, has not the right to be tried by jury. *Regina* v. *Pachal*, 20 Occ. N. 192, 4 Terr. L. R. 310.

Trial — *Speedy Trial of Indictable Offences—Election as to Mode of Trial—Time for—Indictment.*] — When, in the ordinary course, an indictment has been found for an offence with which a person who is either in custody or on bail, has been charged, and such indictment has been returned into Court and has been filed of record, the Court is regularly and exclusively seised of the case, and the accused has no right then to ask for a speedy trial and to remove the case and the indictment and the other documents forming the record to the special Court for speedy trials. *Rex* v. *Komiensky*, Q. R. 12 K. B. 463.

Trial — *Speedy Trial of Indictable Offences—Election as to Mode of Trial—Time for—Indictment.*]—After an indictment has been found against the accused by the grand jury, it is too late for him to elect for speedy trial without a jury under part LIV. of the Criminal Code. Jurisdiction to hold a speedy trial is strictly limited by the terms of s. 765 of the Criminal Code, and such jurisdiction is only conferred where the accused has been committed to gaol for trial, or is otherwise in custody awaiting trial on the charge against him. *Rex* v. *Komiensky*, Q. R. 12 K. B. 329.

Trial — *Speedy Trial of Indictable Offences—Election as to Mode of Trial—Time for—Waiver—Plea to Indictment.*] — Four accused persons, after a preliminary inquiry, were committed for trial for conspiracy to defraud, but no bill of indictment was preferred to the grand jury on such charge. A bill of indictment, however, was preferred by the Crown counsel, with the written consent of the Judge presiding in the Court of King's Bench, charging the four accused and two other persons with conspiracy. Two additional bills were preferred against the six persons, charging them with having committed other indictable offences, and the grand jury declared the three bills well founded and returned them into Court as true bills. The accused, when arraigned, severally pleaded not guilty on the three indictments, but when the Court was proceeding to fix a day for the trials, they moved that an order be made allowing them to be taken before a Judge of sessions to declare their option for speedy trial on the indictments:—Held, that in order to waive a trial by jury and to elect to be tried by a Judge of sessions, an information must have been laid before a justice of the peace, a preliminary inquiry must have been made, depositions giving evidence concerning the offence charged must have been taken, and the accused must have been committed for trial. Rex v. Gibson, 4 Can. Crim. Cas. 451, followed. 2. Whenever an accused party neglects to take the necessary steps to elect for a trial without a jury in the special Court for speedy trials, before an indictment is found against him and returned into Court, his plea to such indictment will be conclusive against him, and he cannot afterwards elect for a speedy trial without a jury: Regina v. Lawrence, 1 Can. Crim. Cas. 295. His plea to the indictment conclusively and exclusively fixes the form. *Rex* v. *Wener*, Q. R. 12 K. B. 320.

Trial—*Speedy Trial of Indictable Offences—Jurisdiction of District Magistrate—Criminal Code.*]—A district magistrate has no jurisdiction to try a person for an indictable offence, except in the special cases provided by law, viz., the indictable offence must be one which is triable before the general or quarter sessions of the peace; the accused person must have been committed or bailed for trial, and be in actual custody awaiting trial; the sheriff must have notified the district magistrate in writing that such person is so confined, stating his name and the nature of the charge preferred against him; the district magistrate must thereupon have caused the prisoner to be brought before him, and, after having obtained the depositions on which the prisoner was committed, state and describe to him the offence with which he is charged, and the prisoner must then have consented to be tried before such district magistrate without a jury. The jurisdiction to hold a speedy trial is strictly limited by the terms of ss. 765-767, Criminal Code, and the conditions specified in these sections must be strictly complied with, on pain of absolute nullity, even where the accused has expressly declared that he consents to stand his trial before the district magistrate who convicted him. *Rex* v. *Breckenridge*, Q. R. 12 K. B. 474.

Trial—*Summary Trial — Assault—Penalty—Right to Jury—Notification by Magistrate's Clerk.*]—Section 785 of the Criminal Code, 1892, as re-enacted by 63 & 64 V. c. 46, gives to the police magistrate of a city or town power to impose the same punishment for a common assault as could be imposed upon a person convicted on an indictment, when he has decided to treat it as an indictable offence and is proceeding under the summary trials part of the Code. 2. The magistrate may ask the question provided for by s. 786 of the Code through the mouth of his clerk. *Rex* v. *Ridehaugh*, 23 Occ. N. 236, 14 Man. L. R. 434.

Venue — *Indictment — Commitment to Penitentiary—Warrant.*] — The venue mentioned in s. 609 of the Criminal Code, 1892,

means the place where the crime is charged to have been committed; and, in cases where local description is not required, there is an implied allegation that the offence was committed at the place mentioned in the venue in the margin of the record. It is of no consequence whether or not the trial Court should be considered an inferior court.—Under s. 42 of the Penitentiary Act, R. S. C. c. 182, a copy of the sentence of the trial court, certified by a Judge or by the clerk or acting clerk of that court, is a sufficient warrant for the commitment and detention of the convict. Decision of Davies, J., in Ex p. Smitheman, 24 Occ. N. 329, 35 S. C. R. 189, affirmed. *Smitheman* v. *The King*, 35 S. C. R. 490.

IV. Summary Conviction.

Appeal — *Notice to Complainant — Forum.*] — Held, that a notice of appeal neither addressed to nor served upon the prosecutor, but addressed to and served upon one only of two convicting justices of the peace, is insufficient, though it appear that when the notice was so served the justice upon whom it was served was verbally informed that it was for the prosecutor. Keohan v. Cook, 1 Terr. L. R. 125, followed. The question, whether a notice of appeal to the Supreme Court of the North-West Territories instead of a Judge thereof was valid, was raised but not decided. *Hostetter* v. *Thomas*, 4 Terr. L. R. 224.

Appeal — *Magistrate Stating Case after Appeal—Res Judicata.*]—The defendant was convicted before a stipendiary magistrate for violation of certain regulations made under the Fisheries Act, R. S. C. c. 96, s. 17, and an appeal was taken to the County Court for district No. 3, where the conviction was affirmed. No appeal was taken from the judgment in the County Court, but the stipendiary magistrate was applied to to state a case for the opinion of the Supreme Court, with the view of questioning the validity of the conviction, which he did:—Held, quashing the case stated, that, with the judgment of the County Court standing in the way, the defendant was precluded from asking the stipendiary magistrate to state a case for the purpose of attacking the conviction in the Supreme Court. The judgment in the County Court, in the identical case, was binding as between the parties, and upon the stipendiary magistrate, and the matter was therefore res adjudicata, and one in which the magistrate could not be asked to state a case. *Rex* v. *Townshend*, 35 N. S. Reps. 401.

Appeal—*Notice of—Parties to be Served.*]—A notice of appeal from a summary conviction (provincial) served upon the convicting magistrate is not invalid because it is not also addressed to and served upon the respondent. It is not a pre-requisite to the right of appeal that the person convicted should have been taken into custody. Quære, whether service of notice of appeal on the respondent's solicitor would not be sufficient in any event. *Rex* v. *Jordan*, 22 Occ. N. 219, 9 B. C. R. 33.

Appeal—*Payment of Fine — Security — Money Deposit—Return to Appellate Court.*]—A person by paying his fine on a summary conviction loses any right of appeal he might otherwise have had under s. 880 of the Criminal Code. Where on an appeal from a summary conviction an appellant makes a money deposit in lieu of recognizance, the deposit, which includes both the fine and the security for costs of appeal, should be returned by the justice into the appellate Court, and in default the appeal cannot be heard. *Rex* v. *Neuberger*, 9 B. C. R. 272.

Appeal—*Recognizance—Defect in—Costs—Order—Motion to Quash — Grounds—Addition of.*]—The Court may allow new grounds to be added on shewing cause against an order nisi to quash an order dismissing an appeal from a conviction under the Criminal Code, granted under the Rule of Court of Michaelmas term, 1899, although the Rule requires the grounds to be stated in the order.—A recognizance entered into under s. 880 (c) of the Code is bad if the word "personally" is omitted from the condition to appear and try the appeal and abide the judgment of the Court thereupon. And the appellate Court, on this objection being raised to the recognizance, has jurisdiction to dismiss the appeal with costs. *Rex* v. *Wedderburn, Ex p. Sprague*, 36 N. B. Reps. 213.

Appeal — *Recognizance — Sureties—Statutory Requirements.*]—On an appeal, under s. 879, Criminal Code, by several defendants from a summary conviction, the recognizance must be that of two sureties besides the appellant, and the appeal will be quashed if the recognizance be given with only one surety. 2. An appeal not being of common law right, the conditions precedent imposed by the statute must be strictly complied with. 3. The giving of security is an essential part of the appeal, and unless it be done in the manner required by statute, the giving of a notice of appeal will be unavailing, and the conviction may be prosecuted as if no notice had been given. *Regina* v. *Joseph*, Q. R. 21 S. C. 211.

Appeal—*Right of —Plea of Guilty.*]—A person who has pleaded "guilty" to a charge, and has been summarily convicted, may raise a question of law in an appeal under s. 897 of the Criminal Code, but on such appeal his former plea of "guilty" estops him from calling upon the respondent to prove his guilt. So far as his guilt or innocence is concerned, he is not a "party aggrieved" within the meaning of s. 879 of the Criminal Code. *Rex* v. *Brook*, 5 Terr. L. R. 369.

Appeal to County Court—*Habeas Corpus Proceedings.*]—Application for a writ of habeas corpus. The prisoner was charged with an offence under s. 523 of the Criminal Code, convicted thereof by the police magistrate for the city of Rossland, and sentenced to two months' hard labour. Immediately after conviction he appealed to a County Court, and Leamy, Co.J., affirmed the conviction:—Held, dismissing the application, that the decision of the County Court in appeal from a summary conviction is final and conclusive, and a Supreme Court Judge has no jurisdiction to interfere by habeas corpus. *Rex* v. *Beamish*, 21 Occ. N. 003, 8 B. C. R. 171.

Appeal to Judge of Supreme Court, N.W.T.—Notice of appeal—Insufficiency—Time of sitting of Court not stated. *Rex* v. *Brimacombe* (N.W.T.), 2 W. L. R. 53.

Case Stated—*Recognizance—Cash Deposit in Lieu of.*]—Appeal by way of case stated under s. 900 of the Code. The defendant was convicted of an offence under the Act to restrict the Importation and Employment of Aliens. Instead of entering into the recognizance required by s.-s. 4 of s. 900 of the Code, the defendant deposited a marked cheque for $100 with the convicting magistrate:—Held, that the recognizance was a condition precedent to the jurisdiction of the Court to hear the appeal, and no substitute was permissible. *Rex* v. *Geiser*, 21 Occ. N. 604, 8 B. C. R. 169.

Certiorari—*Habeas Corpus — Keeper of Bawdy-house—Pleading Guilty—Trial on the Merits.*]—The offence of being a keeper of a house of ill-fame is an indictable offence, and it may be tried either before a jury in the ordinary way, or before a police magistrate under the summary trials clauses, or before a justice of the peace under the summary convictions clauses, of the Code. Upon an application to quash a conviction where the prisoner was in custody when the matter came up on certiorari:—Held, that a writ of habeas corpus was necessary. The defendant was convicted by a police magistrate after pleading guilty to a charge that she did "unlawfully appear the keeper of a house of ill-fame," and sentenced to be imprisoned for one year in the Andrew Mercer reformatory:—Held, that the conviction might be treated as having been made under the summary convictions clauses of the Code, although the sentence exceeded the power of the magistrate, and that such conviction might be supported and the sentence amended under those clauses:—Held, also, that when a prisoner charged before a magistrate with appearing the keeper of a house of ill-fame had pleaded guilty to such charge, there was a trial on the merits, and that such person was to be deemed guilty of the offence of keeping a house of ill-fame. *Regina* v. *Spooner*, 21 Occ. N. 159, 32 O. R. 451.

Certiorari—*Recognizance—Sufficiency of Justification—Appeal.*]—An affidavit of justification upon a recognizance given pursuant to Rule of Court passed under s. 892 of the Criminal Code, need not state that the surety is worth the amount of the penalty over and above other sums for which he is surety. A Rule of Court made under s. 892 of the Criminal Code requiring sufficient sureties for a specific amount, is complied with if the sureties justify as being possessed of property of that value, and as being worth the amount over and above all their just debts and liabilities, and over and above all exemptions allowed by law. Regina v. Robinet, 16 P. R. 49, not followed. Where a conviction is attacked on the ground of want of jurisdiction, the mere filing of a recognizance by the defendant on an appeal therefrom does not deprive him of his right to a writ of certiorari. The conviction and all other proceedings relating thereto having been filed by the magistrate under s. 801 of the Criminal Code, in the office of the clerk of the Court for the judicial district in which the motion is made, a motion to quash the conviction can be made without the issue of a writ of certiorari. Section 892 of the Criminal Code authorizes the requiring of a recognizance only where the conviction is brought before the Court by a writ of certiorari, and no recognizance is required where such a writ is not necessary or is dispensed with. *Regina* v. *Ashcroft*, 4 Terr. L. R. 119.

Certiorari—*Right to—Criminal Code, s. 887—Failure of Remedy by Appeal.*]—Section 887 of the Criminal Code, which enacts that "no writ of certiorari shall be allowed to remove any conviction or order had or made before any justice of the peace, if the defendant has appealed from such conviction or order to any court to which an appeal from such conviction or order is authorized by law, or shall be allowed to remove any conviction or order made upon such appeal," does not deprive the Court of the right to quash a conviction on certiorari, where the convicting justice acted as a partisan in collusion with the prosecutor and without jurisdiction, even though an appeal has been taken which has failed by reason of the refusal of the justice to make the return required by law; Landry, J., dissenting. In re Kelly, 27 N. B. Reps. 553, discussed. *Rex* v. *Delegarde, Ex p. Cowan*, 36 N. B. Reps. 503.

Certiorari—*Selling Liquor to Indians — View of Place of Sale.*]—Motion for certiorari to remove a conviction for selling an intoxicant to an Indian. The magistrate, after hearing the evidence, but before giving his decision, went alone and took a view of the place of sale:—Held, quashing the conviction, that the proceeding was unwarrantable. 2. That s. 108 of the Indian Act and s. 889 of the Criminal Code do not prevent proceedings by certiorari where the ground of complaint is that something was done contrary to the fundamental principles of criminal procedure. *In re Sing Kee*, 21 Occ. N. 220, 8 B. C. R. 20.

Certiorari—*Warrant of Commitment — Illegality—Refusal to Quash — Habeas Corpus.*]—When a person is in custody under a warrant of commitment, founded on a good conviction, the Court will not quash the commitment on certiorari, even if it is illegal. The proper procedure is by way of habeas corpus. *Rex* v. *Melanson, Ex p. Bertin*, 36 N. B. Reps. 577.

Complaint—*Description of Offence—Uncertainty—Certiorari.*]—A conviction obtained upon a complaint which does not give a clear and precise description of the alleged offence or contravention of a statute or by-law will be quashed upon certiorari. *Carriere* v. *City of Montreal*, 5 Q. P. R. 44.

Costs of Distress and Conveying to Gaol—*Variance between Minute and Conviction.*]—The costs of distress and of conveying to gaol are obligatory where a summary conviction imposes a fine and awards distress and imprisonment in default of distress, and therefore the omission of any reference to such costs in the minute of adjudication will not invalidate the formal conviction which includes them. *Rex* v. *Beagan (No. 2)*, 36 N. S. Reps. 208.

Fine—*Distress—Hard Labour—Duplicity — Warrant of Commitment — Habeas Corpus.*] — A conviction, which attaches hard labour to imprisonment in default of there being sufficient distress to levy the fine imposed, is bad. A conviction which charges an offence on two separate days, charges two distinct separate offences, and, if it be a case where s. 26 of the Summary Convictions Act applies, is bad; a warrant of commitment based on such a conviction is consequently bad. It is a usual, convenient, and established practice that a rule nisi to shew cause why a writ of habeas corpus should not issue should also require cause to be shewn why, in the event of the rule being made absolute, the prisoner should not be discharged without the actual issue of the writ of habeas corpus and without his being personally brought before the Court; but in order that the rule may be made absolute in this form, the magistrate, the keeper of the prisoner, and the prosecutor should all be served with the rule nisi, or at least be represented on its return. *Regina* v. *Farrar*, 11 Occ. N. 25, 1 Terr. L. R. 306.

Fine — *Payment to Clerk — Illegality — Quashing.*]—A conviction by the Recorder's Court of Montreal requiring payment of a fine to the clerk of the Court, and not to the city, is illegal, and will be quashed upon certiorari. *Wilcock* v. *City of Montreal*, 5 Q. P. R. 126.

Fine and Costs or Imprisonment—*Defendant Submitting to Imprisonment — Motion for Certiorari—Deposit of Fine and Costs—Refusal of Writ—Surrender of Prisoner—Right to Return of Deposit.*]—W., the plaintiff's assignor, having been condemned to pay a fine and costs for an infraction of the license law, and to imprisonment in default, sought to set aside the conviction by means of certiorari proceedings, after having suffered part of the imprisonment imposed. He deposited with the defendant, in his capacity of clerk of the peace at Montreal, the sum of $114.83, the amount of the fine and costs, besides $50 to cover subsequent costs, pursuant to s. 217 of the Quebec Liquor License Act, 63 V. c. 12, and was released from prison. The writ of certiorari having been refused, W. surrendered himself again as a prisoner, and offered to serve the time of his imprisonment, but claimed at the same time from the defendant the repayment of the $114.83. The latter refused and gave as reasons that W., in making this deposit voluntarily and thus obtaining his freedom, had chosen the alternative of a fine, and the judgment setting aside the writ of certiorari had the result of awarding the deposit in payment of the fine to the miscarriage, the collector of revenue of Montreal:—Held, that this deposit possessed only the character of a security, and could not be converted into a payment of the fine and costs; that the application for certiorari could not take away from one convicted of an offence his right to choose to submit to the term of imprisonment to which he is condemned, instead of paying the fine; that the writ of certiorari, in suspending the execution of the sentence, has only the result when it is discharged of rendering the person convicted liable to his term of imprisonment; and if he makes that choice, he has a right to repayment of his deposit representing the fine and costs. *Wing* v. *Sicotte*, Q. R. 26 S. C. 387.

Imprisonment — *Warrant of Commitment—Defects—Place of Offence—Time for Commencement of Imprisonment — Court of Record—Copy of Sentence.*]—A motion for the discharge of S., a prisoner serving a term of imprisonment at Dorchester Penitentiary, was based upon alleged defects in the warrant of commitment signed by the clerk of the County Court Judge's Criminal Court at Halifax, returned by the warden of the penitentiary as the authority under which S. was held:—Held, that, even if the place where the offence was committed was not stated in the body of the record of conviction, it was covered by that named in the margin, viz., "the county of Halifax."—Semble, that the "copy of the sentence" required to be delivered to the warden of the penitentiary (R. S. C. c. 182, s. 42), need not contain all the averments essential to the validity of an indictment or conviction:—Held, that the document certified by the warden in the present case as his authority was sufficient. *Rex* v. *Smitheman*, 24 Occ. N. 329.

Injury to Property—*Description of Offence.*]—N. L. was committed to gaol under a warrant of a stipendiary magistrate, charging him with having at L., in the county of C. B., "unlawfully and wilfully destroyed and damaged property owned by A. M. S. on the 24th day of December, 1903:"—Held, that the conviction was bad because it did not specify the injuries and the nature of the property injured. *Regina* v. *Spain*, 18 O. R. 385, followed. *In re Leary*, 24 Occ. N. 70.

Justice of the Peace—*Master and Servant Act—Refusal to Work—Information—Amendment—Form of Conviction—Omissions—Distress—Costs.*]—The prosecutor hired the defendant to work on a farm and paid for the defendant's transportation thereto. The defendant worked a few hours, and then left. The prosecutor swore to an information that the defendant did "accept the sum of $1.30 to pay his fare to B. on the condition that the said amount was to be worked out, and refused to work after reaching this place, with the exception of 4 hours," etc. The magistrate issued a warrant setting out the facts stated in the information and adding "consequently obtaining money under false pretences," and the defendant was arrested. The magistrate amended the information by adding a reference to the Master and Servant Act, 1901, but the information was not re-sworn. The amended information was read over to the prisoner and he was informed that he was to be tried under it as amended. He made no objection; the prosecutor gave evidence, and the defendant was sworn and testified on his own behalf. The magistrate adjudged that the defendant should be fined $5 and $4.88 costs, and if the amounts were not paid forthwith he should be committed to gaol. A note of the conviction was made and a formal conviction drawn up. The conviction form was headed "conviction for a penalty to be levied by distress," but no such term was mentioned in the body of it:—Held, that the nature of the offence was sufficiently clear in the original information, and any doubt was removed by the addition of the reference to the Act. 2. That the information having

been read over, and the trial proceeding without objection, and the magistrate having the prisoner before him, even if brought there improperly, he might try him on the amended information not re-sworn, although the Act required an information on oath. 3. That the Court, being satisfied that an offence of the nature described in the conviction had been committed, and that the magistrate had jurisdiction, and that the punishment imposed was not excessive, should not hold the conviction invalid because the date and place of offence were not stated, there being power to amend. 4. That the heading formed no part of the conviction, which was correctly drawn under the statute. 5. That the costs of conveying the accused to gaol being omitted, was a matter which could be amended, if necessary, but here there were no such costs, as the prisoner never went to gaol. 6. That there was special power by 1 Edw. VII. c. 2, s. 14, under which the prisoner was convicted, to award imprisonment in default of payment; and that by R. S. O. 1897 c. 90, s. 4, that power covered costs as well as fine. *Rex* v. *Lewis*, 23 Occ. N. 190, 5 O. L. R. 509, 2 O. W. R. 290, 566.

Motion to Quash—*Jurisdiction of Single Judge—Certiorari — Disorderly House—Inmate—Pleading Guilty—Form of Conviction —Summary Conviction or Summary Trial—Penalty.*]—A single Judge in the Territories has jurisdiction under 54 & 55 V. c. 22, s. 7, s-s. 2, to hear and determine applications to quash summary convictions, whether the convictions have been brought into Court by certiorari or not. If the conviction have been returned to the clerk of the Supreme Court, by virtue of s. 102 of the N. W. T. Act, the issue of a writ of certiorari is unnecessary. The defendant pleaded guilty before a magistrate of being an inmate of a disorderly house, an offence punishable either under part XV. of the Criminal Code (Vagrancy), where the fine on summary conviction is limited to $50, or under part LV. (Summary Trials of Indictable Offences), where the fine and costs together must not exceed $100. A fine of $90, with $6.25 costs, was imposed, but the conviction was in the form WW prescribed under part LVIII. relating to summary convictions, and not the form QQ prescribed under part LV., and did not contain the words "being charged before me the undersigned," which appear in the latter form. On an application to quash, the conviction was sustained as a good conviction under part LV., as being of like effect to the form therein prescribed; the amount of the fine and the fact that the accused was not charged with or convicted of being a loose, idle, or disorderly person, indicating the procedure adopted by the magistrate. The omission to recite that the accused had been charged with the offence before him, a fact which appeared from the proceedings, is a matter of form only, and not sufficient to void the conviction. *Rex* v. *Ames*, 5 Terr. L. R. 492.

Motion to Quash — *Practice — Duty of Justice to Return Depositions—Certiorari.*]—Section 888 of the Criminal Code provides for the return of convictions by justices into the Court to which the appeal is given:—Semble, apart from this provision, it is the duty of justices to make return also of the depositions upon which the conviction is founded.—Held, that papers purporting to be the depositions relating to the conviction having been returned therewith, they should be assumed to be such depositions; that they were properly before the Court, and a writ of certiorari was unnecessary. *Rex* v. *Rondeau*, 5 Terr. L. R. 478.

Motion to Quash—*Preliminary Objections — Security — Cash Deposit — Written Document—Certiorari— Notice—Objection to —Delay.*]—On the return of a rule nisi to quash the conviction of the defendant for an offence against the Liquor License Ordinance, it was objected that no proper security had been given, as required by Supreme Court Rule 13. It appeared by the certificate of the registrar that $100 in cash had been deposited with him in this cause, and that such sum stood to the credit of the cause in a chartered bank. It was the fact, however, that no written document had been deposited with the registrar stating the conditions upon which the deposit was made. Rule 13 requires the deposit to be made "with a condition to prosecute such motion and writ of certiorari:"—Held, that no written document was necessary, the money being in the hands of the registrar for the purposes provided by law. It was also objected that the notice did not give the name of the party who intended to apply, nor the name of the Court or the Judge in Chambers: — Held, that the Court should not entertain this and other like objections, for after a writ of certiorari has issued the objections should be raised by a substantive motion to quash the writ:—Held, also, that when more than three months have intervened between the return to the writ of certiorari and the motion for a rule nisi, the preliminary facts must be taken to be admitted, and an application to quash the writ would be too late. *Regina* v. *Davidson*, 21 Occ. N. 98.

Motion to Quash—*Recognizance—Inefficiency—Justice of the Peace — Married Woman—Separate Estate.*]—The defendant is a necessary party to the recognizance required upon a motion to quash his conviction; and where his recognizance was invalid because entered into before a justice of the peace for a county other than that in which the conviction was made, the recognizance of his surety, though properly taken, was held bad also.—Semble, that a recognizance by the wife of the defendant might be binding in respect to her separate estate, which she connected by affidavit with her recognizance. *Rex* v. *Johnson*, 24 Occ. N. 266, 7 O. L. R. 525, 3 O. W. R. 221, 222.

Motion to Quash—Recognizance—Necessity for defendant joining in—Company defendant—Leave to deposit money in lieu of recognizance — Defective condition — Costs. *Re Western Co-operative Construction Co. and Brodsky* (Man.), 2 W. L. R. 541.

Motion for Rule Nisi to Quash—Untenable grounds—Like motions in other cases —Rule granted on terms. *Rex* v. *McGinnes*, 1 O. W. R. 812.

Ontario Summary Convictions Act—*Criminal Code, s. 841—Time for Laying Information.*]—The Ontario Summary Convictions Act, R. S. O. c. 90, s. 2, has the effect of incorporating s. 841 of the Criminal Code, and therefore, in the case of any offence

punishable on summary conviction, if no time is especially limited for making any complaint or laying any information under the Act or law relating to the particular case, the complaint must be made or the information laid within six months from the time the matter of complaint or information arose. *Rex* v. *McKinnon*, 22 Occ. N. 161, 3 O. L. R. 508, 1 O. W. R. 199.

Special Court—Ontario Liquor Act, 1902—Certiorari—Commitment after service of—Discharge—Amendment—Error in name—Adjudication—Sentence. *Rex* v. *Forster*, 2 O. W. R. 312, 5 O. L. R. 624.

Two Informations—*Withdrawal of One—Canada Temperance Act.*]—Under s. 858 of the Criminal Code, after the evidence has been heard, the magistrate is not bound either to convict or discharge the defendant; he may allow the prosecutor to withdraw the charge, and he may do so even when another information for the same offence has been laid by the same prosecutor against the same defendant, and the determination thereof is still pending. *Ex p. Wyman*, 34 N. B. Reps. 608.

Vagrancy — *Conviction—Information—Facts Necessary to be Stated.*]—Application for habeas corpus. The accused was charged with being a "loose, idle person, or vagrant," and was convicted by a police magistrate, and sentenced to six months' imprisonment with hard labour. The conviction described the offence in the same terms as the information:—Held, that the conviction was bad in that it did not set out the facts constituting the offence. Under s. 207 of the Code various acts constituting vagrancy are specified, and an information charging vagrancy should shew the particular facts on which the prosecution relies to establish the offence. *Rex* v. *McCormack*, 23 Occ. N. 207, 9 B. C. R. 497.

Warrant of Commitment — *No Conviction Alleged—Habeas Corpus—Return.*]—On an application for a writ of habeas corpus, and for discharge of prisoner detained in custody under a warrant of a justice of the peace in form V., Criminal Code, s. 596 (committal for trial), the warrant did not allege a conviction, but only that the accused had been charged before the justice. The conviction upon which the warrant was issued was admittedly bad, but an amended conviction was returned to the clerk by the justice after the argument: — Held, that where a warrant of commitment upon a conviction does not allege that the prisoner has been convicted of an offence, the conviction cannot be referred to in order to support the warrant. Order made discharging prisoner. —Semble, that had the warrant shewn the prisoner to have been convicted of some specific offence, even though insufficiently stated, the conviction could have been referred to, to support it. An application to discharge a prisoner held under a defective warrant of committal in execution will not be adjourned in order to procure the return of the conviction with a view to supporting the warrant, if the prisoner has been actually brought up on a habeas corpus, aliter where he has not been brought up. *Regina* v. *Lalonde*, 2 Terr. L. R. 281.

V. SUMMARY TRIAL.

Assault — *Information for Indictable Offences—Conviction for Common Assault—Jurisdiction of Magistrate — Indictment — Court — Information.*] — The defendant was tried before a stipendiary magistrate on an information charging him with committing an assault upon J. F., causing bodily harm. The accused having consented to be tried summarily, in accordance with s. 787 of the Code, was tried and convicted of a common assault only:—Held, that s. 713 of the Code enabled the magistrate to convict of the common assault under s. 265, notwithstanding that the information was for an indictable offence under s. 262, as the latter section includes common assault. 2. That the contention that s. 713 only applies to indictments, "counts" being the only word used, was disposed of by s. 3 (b) of the Code, where it is provided that the expressions "indictment" and "count," respectively, include information and presentment, as well as indictment, and also any plea, replication, or other pleading, and any record. 3. That independently of the statute the conviction was good. The Queen v. Oliver, 30 L. J. M. 12, and The Queen v. Taylor, L. R. 1 C. C. R. 194, followed. *Rex* v. *Coolen*, 36 N. S. Reps. 510.

Assault and Theft — *Summary Trial—Police Magistrate—Election—Next Court for Jury Trial—Amendment—Fresh Election—New Trial.*]—In order to give a police magistrate jurisdiction to try an indictable offence, namely, a charge of assault and robbing prosecutor of 30c., not triable summarily by the magistrate except with the prisoner's consent, the magistrate, in putting the prisoner to his election to be tried before him or by jury, must expressly name the Court at which the charge can probably be soonest heard; and it is immaterial that the election is made by counsel representing the prisoner: Maclaren, J.A., dissenting. Regina v. Cockshott, [1898] 1 Q. B. 582, followed. After the election of the prisoner to be tried summarily on such charge, and after the magistrate has entered upon the trial thereof, he has no power to amend the indictment so as to cause a further charge to be preferred against the prisoner, unless the prisoner is again put to his election, and consents to be so tried. *Rex* v. *Walsh*, 24 Occ. N. 82, 7 O. L. R. 149, 2 O. W. R. 222, 3 O. W. R. 31.

Election — *Absence of Accused.*]—A prisoner charged with theft waived preliminary examination, and was committed for trial. Upon then being arraigned before the junior Judge of the County Court he consented to be tried by "the said Judge without a jury:" —Held, that s. 767 of the Criminal Code, as amended by 63 & 64 V. c. 46 (D.), contemplates an election to be tried in a certain way and not necessarily by the Judge before whom the election is made; that the election in question having been given in a limited form was void; and that the senior Judge could not proceed with the trial of the accused.—Held, also, that a person accused, by waiving preliminary investigation and thus accepting committal without depositions taken, foregoes his right to a speedy trial and cannot make an election effectual to confer jurisdiction:—Held, further, that,

unless in the case of misconduct rendering it impracticable to continue the proceedings in his presence, or at his request and with the permission of the Court, the trial of a person accused of felony cannot proceed in his absence. *In re Rex* v. *McDougall*, 24 Occ. N. 324, 8 O. L. R. 30, 3 O. W. R. 750.

Election — Absence of preliminary inquiry by magistrate—Neglect to inform prisoner of time of next sitting—Conviction—Invalidity — Discharge. *Rex* v. *Williams* (B.C.), 2 W. L. R. 410.

Election—Amendment of charge—Substitution of earlier date for offence—Seduction of girl under sixteen—Necessity for new election. *Rex* v. *Lacelle*, 6 O. W. R. 911, 11 O. L. R. 74.

Election — *Depositions Disclosing More Serious Offence.*]—Where the depositions disclose an offence which could not have been disposed of by speedy trial, the prisoner will not be allowed to elect for speedy trial if the Crown intends to lay the more serious charge, even though he is committed for an offence which may be disposed of by speedy trial. *Rex* v. *Preston*, 11 B. C. R. 159, 1 W. L. R. 17.

Election—*N. W. T. Act—Re-trial—New Election—Duty of Judge.*]—The North-West Territories Act, R. S. C. c. 50, s. 67 (section substituted by 54 & 55 V. c. 22) provides that "when the person is charged with any other criminal offence, the same shall be tried, heard, and determined by the Judge with the intervention of a jury of six, but in any such case the accused may, with his own consent, be tried by a Judge in a summary way, and without the intervention of a jury:"—Held, that the consent of the accused does not make it imperative upon the Judge to try the charge without the intervention of a jury. It appears to be assumed by the Court that where the accused had been tried by a Judge with the intervention of a jury who disagreed and were discharged, and the accused was brought up again for trial, the Judge on the second trial might, had he seen fit, have, on the accused's consent, tried him without the intervention of the jury. *Regina* v. *Brewster* (*No. 1*), 2 Terr. L. R. 353.

Election — *Withdrawal.*] — A prisoner who, on being brought before the County Judge's Criminal Court, elects to be tried summarily by the Judge, cannot be allowed afterwards to withdraw his election; no provision therefor having been made in the Criminal Code, ss. 762-781, such as the amendment to s. 767 with regard to elections to be tried by a jury. *Rex* v. *Keefer*, 21 Occ. N. 385, 2 O. L. R. 572.

Evidence — Consent — Felony — Misdemeanour. *Rex* v. *Fox*, 2 O. W. R. 728.

Inmate of House of Ill-fame—*Jurisdiction of Stipendiary Magistrate — Punishment.*]—The defendant was convicted before a stipendiary magistrate of being an inmate of a house of ill-fame, and sentenced to imprisonment at hard labour for one day, and to forfeit and pay $60, and in default of payment to a further term of imprisonment for six months, unless the sum should be sooner paid. She was arrested and imprisoned under a warrant issued on the conviction, and an application was made for a writ of habeas corpus to test the legality of her imprisonment:—Held, that the conviction was under Part LV. of the Criminal Code, and the trial was a summary trial of an indictable offence, and not a summary conviction. The jurisdiction is given by s. 783 (f) of the Code. The following section makes the jurisdiction of the magistrate absolute in respect of the particular offence, and independent of the consent of the person charged. Section 788 fixes the punishment which the magistrate on summary trial of indictable offences may inflict upon the person convicted in respect of all the crimes mentioned in s. 783, except theft and attempt to commit theft, the punishment for which is provided by s. 787. The punishment inflicted was not in excess of that authorized by the Code, and is not limited to that prescribed by s. 208. The jurisdiction of the magistrate to try the offence charged under Part LV. of the Code and to inflict the punishment which he awarded was quite clear, and no ground had been shewn for the discharge of the prisoner. *Rex* v. *Roberts*, 21 Occ. N. 314.

Jury — *Election — Withdrawal—Refusal of Judge to Dispense with Jury.*]—The N. W. T. Act, R. S. C. 1886 c. 50, s. 67 (section substituted by 54 & 55 V. c. 22, s. 9), provides that "When the person is charged with any other criminal offence the same shall be tried, heard, and determined by the Judge, with the intervention of a jury of six; but in any such case the accused may, with his own consent, be tried by a Judge in a summary way and without the intervention of a jury:"—Held, that in the event of the accused electing to be tried by a Judge alone, the Judge is not bound so to try the case, but may insist upon the intervention of a jury. So held, where the accused was first tried with the intervention of a jury, who disagreed, and upon a second trial coming on withdrew his first election and elected to be tried by the Judge alone. *Regina* v. *Webster*, 2 Terr. L. R. 236.

Keeping Bawdy House—*Consent—Conviction — Date of Offence — Discharge of Prisoner—Protection against Actions.*]—The defendant was summarily tried without her consent and convicted for keeping a disorderly house, that is to say, a common bawdy house, and was sentenced to pay a fine, and in default to be imprisoned at hard labour:—Held, that, as she was charged and punished under the combined operation of ss. 198 and 958 of the Criminal Code, the magistrate could lawfully try her only after having obtained her consent under s. 785, and for want of such consent the conviction was wholly without jurisdiction and void. Nor could the proceedings be sustained under s. 783 (f) of the Code, nor under s. 207 (j). 2. The conviction, which was in the form QO. declared that the defendant had been guilty of the offence "on the 21st day of April, A.D. 1901, and on divers other days and times during the month of April:"—Held, that it was bad, as it might be read as indicating the commission of an offence subsequent to the laying of the information (the date of which was the 29th April) and including the date of the conviction (the 30th April.) Ex p. Kennedy, 27 N. B. Reps. 493,

followed. 3. Held, also, following In re Moore, 33 C. L. J. 400, that where relief from imprisonment was given as in this case under R. S. N. S. 1900 c. 181, the Judge can only protect from civil action, at the instance of the applicant, in respect to the imprisonment from which she is discharged, the keeper of the common gaol in which she was detained. *Rex* v. *Keeping*, 21 Occ. N. 508.

Obstructing Peace Officer—*Consent.*]—A person charged with obstructing a peace officer in the execution of his duty may, without his own consent, be tried summarily by the magistrate. *Rex* v. *Jack*, 9 B. C. R. 19.

Obstructing Peace Officer—*Consent of Accused.*]—Held, that a person charged with obstructing a peace officer in the execution of his duty may be tried summarily by a magistrate without the consent of the accused. See Criminal Code, ss. 144, 783-6. Semble, that a magistrate is not bound to inform an accused of the exact sections of the Code under which the proceedings are being taken. Regina v. Crossen, 3 Can. Crim. Cas. 152, not followed. *Rex* v. *Nelson*, 21 Occ. N. 456, 8 B. C. R. 110.

Powers of Magistrate—*Theft—Attempt to Commit—Description of Offence—Warrant of Commitment—Absence of—Order for Further Detention.*] — It is competent for a magistrate upon the summary trial before him of a prisoner charged under s. 783 (a) of the Criminal Code with having committed theft, to convict him of the offence of attempting to commit it provided for in s.-s. (b). The offence of theft from the person is sufficiently described in popular language as picking the pocket of a person. To authorize the detention of a person under a conviction there should be a warrant of commitment; but where there was none, and the conviction itself was lodged with the gaoler as his authority for the detention, there being an offence proved and a proper conviction for the offence, and no merits on the part of the prisoner, the Judge before whom the prisoner was brought upon habeas corpus exercised the power conferred by s. 752 of the Code, and directed that the prisoner should be further detained and that the convicting magistrate should issue and lodge with the gaoler a proper warrant. *Rex* v. *Morgan*, 21 Occ. N. 533, 2 O. L. R. 413. (Affirmed by the Court of Appeal, 20th November, 1901, 21 Occ. N. 583.)

Without Consent of Prisoner—Conviction—Discharge from gaol—Second prosecution. *Rex* v. *Kennedy*, 1 O. W. R. 31.

VI. Miscellaneous.

Comment of Judge—*Reserved Case—Application for after Sentence.*] — On the trial of a prisoner indicted for stealing, the Judge, in his charge to the jury, called attention to the fact that the prisoner was not called to testify on his own behalf, and warned the jury that they were not to take that fact to his prejudice; but added, if he were an innocent man he could have proved that at the time of the offence he was not in the vicinity where the theft took place:—Held, that this was "comment" within the meaning of s. 4 (2) of the Canada Evidence Act, 1893. It is not too late after the sentence has been imposed to ask to have a case reserved for the opinion of the Court. *Rex* v. *McGuire*, 36 N. B. Reps. 609.

Conviction under Liquor License Act—*Arrest under Justices' Warrant—Prisoner Found in Another County — Warrant not Indorsed—Unlawful Caption—Legal Detention—Habeas Corpus—Reference to Divisional Court—Conviction for Second Offence—Form—Finding of Previous Conviction—Order of Proceedings—Amendment.*]—Appeal by prisoner from order of Anglin, J., upon the return of the habeas corpus and certiorari in aid, refusing to discharge the prisoner and remanding him to the custody of the keeper of a common gaol. The prisoner was convicted for a second offence of selling liquor without license. He was sentenced to imprisonment with hard labour for 4 months. The gaoler made his return to the habeas corpus, assigning the warrant of commitment as the cause of detention. The conviction and proceedings before the magistrate were returned upon the writ of certiorari in aid, and an amended conviction was also returned. It was objected that the warrant was defective in form; that the arrest thereunder was irregular or void, the warrant not having been backed by a justice of the peace of the County of Victoria, in which county the prisoner was arrested, and whence he was taken to gaol. It was contended that the conviction, as well in its amended as in its original form, was invalid, as the finding in respect of the previous conviction was omitted in the latter and improperly set forth in the former, and also because the magistrate had entered upon the inquiry as to the previous conviction before adjudicating upon the guilt of the prisoner in respect of the charge then before him, contrary to the provisions of sec. 101 of the Liquor License Act:—Held, all the objections urged against the proceedings failed. The second deposition of Chief Constable Jarvis shews that the magistrate had already adjudicated upon the charge laid in the information then before him before entering upon the inquiry as to the fact of the previous conviction. The affidavits from which it was argued that he had probably not done so are too vague and indefinite to warrant an assumption to the contrary of the deposition; but the amended conviction, though carelessly prepared and not following accurately the form given in the schedule to the Act, of the conviction, may be amended upon the evidence: 1 Edw. VII. ch. 13 (O.); Criminal Code, secs. 889, 896. There is nothing in the objection that the arrest was made in the county of Ontario without the warrant having been backed by a justice of that county. The warrant of commitment is sufficient to justify the prisoner's detention in the gaol of the proper county, and the Court will not, on habeas corpus, inquire into any irregularity in his caption. The distinction in this respect between the practice in criminal and civil cases has been settled too long and too firmly to admit of the point being now debated. Regina v. Jones, 8 Occ. N. 332 overruled, appeal dismissed. *Rex* v. *Whitesides*, 4 O. W. R. 113, 237, 25 Occ. N. 33, 8 O. L. R. 622.

Judge of Sessions—*Acting for Recorder—Conviction — Jurisdiction.*]—A conviction

and sentence rendered by a Judge of the sessions of the peace, acting for the recorder of Montreal, are valid. *Deschamps* v. *Vallée*, 7 Q. P. R. 231.

Jurisdiction of Magistrate—*Constitutional Law — Constitution of Criminal Courts.*]—By s. 785 of the Criminal Code any person charged before a police magistrate in Ontario with an offence which might be tried at the General Sessions of the Peace, may, with his own consent, be tried by the magistrate and sentenced, if convicted, to the same punishment as if tried at the General Sessions. By an amendment in 1900 the provisions of this section were extended to police and stipendiary magistrates of cities and towns in other parts of Canada:—Held, that, though there are no Courts of General Sessions except in Ontario, the amending Act is not therefore inoperative, but gives to a magistrate in any other province the jurisdiction created for Ontario by s. 785. Though the organization of Courts of criminal jurisdiction is within the exclusive powers of the legislature, the Parliament of Canada may impose upon existing Courts or individuals the duty of administering the criminal law, and their action to that end need not be supplemented by provincial legislation. *In re Vancini*, 24 Occ. N. 265, 34 S. C. R. 621.

Leave to Appeal—Conviction for theft—Evidence for jury—Weight of evidence—Conduct of case. *Rex* v. *Callaghan*, 2 O. W. R. 1141.

CRIMINAL PROSECUTION.

See DURESS.

CROPS.

See LANDLORD AND TENANT.

CROSS-DEMAND.

See PLEADING.

CROSSINGS.

See RAILWAY.

CROWN.

I. CROWN LANDS, 497.
II. EXPROPRIATION, 502.
III. PUBLIC WORKS, 507.
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I. CROWN LANDS.

Adverse Possession—*Information of Intrusion.*]—Though there has been adverse possession of Crown lands for more than twenty years, the Act 21 Jac. I. c. 14 does not prevent the Crown from validly granting the same without first re-establishing title by information of intrusion; Davies, J., dissenting. Judgment in Emmerson v. Maddison, 36 N. B. Reps. 260, reversed. *Maddison* v. *Emmerson*, 24 Occ. N. 204, 34 S. C. R. 533.

Contract for Grant of Public Domain—*Breach of—Exchequer Court—Petition of Right.*]—The Exchequer Court of Canada has jurisdiction in respect of a claim arising out of a contract to grant a portion of the public domain made under the authority of an Act of Parliament. 2. Such a claim may be prosecuted by a petition of right. 3. Where the Court has jurisdiction in respect of the subject-matter of a petition of right, the petition is not open to objection on the ground that a merely declaratory judgment or order is sought thereby. If, on the other hand, there is no jurisdiction, no such declaration should be made. Clark v. The Queen, 1 Ex. C. R. 182, considered. *Qu'Appelle, Long Lake, and Saskatchewan Railroad and Steamboat Co.* v. *The King*, 21 Occ. N. 283, 7 Ex. C. R. 105.

Crown Grant — *Concealment—Revocation.*]—Action to set aside a Crown grant to the defendant on the ground that it was erroneously and improvidently granted. The land covered by the grant was in the town of Sydney, but in the application it was described as "near the town of Sydney." Moreover, it was included in the description of land expropriated by the town of Sydney under legislative sanction and afterwards conveyed by the town to a company. These circumstances were withheld from the officers of the Crown, when the grant was made:—Held, that the action must succeed, the Crown having acted upon a mistake and upon a false statement. Attorney-General v. McNulty, 11 Gr. 281, followed. *Attorney-General* v. *McGowan*, 24 Occ. N. 136.

Crown Grant—*Person in Occupation — Permission—Estoppel—Non-disclosure — Collateral Proceedings.*]—In an action to recover land, the plaintiffs relied upon a grant from the Crown dated the 14th March, 1891. The defendants limited their defence to a portion of the land claimed, and, as to that portion, depended upon title acquired in 1893, from H., who entered as a servant of the plaintiffs, and, by their permission, erected a house on the land in 1890:—Held, that the possession of H. was not sufficient to prevent the Crown from granting to the plaintiffs; that H. having entered by the plaintiffs' permission, both the defendants and H. were estopped from denying the plaintiffs' title; that if the Crown was misled by the omission of the plaintiffs to disclose in their petition that the land was in the occupation of H., that objection could not be raised by a third party, in collateral proceedings, but must be raised in a proceeding to be taken before the Governor in council to have the grant vacated; and that the case was not within the provisions of R. S. (5th series) c. 9, and that the occupancy, being that of a person in possession by permission of the plaintiffs, did not require to be disclosed. *Lakeview Mining Co.* v. *Moore*, 36 N. S. Reps. 333.

Lease of—Building erected by lessee—Interference with right of access to canal—Action—Parties. *Slater* v. *Dominion Supply Co.*, 3 O. W. R. 254.

Lien—*Dominion Lands Act Amendment, 1897—Registry Laws—Entries—Costs.*] — Under s. 18 of 60 & 61 V. c. 29, amending the Dominion Lands Act, unless the Registrar makes the necessary entries respecting the indebtedness of the patentee there referred to "in the proper register or other record book in his office," no charge or lien will be created on the land comprised in the patent for such indebtedness. A docket or note book in which the Registrar kept a record of applications under the Real Property Act received and examined by him, is not to be considered "the proper register or record book" in which to make the necessary entries, which should have been made in the abstract book kept under the Registry Act, as the patent had been registered under the old system of registration. Under Rule 277 of the Queen's Bench Act, 1895, costs will be given against the Crown when it falls in proceedings taken by way of caveat and petition under the Real Property Act. *Regina* v. *Fawcett*, 20 Occ. N. 287, 13 Man. L. R. 205.

Location Ticket — *Conditions—Non-fulfilment — Cancellation—Prescription.*] — Under the terms of a sale from the Crown in 1857, the grantee was obliged to perform all the obligations contained in ordinary location tickets, and without residence and clearance upon the lot the grantee could not become the incommutable owner nor acquire letters patent. 2. Prescription does not run against the Crown, which always has the right to cancel a location ticket. *Kealy* v. *Regan*, Q. R. 23 S. C. 305.

Military Reserve—*Provincial or Federal Domain—Recitals in Private Acts.*]—The statement in the Vancouver Incorporation Acts, which are private in their nature, that certain land is a "Government Military Reserve," is not conclusive on the Crown in right of the Province:—Held, on the facts, that it was not shewn that Deadman's Island was a military reserve called into existence by properly constituted authority, and, therefore, that it belongs to the Province and not to the Dominion. Remarks as to the powers of the Governor of British Columbia in 1858, and as to what constituted a "reserve." *Attorney-General for British Columbia* v. *Ludgate*, 8 B. C. R. 242.

Patent —*Locatee—Improvements—Ascertainment of Amount Payable for — Crown Lands Department.*]—On an application being made for the patent to certain lands, a claim was made by the defendant, who had married the widow of the locatee and had improved the land, to be allowed the value of such improvements, whereupon the Commissioner of Crown Lands directed that before the patent issued the amount, if any, payable to the defendant for his improvements and work on the land, after proper deductions, should be ascertained. A consent judgment was obtained referring it to the Master to inquire and report as to what sum, if any, the defendant was entitled to for permanent improvements and work done upon the land; for maintenance of the family of the locatee, and for any advances made to the family, after making all proper deductions:—Held, that, as the consent judgment was silent as to the principle to be applied in ascertaining the amount payable to the defendant for the improvements, the proper mode, having regard to the object of the Crown Lands Department, was to award such sum as in foro conscientiæ the defendant ought to receive. *Highland* v. *Sherry*, 21 Occ. N. 116, 32 O. R. 371.

Patent—*Revocation—Powers of Commissioner of Lands—Scire Facias.*]—The power to annul letters patent belongs to the Superior Court only, and not to the Commissioner of Lands, who has no power to correct errors which have crept in, in the preparation of such letters, when there is no adverse contention. 2. The legal way to proceed to have nullified the action of the Commissioner in revoking letters patent in order to make a grant to another, is by scire facias. Regina v. Adams, Q. R. 18 S. C. 520. (Reversed by the Court of Queen's Bench, but restored by the Supreme Court of Canada.) Q. R. 11 K. B. 56, 21 Occ. N. 328, 31 S. C. R. 220.

Patent for Land—Action to repeal — Affidavit—Concealment of improvements — Burden of proof—Costs. *Bailey* v. *DuCailland*, 6 O. W. R. 506.

Pre-emption—Laches—Abandonment — Petition of right—Contract of Crown with pre-emptor. *Cartwright* v. *The King* (B. C.), 1 W. L. R. 82, 103.

Right of Way Over—*Easement—Prescription—Possession—Predecessors in Title.*] —The provisions of C. S. U. C. c. 88, ss. 37, 40, and 44, were in force at the time of Confederation, and have not been repealed by the Parliament of Canada. Such provisions affect the right of the Crown as represented by the Government of Canada. 2. Under such provisions, where one enjoys an easement as against the Crown and over Crown property within the limits of some town or township, or other parcel or tract of land duly surveyed and laid out by proper authority in Ontario, for a period of twenty years, he thereby establishes a right by prescription in such easement; and if the Crown interferes with the enjoyment of it by expropriation proceedings the owner is entitled to compensation. 3. To establish the easement by prescription it is not necessary to shew that the present owner was in undisturbed possession for the full twenty years; but the undisturbed possession of his predecessors in title may be invoked in order to complete the term of prescription. *McGee* v. *The King*, 22 Occ. N. 87, 7 Ex. C. R. 309.

Road Reservation — *Expropriation by the Town—Subsequent Grant to Individual —Fraudulent Concealment—Cancellation — Jurisdiction of Court—Construction of Statutes.*]—The defendant, in making application for a grant of land from the Crown, represented that the land applied for was "near" the town of Sydney, when in fact it was in that town; also that the land was "unoccupied and unimproved," when in truth, to the defendant's knowledge, it was then in the occupation of the Dominion Steel Co., being a part of land which had been expropriated by the town and conveyed to the company for use in connection with their works, and was a portion of what was known as the "Cornish town road," being land reserved by the Crown many years previously for the purpose of a public road or highway, but which had never been used and was

wider than was required for the purpose, and out of which some grants had been made. By the provisions of the Towns Incorporation Act, R. S. N. S. c. 71, s. 170, all public streets, roads, highways, &c., were vested absolutely in the town, and the town council was given full control over the same: —Held, that the Crown having been induced by false suggestions and fraudulent concealment to make a grant which it would not have made if the Crown officers had been properly informed, the grant must be set aside; that the statute was not to be construed as not applying to the road in question merely because it had not been used or was wider than was required; that the grant was one which the Court had jurisdiction to vacate; and that authority on the part of the town to expropriate the land in question, if the Act (1899 c. 84) did not apply to Crown land, was supplied by the Act ratifying and confirming the expropriation proceedings (1900 c. 66). *Attorney-General* v. *McGowan*, 37, N. S. Reps. 35.

Settlement of Manitoba Claims — *Statute—Operation of Grant—Ascertainment and Identification of Swamp Lands—Revenues — Constitutional Law.*]—The first section of the Act for the final settlement of the claims of the Province of Manitoba on the Dominion, 48 & 49 V. c. 50, enacts that "all Crown lands in Manitoba which may be shewn, to the satisfaction of the Dominion Government, to be swamp lands, shall be transferred to the Province and enure wholly to its benefit and uses:" — Held, affirming the judgment in 8 Ex. C. R. 337, Girouard and Killam, JJ., dissenting, that the operation of the statutory conveyance in favour of the Province of Manitoba was suspended until such time or times as the lands in question were ascertained and identified as swamp lands and transferred as such by order of the Governor-General in Council, and that, in the meantime, the Government of Canada remained entitled to the administration thereof, and that the revenues derived therefrom enured wholly to the benefit and use of the Dominion. *Attorney-General for Manitoba* v. *Attorney-General for Canada*, 24 Occ. N. 103, 34 S. C. R. 287.

Squatter—*Grant—Purchaser for Value—Priorities—Notice—Registry Act—Instrument Improperly Registered.*] — A squatter upon Crown land, which he had partly cleared, and upon which he had built a house, gave a registered mortgage of it in 1874 for value, and in 1881 conveyed the equity of redemption by registered deed to the mortgagee, remaining in occupation of the land as tenant. In 1898 a son of the squatter, having no knowledge of the mortgage or deed, or that his father occupied the land as tenant, obtained a grant of the land from the Crown:—Held, that he should not be declared a trustee of the land for the purchaser from the father:—Semble, that s. 69 of the Registry Act, 57 V. c. 20 (C. S. 1903, c. 151, s. 66), by which it is provided that "the registration of any instrument under this Act shall constitute notice of the instrument to all persons claiming any interest in the lands subsequent to such registration, "does not apply to an instrument not properly on the registry, such as a conveyance of Crown land by a squatter. *Robin, Collas, and Co., Limited* v. *Theriault*, 25 Occ. N. 68, 3 N. B. Eq. 14.

Squatter — Settler—Rights of—Railway belt—Vancouver Island Settlers' Rights Act, 1904—Construction—Expropriation — Compensation—Powers of Provincial Legislature — Timber — Mines and minerals. *Esquimalt and Nanaimo R. W. Co.* v. *McGregor* (B. C.), 2 W. L. R. 530.

Swamp Lands—*Transfer to Province—Construction of Statute—Order in Council.*] —By s. 1 of 48 & 49 V. c. 50 (D.), subsequently re-enacted by R. S. C. c. 47, s. 4, it was provided that all Crown lands which may be shewn to the satisfaction of the Dominion Government to be swamp lands shall be transferred to the province and enure wholly to its benefit and uses:—Held, that by its true construction the section did not operate as an immediate transfer to the province of any swamp lands or of the profits arising therefrom, but only from the date of the order in council, made after survey and selection as prescribed by the Act directing that the selected lands be vested in the province. Down to that date the profits resulting from the transferred lands belonged to the Dominion. Judgment in 34 S. C. R. 287 affirmed. *Attorney-General for Manitoba* v. *Attorney-General for Canada*, [1904] A. C. 799.

Timber Licenses—*Prior Grant of Land —Retroactivity.*]—Lots granted or located prior to the date of a license to cut timber under Art. 1309, R. S. Q., are exempt from the rights conferred by such license. 2. Licenses to cut timber on Crown lands are not retroactive as against prior grantees of said lands. *Price* v. *Delisle*, Q. R. 21 S. C. 411.

Timber Licenses—*Sales by Local Agent —Location Ticket—Suspensive Condition — Title to Lands.*] — During the term of a license to cut timber on ungranted lands of the Province of Quebec, the local Crown lands agent made a sale of a part of the lands covered by the license, and issued location tickets or licenses of occupation thereof under the provisions of Arts. 1269 et seq., R. S. Q., respecting the sale of Crown lands. Subsequently the timber license was renewed, but at the time the renewal license was issued there had not been any express approval by the commissioner of Crown lands of the sales so made by the local agent, as provided in Art. 1269, R. S. Q.:—Held, affirming the judgment appealed from, Taschereau and Davies, JJ., dissenting, that the approval required by Art. 1269, R. S. Q., was not a suspensive condition, the fulfilment of which would have retroactive effect from the date when the sales by the local agent were made, and that, at the time of the issue of the renewal license, the lands in question were still ungranted lands of the Crown for which the timber license had been validly issued. *Leblanc* v. *Robitaille*, 22 Occ. N. 78, 31 S. C. R. 582.

II. EXPROPRIATION.

Actual Value — *Compulsory Taking — Compensation.*] — In expropriation cases, where the actual value of lands can be closely and accurately determined, a sum equivalent to ten per cent. of such actual value should be added thereto for the compulsory taking; but where that cannot be done, and where

the price allowed is liberal and generous, nothing should be added for the compulsory taking. *Symonds* v. *The King*, 8 Ex. C. R. 319.

Compensation—*Damages for Injury to Adjoining Lands—Amount of Judgment of Exchequer Court — Appeal to Supreme Court.*]—Information in the Exchequer Court for a declaration that certain lands taken for the Trent Canal were vested in Her Majesty, and that the sum of $6,860 tendered to the defendant was sufficient compensation for the lands taken and for damages to adjoining lands. The amount tendered was made up of $3,860 for the lands taken and $3,000 for damages. The valuators on whose report the tender was made put the value of the land at $200 per acre. This was accepted by the Judge of the Exchequer Court, but, upon conflicting evidence, he increased the amount for damages to $10,250. The Crown appealed on the ground that the damages were excessive:—Held, Gwynne and Girouard, JJ., dissenting, that, as it did not appear from the evidence that there was error in the judgment appealed from, the Supreme Court would not interfere. *Regina* v. *Armour*, 31 S. C. R. 499.

Compensation — *Leasehold Interest — Measure of Damages.*]—The suppliants were lessees of certain land and premises expropriated for the Intercolonial Railway. The premises had been fitted up and were used by them for the purpose of their business as coal merchants. By the terms of the lease under which they were in possession, the term for which they held could at any time be determined by the lessors by giving six months' notice in writing, in which event the suppliants were to be paid $2,500 for the improvements they had made: — Held, that the measure of compensation to be paid to the suppliants was the value, at the time of the expropriations, of their leasehold interest in the lands and premises. Apart from the sum payable for improvements there was no direct evidence to shew what the value was. But it appeared that the suppliants had procured other premises in which to carry on their business, and that in doing so they had of necessity been at some loss, and that the cost of carrying on their business had been increased. The amount of the loss and of increased cost of carrying on business during the six months succeeding the expropriation proceedings was, in addition to the sum mentioned, taken to represent the value to them, or to any person in a like position, of their interest in the premises. The suppliants also contended that, if they had not been disturbed in their possession, they could have increased their business, and so have made additional profits, and they claimed compensation for the loss of such profits, but this claim was not allowed. *Gibbon* v. *The Queen*, 20 Occ. N. 434, 6 Ex. C. R. 430.

Damages to Land — *Owner — Public Work—Liability—Land Dedicated for Highway.*]—It is the owner of the land at the time a public work is constructed that is entitled to damages for lands taken for or injuriously affected by such construction and not his successor in title:—Held, in view of the opinion in City of Quebec v. The Queen, 24 S. C. R. 420, that where the injury to property does not occur on a public work the suppliant has no remedy under 50 & 51 V. c. 16, s. 16 (d). Where in the division of his land the owner dedicates a portion to the public for a street or highway, a part of which is subsequently taken by the Crown for a public work, the owner is not entitled to compensation for the part so taken. Stebbing v. Metropolitan Board of Works, L. R. 6 Q. B. 37, and Paint v. The Queen, 2 Ex. C. R. 149, 18 S. C. R. 718, followed. *Letourneux* v. *The Queen*, 21 Occ. N. 277, 7 Ex C. R. 1.

Damage to Remaining Land—*Access —Undertaking — Right of Way—Future Damages—Agreement—Increased Value.*] — The defendants owned a certain property, a portion of which was taken by the Crown for the purpose of a canal. Access to the remaining portion of the defendants' land was cut off by the canal, but the Crown, under 52 V. c. 38, s. 3, filed an undertaking to build and maintain a suitable road across its property for the use of the defendants. The evidence shewed that the effect of this road would be to do away with all future damage arising from deprivation of access; and the Court assessed the damages for past deprivation only. 2. It having been agreed between the parties in this case that the question of damages which might arise in the future from any flooding of the defendants' lands should not be dealt with in the present action, the Court took cognizance of such agreement in pronouncing judgment. 3. In respect to the lands taken, the Court declined to assess compensation based upon the consideration that the lands were of more value to the Crown than they were to the defendants at the time of the taking. Stebbing v. Metropolitan Board of Works, L. R. 6 Q. B. 37, and Paint v. The Queen, 2 Ex. C. R. 149, 18 S. C. R. 718, followed. *Regina* v. *Harwood*, 20 Occ. N. 424, 6 Ex. C. R. 420.

Damages—*Valuation—Evidence.*] — The Crown expropriated land of L. and had it appraised by valuators, who assessed it at $11,400, which sum was tendered to L. but refused. L. brought suit by petition of right for a larger sum as compensation. The Exchequer Court awarded him $17,000. On appeal by the Crown:—Held, Girouard, J., dissenting, that the evidence given on the trial of the petition shewed that the sum assessed by the valuators was a very generous compensation to L. for the loss of his land, and the increase by the judgment appealed from was not justified. The Court, while considering that a less sum than that fixed by the valuators should not be given in this case, expressly stated that the same course would not necessarily be followed in future cases of the kind. *Rex* v. *Likely*, 22 Occ. N. 191, 32 S. C. R. 47.

Leasehold Property—*Tenant's Improvements—Expense of Removal—Compensation.*] —The suppliant was tenant of certain buildings and wharves erected upon lands of which he had acquired possession as assignee of two leases. He there carried on business as a junk dealer. The terms for which the leases were made had expired at the time of the expropriation of the lands by the Crown; but the leases contained a proviso that the buildings and other erections put on the demised premises should be valued by appraisers, and that the lessor or reversioner

should have the option of resuming possession upon payment of the amount of such appraisement, or of renewing the leases on the same terms for a further term not less than three years. No such appraisement had been made, and the suppliant continued in possession of the property as tenant from year to year. The evidence shewed that the lessor had no present intention of paying for the improvements and of resuming possession of the property:—Held, that, in addition to the value of his improvements, the suppliant should be allowed compensation for the value under all the circumstances of his possession under the leases at the date of the expropriation. *McGoldrick* v. *The King*, 23 Occ. N. 99, 8 Ex. C. R. 169.

Lessor and Lessee—*Covenant to Build on Demised Premises.*]—Where a lessee is under covenant to build upon the demised premises, and a part of the premises are expropriated by the Crown for the purposes of a public work, the fact that by the expropriation the lessee is relieved from his covenant and the further fact that his rent is reduced by reason of the taking of a part of the premises, will be taken into consideration by the Court in fixing the amount of compensation to be paid to the lessee. *Rex* v. *Young*, 22 Occ. N. 84, 7 Ex. C. R. 282.

Possession by Officers of the Crown of Lands not Expropriated—*Taking of Highway—Rifle Range—Damages.*]—The defendants complained that possession of certain lands not covered by the plan and description filed by the Crown in an expropriation proceeding had been taken by the officers of the Crown, and claimed compensation:—Held, that the right to recover compensation must be limited to lands mentioned in the plan and description filed, and to the injurious affection of other lands held therewith. 2. The defendants' predecessor in title, in laying off into lots the land of which a portion was taken from the defendants by the Crown, left a roadway between the land so divided and the top of the land adjacent to the sea. This roadway had been used by the public, and work had been done upon it by the municipal authorities. The land between that so taken and the sea was not included in the plan and description filed; but the Crown closed up the roadway, and from the land taken from the defendants opened another in lieu thereof:—Held, that the defendants were not entitled to compensation in respect of the taking of the roadway. 3. Where property adjoins a rifle range, the site of which has been expropriated from the lands of the owner of such adjacent property, he is entitled to compensation for damages arising from the use of such rifle range. *Rex* v. *Harris*, 22 Occ. N. 83, 7 Ex. C. R. 277.

Prospective Value—*Assessed Value.*]—Where lands at the time of the expropriation had a prospective value for residential purposes beyond that which then attached to them as lands used for farming or dairy purposes, such prospective value was taken into consideration in assessing compensation. 2. In assessing compensation in this case the Court looked at the assessed value of the lands, not as a determining consideration, but as affording some assistance in arriving at a fair valuation of the property taken. *Rex* v. *Turnbull Real Estate Co.*, 23 Occ. N. 99, 8 Ex. C. R. 163. Affirmed in *Turnbull Real Estate Co.* v. *The King*, *Corkery* v. *The King*, *De Bury* v. *The King*, 33 S. C. R. 677.

Public Work—*Damages—Reference.*] — Upon an appeal from the report of special referees, on the ground that the amount of damages reported by them was excessive, and it appearing to the Court that the matter was one in which it was expedient that there should be a reference back to the referees under the 19th Rule of Court of the 12th December, 1899, an order was made therefor, in which the following directions were given to the referees:—1. To find what in September, 1902, was the value of the wharf, land, and premises taken by the Crown as mentioned in the information. In finding that value the referees were directed to exclude from their consideration the value of the same to the Crown, in the way of saving expense in the construction of the public work, or otherwise, and to determine its value at that time to the owner or any other person, for any purpose to which in the ordinary course of events it could be put. In finding that value the referees were also directed to take into account the condition, situation, and prospects of the property taken; but that such value should be one that the property had at the time it was taken, and not one that the referees might think that it might have at some future time by reason of its condition, situation, or prospects. 2. With regard to the remainder of the property, of which that taken formed part, the referees were directed to find the amount of damages, if any, that had been occasioned to the portion not expropriated by the taking of the part mentioned, and the construction of the public work. The referees were further directed that if the construction of the public work benefited and increased the value of the portion of the property not expropriated, that was to be taken into account and set off against the damages occasioned by the severance. *Rex* v. *Shives*, 9 Ex. C. R. 200.

Will—*Construction — Gift Over in the Event of Death—Life Estate—Interest on Compensation Money.*]—A testatrix devised and bequeathed to her niece M. W. a dwelling-house and its contents, "but in case she should die without leaving lawful issue, then to my nieces hereinafter mentioned, and their children, being females." Following this there was a residuary gift or bequest to "the daughters of my sisters M. and H. and to the daughters or daughter of my late brother J., and to their children, if any, being daughters:"—Held, that there was nothing in the will to indicate any intention on the part of the testatrix that the gift over should not take effect unless in her lifetime her niece M. W. died without leaving lawful issue. but, on the contrary, it was to be inferred from the terms of the will that it was the intention of the testatrix that in the case of the death at any time of M. W. without leaving lawful issue, the other nieces, to whom she left the residue of her estate, should take the property. Cowan v. Allen, 26 S. C. R. 292, Fraser v. Fraser, ib. 316, and Olivant v. Wright, 1 Ch. D. 348, referred to. 2. The property in question had been expropriated by the Crown for the purposes of a public work:—Held, that the suppliant M. T., the devisee under the will sub nomine M. W., was in any event entitled to a life interest in the compensation money, and that she might be

paid the interest thereon during the pendency of proceedings to determine the respective rights of all parties interested therein. *Trail* v. *The King*, 21 Occ. N. 281, 7 Ex. C. R. 98.

III. Public Works

Collision of Vessel with Entrance Pier to Canal — *Negligence in Construction.*]—One of the entrance piers to a government canal was so constructed that a substructure of masonry rested on crib-work. The base of the pier was set back three feet from the edge of the crib-work, which left a step or projection under water between the masonry and the side of the crib-work. It was necessary for vessels to enter the canal with great care, at this point, owing to the eddies and currents that existed there. The proper course, however, for vessels to steer was marked by buoys. A vessel on entering the canal touched another pier than the one in question, and then, taking a sheer and getting out of control, swung over and came in collision with this pier:—Held, that, upon the facts proved, the accident was caused by the vessel being caught in a current or eddy and so carried against the pier. 2. That, as there was no negligence by any officer or servant of the Crown as to the location and the method of construction of this pier, the Crown was not liable for damages arising out of the collision. *British and Foreign Marine Ins. Co.* v. *The King*, 25 Occ. N. 146.

Compulsory Taking — *Compensation — Value.*]—It is the value of the land at the time of the expropriation that the Court has to consider in assessing compensation. If the property has depreciated in value between the time it was acquired by the person seeking compensation and the time of the expropriation by the Crown, the former has to bear the loss. 2. Where the property is occupied by the owner as his home, and he has no need or wish to sell, the compensation ought to be assessed upon a liberal basis. *Rex* v. *Sedger*, 22 Occ. N. 84, 7 Ex. C. R. 274.

Contract—*Abandonment and Substitution of Work—Implied Contract.*]—The suppliants contracted with the Crown to do certain work on the Cornwall canal, the contract providing that they should provide all labour, plant, etc., for executing and completing all the works set out or referred to it in the specifications, namely, "all the dredging of the Cornwall canal on section No. 8 (not otherwise provided for)" on a date named; "that the several parts of this contract shall be taken together to explain each other and to make the whole consistent; and if it be found that anything has been omitted or misstated which is necessary for the proper performance and completion of any part of the work contemplated the contractors will, at their own expense, execute the same as though it had been properly described:" and that the engineer could, at any time before or during construction, order extra work to be done, or changes to be made, either to increase or diminish the work to be done, the contractors to comply with his written requirements therefor. By cl. 34 it was declared that no contract on the part of the Crown should be implied from anything contained in the signed contract or from the position of the parties at any time. After a portion of the work had been done, the Crown abandoned the scheme of constructing dams contemplated by the contract, and adopted another plan, the work on which was given to other contractors. After it was completed the suppliants filed a petition of right for the profits they could have made had it been given to them:—Held, affirming the judgment of the Exchequer Court, 7 Ex. C. R. 221, 22 Occ. N. 82, that the contract contained no express covenant by the Crown to give all the work done to the suppliants and cl. 34 prohibited any implied covenant therefor. Therefore the petition of right was properly dismissed. *Gilbert Blasting and Dredging Co.* v. *The King*, 23 Occ. N. 59, 33 S. C. R. 21.

Contract—*Breach—Contractor's Duty — Repetition of Claims—Extra Work—Loss of Profits—Damages.*]—By cl. 26 of the suppliants' contract with the Crown for the construction of a public work, it was, in substance, stipulated that, if the contractors had any claims which they considered were not included in the progress certificates, it would be necessary for them to make and repeat such claims in writing to the engineer within fourteen days after the date of the certificate in which such claims are alleged to have been omitted; and by cl. 27 it was stipulated that the contractors in presenting claims of this kind should accompany them with satisfactory evidence of their accuracy, and the reason why, in their opinion, they should be allowed; and unless such claims were so made during the progress of the work and within the fourteen days mentioned, and repeated in writing every month until finally adjusted or rejected, it should be clearly understood that the contractors would be shut out and have no claim against the Crown in respect thereof. The suppliants did not comply with these provisions:—Held, that a petition of right for moneys claimed to be so due to contractors could not be sustained. 2. By one of the clauses of the contract it was provided that the engineer might, in his discretion, require the contractor to do certain work outside of his contract: — Held, that there was no implied contract on the part of the Crown that work outside of the contract which the engineer might, under the authority so vested in him, have required the contractor to do, should be given to the contractor; and where this is not done by the engineer, and such outside work is given to others, the contractor is not entitled to the profit that he would have made on the performance of such work. 3. Where, by a change in the plan of the works, certain works are abandoned and others substituted therefor, and the contractor is paid the loss of profits in respect of such abandoned works, he is not entitled to profits upon the substituted works. *Gilbert Blasting and Dredging Co.* v. *The King*, 22 Occ. N. 82, 7 Ex. C. R. 221.

Contract—*Delay—Forfeiture — Notice by Engineer—Withdrawal of Work—Damages—Interest.*]—Where a contract provides for a forfeiture for not proceeding with work at the rate required, and fixes a time for its completion, any notice given after such date to determine the contract and enforce the forfeiture must give the contractor a reasonable time in which to complete the work, and the contractor must, before the forfeiture

can be enforced, have made default with reference to such reasonable time, according to the decision of the engineer, of which the contractor is to have notice. Walker v. London and North-Western R. W. Co., 1 C. P. D. 518, discussed. 2. The damages for a breach have to be measured as nearly as may be by the profits which the contractor would have made by completing the contract in a reasonable time; and loss of profits in respect of extras could not be taken into consideration. 3. Where the Crown dispossessed the contractor of his plant, and used it in the completion of the work, the contractor was entitled to recover the value as a going concern. 4. Where the contractor was not allowed interest upon the value of such plant, it was held that he was not to be charged with interest upon the balance of the purchase price of a portion of the plant which, with his consent, the Crown had subsequently paid. *Stewart* v. *The King*, 21 Occ. N. 280, 7 Ex C. R. 55. Affirmed *Rex* v. *Stewart*, 32 S. C. R. 483.

Contract for Improvement of Government Canal—*Change in Works—Breach of Contract — Spoiled Grounds — Cost of — Allowance for.*]—The suppliants were contractors for certain works of improvement on the Rapide Plat division of the Williamsburg canal. For their own use and benefit, and without notice to or request of the Crown in such behalf, they obtained certain grounds upon which to waste the material excavated by them:—Held, that the Crown was not bound to indemnify them for money expended in obtaining the said spoiled grounds. 2. In order to carry on the works in the way contemplated by the contract and specification, the contractors changed certain dump-scows into deck-scows. Thereafter a change was made by the Crown in the manner of carrying out the work, which required the contractors to convert the deck-scows into dump-scows:—Held, that the contractors were not entitled to recover from the Crown the expense they were put to in respect to the scows, because, the change in the works being provided for in the contract, there was no breach; but that such expense might be taken into account in considering the increased cost of doing the work, under the circumstances in which it was done, as compared with the cost of doing it in the way contemplated by the contract. *Weddell* v. *The King*, 22 Occ. N. 85, 7 Ex. C. R. 323.

Contract for Sale of Railway Ties—*Delivery — Inspection—Payment—Purchase by Crown from Vendee in Default—Title.*]—In January, 1894, the suppliant agreed with M., acting for the B. & N. S. C. Co., to supply the company with railway ties. The number of the ties was not fixed, but the suppliant was to get out as many as he could, to place them along the line of the Intercolonial Railway, and was to be paid for them as soon as they were inspected by the company. The ties were not to be removed from where the suppliant placed them until they were paid for. During the season of 1894 the suppliant got out a number of ties, which were piled alongside the Intercolonial Railway, inspected, those accepted being marked with a dot of paint and the letters "B. & S.," and thereafter paid for by the company. In 1895 the suppliant made a second agreement with M. to get out another lot of ties for the company upon the same terms and conditions. Under this agreement the suppliant got out ties and placed them along the Intercolonial Railway where the former ties were piled, but the lots were not mixed. The second lot was inspected and marked with the dot of paint, but the letters "B. & S." were not put on them. The suppliant demanded payment for them from the company, but was not paid. In November, 1896, the company sold both lots of ties to the Crown for the use of the Intercolonial Railway, and was paid for them, and in May or June, 1897, the Intercolonial Railway authorities removed all the ties:—Held, that the B. & N. S. C. Co. had not at the time when they professed to sell the second lot of ties to the Crown any right to sell them, and the Crown did not thereby acquire a good title to the ties. That being so, the suppliant was entitled to have the possession of the ties restored to him, or to recover their value from the Crown. *McLellan* v. *The King*, 25 Occ. N. 81, 9 Ex. C. R. 227.

Government Railway — *Carriage of Goods—Breach of Contract — Damages — Negligence.*]—The suppliant sought to recover a sum of $886.38 alleged to have been lost by him on a shipment of sheep undertaken to be carried by the Crown from Charlottetown, P.E.I., to Boston, U.S.A. The loss was occasioned by the sheep not arriving in Boston before the sailing of a steamship thence for England, on which space had been engaged for them; and the cause of such failure was lack of room to forward them on a steamboat by which connections are made between the Summerside terminus of the Prince Edward Island Railway and Pointe du Chene, N.B., a point on the Intercolonial Railway. The suppliant alleged that before the shipment was made the freight agent of the Prince Edward Island Railway at Charlottetown represented to him that if the sheep were shipped at Charlottetown on a certain date, which was done, they would arrive in Boston in time:—Held, that, even if the suppliant had proved, which he failed to do, that this representation had been made, it would have been inconsistent with the terms of the way-bill, and contrary to the regulations of the Prince Edward Island Railway, and therefore in excess of the freight agent's authority. 2. That the evidence did not disclose negligence on the part of any officer or servant of the Crown within the meaning of s. 16 (c) of the Exchequer Court Act. *Wheatley* v. *The King*, 25 Occ. N. 80, 9 Ex. C. R. 222.

Government Railway — *Contract for Services—Conditional Increase of Salary—Impossibility of Performance of Condition — Promises by Crown's Officers—Liability.*] — H., while general traffic manager of the Intercolonial Railway, offered to secure the appointment of R. to a position in H.'s department of the railway at a salary of $2,000 per annum. R. refused that amount, but signified his willingness to accept $2,400. H., after obtaining the permission of the Minister of Railways to offer R. $2,100 per annum, wrote to him: "I would be prepared to alter the terms of my letter to read $2,100, with the assurance that should you, as I feel confident you can, develop the traffic on your division to my satisfaction, your salary should be increased to $2,400 on the 1st January, 1899." R. accepted the appointment upon

these terms, and entered upon the duties of his office on the 1st January, 1898. In the following autumn H. resigned his position on the railway. Shortly after, namely, in September, 1898, the department offered to appoint R. general traveller freight agent of the railway, with headquarters at Toronto, and R. accepted the new office on the assurance contained in the letter from W., the then general freight agent of the railway, that "there is to be no change in the salary of the present position and the one in the west." R. entered upon his new duties on the 10th October, 1898, and discharged the same until April, 1903, when his services were dispensed with. He had never been paid a salary during his employment by the Department of Railways of more than $2,100 per annum, and after his retirement he filed a petition of right claiming a balance of salary due him at the rate of $2,400 from the 1st January, 1899, basing such claim upon H.'s letter and W.'s letter, above mentioned: —Held, that, even if the assurance of increase of salary contained in such letter was more than an engagement or liability in honour, the contingency upon the happening of which the salary was to be increased had never in fact arisen. Before the time arrived when it could happen, two things had occurred to prevent it, neither of which was in the contemplation of the parties when the appointment was made. H. had resigned his office, and was no longer in a position to say whether R. had, or had not, developed the traffic to his satisfaction, and secondly, R. had ceased to hold the office in respect of which the increase of salary had been promised, and had accepted another office in connection with the traffic department of the railway. 2. The fair meaning of W.'s promise that there would be no change in the salary on R.'s acceptance of his new office in the traffic department was that R. would be paid the same amount of salary in the new position as that which he was then receiving, namely, $2,100. 3. That W. not having been shewn to have had any authority to bind the Crown by a promise to give any such increase of salary, no such authority was to be implied from the fact that he was at the time the general freight agent of the railway, and as such R.'s immediate superior officer. *Robinson* v. *The King*, 25 Occ. N. 143, 9 Ex. C. R. 448.

Government Railway—*Injury to Person at Crossing—Negligence—Defective Engine—Rate of Speed—"Train of Cars"—Dangerous Crossing—Gates or Watchman—Discretion of Crown.*]—The husband of the suppliant was killed by being struck by the tender of an engine while he was on a level crossing over the Intercolonial Railway tracks, in the city of Halifax. The evidence shewed that the crossing was a dangerous one, and that no special provision had been made for the protection of the public. Immediately before the deceased attempted to cross the tracks, a train of cars had been backed, or shunted, over this crossing in a direction opposite to that from which the engine and tender by which he was killed was coming. The engine used in shunting this train was leaking steam. The atmosphere was at the time heavy, and the steam and smoke from the engine did not lift quickly, but remained for some time near the ground. The result was that the shunting engine left a cloud of steam and smoke that was carried over towards the track on which the engine and tender were running, and obscured them from the view of any one who approached the crossing from the direction in which the deceased approached it. The train that was being shunted and the engine and tender by which the accident was caused passed each other a little to the south of the crossing. The train and shunting engine being clear of the crossing, the deceased attempted to cross, and when he had reached the track on which the engine and tender were being backed, the latter emerged from the cloud of steam and smoke and were upon him before he had time to get out of the way. At the time of the accident the engine and tender were being backed at the rate of six miles an hour:—Held, that the accident was attributable to the negligence of officers and servants of the Crown employed on the railway, both in using a defective engine, as above described, and in maintaining too high a rate of speeed under the circumstances. 2. An engine and tender do not constitute a "train of cars" within the meaning of s. 29 of the Government Railways Act, R. S. C. c. 38. Hollinger v. Canadian Pacific R. W. Co., 21 O. R. 705, not followed. 3. Where the Minister of Railways, or the Crown's officer under him whose duty it is to decide as to the matter, comes, in his discretion, to the conclusion not to employ a watchman or to set up gates at any level crossing over the Intercolonial Railway, it is not for the Court to say that the Minister or the officer was guilty of negligence because the facts shew that the crossing in question was a very dangerous one. *Harris* v. *The King*, 24 Occ. N. 388, 9 Ex. C. R. 206.

Head-gates and Waters of Canal—*Control of Public and Private Rights—Crown Officer—Estoppel by Acts of—Departmental Report.*] — The suppliant's predecessor in title, the Seignior of Beauharnois, early in the last century had constructed a canal or feeder, with hear-gates and appurtenances, through his own land for the purpose of conveying water from the river St. Lawrence to the river St. Louis, and so increase certain water-powers belonging to the seigniory. Later in the century, when the Beauharnois canal was constructed by the government of the province of Canada, certain works near the head of that canal had the effect of raising the water along the shores of Hungry bay, in lake St. Francis, and flooding a considerable portion of the seigniory of Beauharnois. To overcome this, the government built a dyke through Hungry bay, which crossed the feeder and had a flume with three sluice-gates at its entrance into the St. Louis river. The gates that the seignior had used up to that time were removed, and the three sluice-gates mentioned were constructed as part of the public work. It was not disputed that this dyke was part of the property of the province, and passed to the Dominion of Canada in 1867; but down to the year 1882 the seignior and his grantees remained in possession of the feeder and head-gates. In that year, however, a sum of $10,000 was voted by Parliament for the improvement of the river St. Louis, and a sum of $5,000 in each of the two years following. In connection with the work so provided for, the Crown took possession of the feeder, deepened and improved it, built a bridge over it, and took out and re-built the head-gates. It

was not quite clear whether these works were undertaken by the Dominion government at the request of the farmers who owned adjacent lands or of the mill owners, or at the request of both. It was clear, however, that none of the mill owners, of whom the suppliant was one, objected in any way to what was done. But after the work was completed, the Crown's officers continued in possession of both the feeder and the head-gates, and the suppliant complained to the Minister of Public Works that he was prevented, along with other mill owners, from exercising the control of the feeder and head-gates to which they were as such owners entitled. The result of this complaint was that the control and possession of the feeder and head-gates were handed over to the suppliant, who retained possession until 1892, when the government resumed possession against the will and consent of the suppliant, who gave up the keys of the gates without waiving any of his rights. Prior to the time when the government in 1892 took possession of the feeder, the suppliant had acquired the rights therein of all the mill owners interested excepting one, the rights of the latter being acquired afterwards in the same year:—Held, that, as the suppliant's auteurs were not in possession of the feeder and head-gates at the time of the deed of conveyance, they could not give him possession thereof as against the Crown; and, as the right of control and regulation of the head-gates had been in the Crown from the time the dyke was built, such right was not lost by the Crown ceasing to exercise it for the period above mentioned. The suppliant, while enjoying the right to have these works so regulated and controlled as to give him all the water he was entitled to, consistent with other public or private interest therein, had not the paramount or exclusive control and regulation of them, which, by the necessities of the case, were vested in the Crown. The Crown is not estopped by any statement of facts or by any conclusions or opinions stated in any departmental report by any of its officers or servants. *Robert* v. *The King*, 9 Ex. C. R. 21.

Injurious Affection—*Closing up Street —Compensation.*]—The properties of the suppliants were injuriously affected by the construction of a public work, which obstructed a highway upon which the properties respectively abutted. MacArthur's property was 190 feet from the place of obstruction, and Keefe's 240 feet. The suppliant's properties, instead of being respectively situated, as they were formerly, on a main thoroughfare, were, by the change effected by the construction of the said public work, situated at the extreme end of a street closed up at one end, and forming a cul de sac:—Held, that where the injurious affection concerned the personal convenience of the occupiers of the properties in question, the suppliants were not entitled to compensation, but that in so far as the value of the property, in the hands of any one, and used for any purpose to which they could be put, was lessened, the suppliants ought to recover therefor. *MacArthur* v. *The King*, *Keefe* v. *The King*, 23 Occ. N. 213, 8 Ex. C. R. 245.

Injurious Affection of Property—*Deprivation of Access—Street—Damages.*]—By the construction of a public work a public highway was closed up at a point two hundred and fifty feet distant from the suppliant's property, which fronted on the highway. In the first expropriation for the public work of land in the neighbourhood no part of the suppliant's property was taken. Afterwards, and during the construction of the public work, a portion of his property was taken for the public work, and on the trial of a petition of right for compensation, the question arose as to whether or not the depreciation of the property by reason of the closing up of the street or highway should be taken into account as one of the elements of damages:—Held, that it should be so taken into account, first, because it appeared that the depreciation from this cause in fact occurred subsequent to the taking of the land, and secondly, it was a case in which the suppliant was entitled to compensation for the injurious affection of his property by reason of the obstruction of the highway, which was proximate and not remote. Metropolitan Board of Works v. McCarthy, L. R. 7 H. L. 243, Caledonian Railway Co. v. Walker's Trustees, 7 App. Cas. 259, and Barry v. The Queen, 2 Ex. C. R. 333, referred to. *McQuade* v. *The King*, 22 Occ. N. 87, 7 Ex. C. R. 318.

Injurious Affection—*Erosion—Increase of—Exchequer Court—Jurisdiction.*]—Where the erosion of land by the natural action of the waters of a river was accelerated and increased by certain works erected in the river, and some dredging done therein by the Crown, a petition of right will lie for damages. 2. The jurisdiction of the official arbitrators under s. 1 of 33 V. c. 23, and s. 4 of 31 V. c. 12, was, in substance, transferred to the Exchequer Court of Canada by ss. 16, 58, and 59 of 50 & 51 V. c. 16. *Graham* v. *The King*, 8 Ex. C. R. 331.

Injury to Person—*Negligence—Common Employment in Manitoba—Workmen's Compensation Act.*]—The effect of s. 16 (c) of the Exchequer Court Act is not to extend the Crown's liability so as to enable any one to impute negligence to the Crown itself, or to make it liable in any case in which a subject in like circumstances would not be liable. 2. In the province of Manitoba the Dominion government is not liable for any injury to one of its servants arising from the negligence of a fellow-servant. Filion v. The Queen, 24 S. C. R. 482, referred to. 3. With respect to the liability of the Dominion government in cases involving the doctrine of common employment, nothing short of an Act of the Parliament of Canada can alter the law of Manitoba as it stood on that subject on the 15th July, 1870. The Workmen's Compensation Act, R. S. M. c. 178, does not apply to the Crown, the Crown not being mentioned therein. *Ryder* v. *The King*, 25 Occ. N. 85, 113, 9 Ex. C. R. 330, 36 S. C. R. 462.

Injury to Property—*Barge Wintering in Government Canal—Lowering Level of Water —Omission to Notify Owner—Negligence — 50 & 51 V. c. 16, s. 16 (c).*]—In the autumn of 1900 the suppliant placed his barge for winter quarters at a place in the Lachine canal which he had before used for a similar purpose. The practice is now changed, but up to and including the year 1900 it was sufficient for any owner of a barge, without asking leave or notifying any one on behalf

of the Crown, to leave his barge in the canal, and during the winter some officer of the canals department would take the name of the barge, measure it, make up an account based on the tonnage for such use of the canal, and in the spring collect the amount thereof from the owner of the barge before she was permitted to leave the canal, the whole in conformity with the provisions of Art. 32 of the tariff of tolls framed by that department and issued in the year 1895. Some time after the suppliant had so placed his barge in the canal, M., the superintending engineer for the province of Quebec of the canals department, wrote officially to O'B., the superintendent of the Lachine canal, directing him to have the water lowered on certain dates during the winter to facilitate certain work then being done by the Grand Trunk Railway Company on their swing bridge at St. Henri. M. also gave an oral order to O'B. to comply with the usual practice of notifying the owners of barges wintering in the canal before lowering the water on any occasion. In pursuance of such order, O'B. directed one of the employees of the canal to notify the barge owners whenever the level of the water was to be lowered. This employee failed to notify the suppliant before the water was lowered on a certain date, and his barge was so injured by the lowering of the level of the water that she became a total loss:—Held, confirming the report of the registrar, that, as the canal was a public work, a case of negligence was established for which the Crown was liable under the provisions of s. 16 (c) of the Exchequer Court Act, 50 & 51 V. c. 16. *Gagnon* v. *The King*, 25 Occ. N. 56, 9 Ex. C. R. 189.

Lands Injuriously Affected — *Closing Highway—Inconvenient Substitute.*] — The owner of land is not entitled to compensation where, by construction of a public work, he is deprived of a mode of reaching an adjoining district and obliged to use a substituted route which is less convenient. The fact that the substituted route subjects the owner at times to delay does not give him a claim to be compensated, as it arises from the subsequent use of the work, and not its construction, and is an inconvenience common to the public generally. The general depreciation of property because of the vicinity of a public work does not give rise to a claim by any particular owner. Where there is a remedy by indictment, mere inconvenience to an individual or loss of trade or business is not the subject of compensation. Judgment of the Exchequer Court, 8 Ex. C. R. 245, reversed. *Rew* v. *MacArthur*, 24 Occ. N. 201, 34 S. C. R. 570.

Lease of Water Power — *Stoppage of Power on Improvement of Canal—Damages—New Lease—Waiver—Surrender—Measure of Damages.*]—The suppliant was the owner of a flouring mill at Iroquois, Ontario, which was built upon a portion of the Galops Canal reserve, and, prior to the 12th December, 1898, was operated by water power taken from the surplus water of the canal. The site upon which the mill was built, as well as the water power sufficient to drive four runs of ordinary mill stones, equal to a ten-horse power for each run, were held by the suppliant under a lease from the Crown. On that date the canal was unwatered to facilitate the construction of certain works that were being carried out by the government of Canada for its enlargement and improvement. At that time it was not intended that the stoppage of the supply of such surplus water to the mill should be permanent, but temporary only. Subsequently, however, certain changes in the work were made, which resulted in such supply being permanently discontinued. These changes were made by the Crown, at the request of the suppliant and others, for the purpose of developing the water power, of which the suppliant expected to obtain a lease on favourable terms:—Held, that the suppliant was entitled to recover compensation for the loss of power to which he was entitled under the earlier lease. 2. The Court did not include in such compensation any claim for loss of profits or dissipation of business, because, on the one hand, in its inception the stoppage of water was lawful and within the lease, and there was no ground upon which such claim could be allowed except that founded upon a change in the works that was made in part at the instance of the suppliant and to meet his views, and wholly with his acquiescence and consent; while, on the other hand, he had at all times a well founded claim either to have the power granted by the former lease restored to him, or to be paid a just compensation for the loss of it. 3. It was provided in the first lease that the suppliant would have no claim for damages in the event of a temporary stoppage of water for the purpose, inter alia, of improving or altering the canal. Upon the question whether the stoppage of the water supply for the period of two and one-half years, being the time actually necessary for the execution of the works for enlarging and improving the canal would have been a temporary stoppage within the meaning of the former lease:—Held, that, having regard to the subject matter of the lease, any stoppage of the supply of surplus water actually necessary for the repair, improvement, or alteration of the canal, in the public interest, and to meet the requirements of the trade of the country, would be temporary within the meaning of the provision above referred to, although it might last for several years. 4. Upon the question as to whether the acceptance by the suppliant of the lease of 1901 worked a surrender of the grant of surplus water made by the former lease:—Held, that, as there was nothing in the two leases which would go to affect the validity of either of them, and there was no inconsistency between them, the two leases should stand. 5. That the damages should be measured by the cost of supplying and using for the operation of the mill forty horse power furnished in some other way than by the water supply in question. *Beach* v. *The King*, 25 Occ. N. 83, 9 Ex. C. R. 287.

Negligence — *Freight Elevator—Use of, by Employees—City By-law.*]—The suppliant, an employee of the post office in the city of Montreal, was injured by falling from a lift to the floor of the basement. The lift was used for the transfer of mail bags and matter with those in charge of them from one floor to another in the post office building. It was proved that the lift was constructed in the usual and customary manner of freight elevators, but the suppliant contended that, as the lift was allowed to be used by certain employees in going from one

floor to another, it should have been provided with guards or something to prevent anyone from falling from it, as the suppliant did, while passing from the first floor to the basement:—Held, that such user by the employees did not constitute the lift a passenger elevator and impose a duty upon those in charge of it to see that it was better protected than it was. 2. In any event the suppliant was not using the lift as a passenger at the time of the accident, but to transfer mail matter of which he was then in charge. 3. The by-law of the city of Montreal respecting freight and passenger elevators, passed on the 4th February, 1901, did not affect the liability of the Crown in this case. The lift in question was built in 1897, before the enactment of such by-law, and was situated in the post office at Montreal, which building constitutes part of the public property of the Dominion, and so was within the exclusive legislative authority of the Parliament of Canada. *Finigan* v. *The King*, 25 Occ. N. 145.

Negligence of Crown Officials—*Right of Action—Injury to Land—Jurisdiction of Exchequer Court — Prescription.*] — Lands in the vicinity of a government canal were injuriously affected through flooding caused by the negligence of the Crown officials in failing to keep a siphon-tunnel clear and in proper order to carry off the waters of a stream which had been diverted and carried under the canal, and also by part of the lands being spoiled by dumping matter upon it:—Held, reversing the judgment in 21 Occ. N. 277, 7 Ex. C. R. 1, that the owner had a right of action and was entitled to recover damages for the injuries sustained, and that the Exchequer Court of Canada had exclusive original jurisdiction under ss. 16, 23, and 58 of the Exchequer Court Act. Regina v. Filion, 24 S. C. R. 482, approved. City of Quebec v. The Queen, ib. 430, referred to. The prescription established by art. 2261, C. C., applies to the damages claimed by the owner. *Letourneux* v. *The King*, 33 S. C. R. 335.

Non-repair—*Money Voted by Parliament—Discretion of Minister — Jurisdiction of Court—Improvement of Navigation.*]—There is no law of Canada under which the Crown is liable in damages for the mere non-repair of a public work, or for failing to use in the repair of any public work money voted by Parliament for the purposes of such public work. 2. In such a case, whether the repair should be made or the money expended is within the discretion of the Governor in Council or of the Minister of the Crown under whose charge the work is; and for the exercise of that discretion he and they are responsible to Parliament alone, and such discretion cannot be reviewed by the Courts:—Semble, that, although the channel of a river may be considered a public work under the management, charge, and direction of the Minister of Public Works during the time that he is engaged in improving the navigation of such channel under the authority of s. 7 of the Public Works Act, R. S. C. c. 36, it does not follow that once the Minister has expended public money for such a purpose, the Crown is for all time bound to keep such channel clear and safe for navigation, or that for any failure to do so it must answer in damages. *Hamburg American Packet Co.* v. *The King*, 21 Occ. N. 517, 7 Ex. C. R. 150, affirmed 33 S. C. R. 252.

Rifle Range—*Injury to Person.*]—A rifle range under the control of the Department of Militia and Defence is not a "public work" within the meaning of the Exchequer Court Act, 50 & 51 V. c. 16, s. 16 (c). The words "any officer or servant of the Crown" in the section referred to, do not include officers and men of the militia. Judgment in 6 Ex. C. R. 425, 20 Occ. N. 424, affirmed. *Larose* v. *The King*, 21 Occ. N. 327, 31 S. C. R. 206.

IV. Other Cases.

Bounties on Manufacture of "Pig Iron" and Steel — *Statutes — Interpretation.*]—It is a general practice in the art of manufacturing steel to use the iron product of the blast furnaces while still in a liquid or molten form for the manufacture of steel, the hot metal being taken direct from the blast furnaces to the steel mill. Among iron-masters and those who are familiar with the art of manufacturing iron and steel the term "pig iron" has come to mean that substance or material in a liquid as well as in a solid form. A question having arisen as to whether the iron when so used in a liquid or molten form was "pig iron" within the meaning of the term as employed in 60 & 61 V. c. 6 and 62 & 63 V. c. 8:—Held, that the term "pig iron" in the Act mentioned applied to the iron used in the manner described, and that a manufacturer of steel ingots therefrom was entitled to the bounty provided by the said Acts in respect of the manufacture of such iron. *Dominion Iron and Steel Co.* v. *The King*, 23 Occ. N. 1. 8 Ex. C. R. 107.

Contract—*Bailment—Hire of Horses for Construction of Public Work—Loss of Horses—Negligence—Liability — Petition of Right—Demise of Crown.*] — 1. Where the suppliant's goods are in the possession of an officer or servant of the Crown under a contract of hiring made by him for the Crown, the obligation of the hirer in such a case is to take reasonable care of the goods according to the circumstances, and the hirer is liable for ordinary neglect. Where there is a breach of the hirer's obligation in such a case, the Crown is liable under the contract of its officer or servant. 2. Having regard to the circumstances in evidence, the hirer had acted imprudently in continuing the horses on the work after the grazing failed, and the Crown was liable therefor. 3. Wherever there is a breach of a contract binding on the Crown, a petition will lie for damages notwithstanding that the breach was occasioned by the wrongful acts of the Crown's officer or servant. Windsor v. Annapolis R. W. Co. v. The Queen, 11 App. Cas. 607, referred to. 4. The Crown is liable in respect of an obligation arising upon a contract implied by law. Regina v. Henderson, 28 S. C. R. 425, referred to. 5. An action arising out of a contract for the hire of horses to be used in the construction of a public work of Canada lies against the executive authority of the Dominion, and is not affected or defeated by the demise of the Crown.—Semble, that the loss sustained by the suppliant in this case was an "injury to property on a public work" within the meaning of clause C. of s. 16 of the Exchequer Court Act. *Johnson* v. *The King*, 24 Occ. N. 2, 8 Ex. C. R. 360.

Contract — *Inland Revenue Stamps — Breach of Contract—Acceptance by Officer—Recovery of Money Paid—Deduction of Cost of Production—Set-off—Quantum Meruit.*]—Revenue stamps are not articles of merchandise, and have no commercial value. 2. The defendants contracted to print for the Crown certain Inland Revenue stamps from steel plates, but delivered, instead, stamps produced from steel transferred to stone, which were accepted, paid for, and used by an officer of the Crown under the belief that they were produced by the process specified in the contract, the Crown not being bound by the acts of the officer:—Held, that the Crown was entitled to recover back the money paid. —3. Semble, that the defendants could not recover from the Crown on a quantum meruit the fair value of the stamps produced from stone; their right to an allowance therefor would be a right of set-off, which does not exist against the Crown; but the Crown having consented to allow the defendants the fair cost of production without profit, they must accept that or nothing; and the "fair cost of production" meant the fair cost to a competent person with the necessary capital, skill, means, and appliances for producing such stamps. *Rex* v. *British American Bank Note Co.*, 7 Ex. C. R. 119.

Insolvent Bank—*Winding-up Act—Sale of Unrealized Assets — Set-off — Funds in Hands of Receiver-General — Estoppel.*]—Where funds belonging to the suppliants had gone to form part of a fund paid into the hands of the Minister of Finance and Receiver-General, as unadministered assets, in the case of the insolvency of a bank, in proceedings under the Winding-up Act, R. S. C. c. 129, and it was objected that the suppliants were not entitled to such moneys because of judicial decision to the contrary in other litigation in respect to the fund:—Held, that, if it was clear that the matter had been really determined, effect should be given to the estoppel, but that where to give effect to it would work injustice, the Court, before applying the rule, ought to be sure that an estoppel arises by reason of such decision. In this case there was no estoppel. A reference to the Registrar was directed to ascertain what proportion of the fund in the hands of the Minister properly belonged to the suppliants. The rule as to estoppel stated by King, J., in Farwell v. The Queen, 22 S. C. R. 558, referred to. 2. One of the equities or conditions attaching to the sale to H. was that a debtor had a right to set off against his debt the amount which he had at his credit in the bank at the date of its insolvency. It appeared that at the time of the bank's insolvency certain of its debtors had at their credit in the bank's books sums which they would, on payment or settlement of their debts, have a right to apply in reduction thereof, and the suppliants claimed that they were entitled to be indemnified in respect of such reductions out of the fund in the hands of the Receiver-General:—Held, that the suppliants were not entitled to such indemnity. *Hogaboom* v. *The King*, 22 Occ. N. 88, 7 Ex. C. R. 292.

Liability as Common Carrier—*Loss of Acid in Tank Car during Transportation—Contract—Negligence—Costs.*] — The Crown is not, in regard to liability for loss of goods carried, in every respect in the position of an ordinary common carrier. The latter is in the position of an insurer of goods, and any special contract made is in general in mitigation of its common law obligation and liability. The Crown, on the other hand, is not liable at common law, and a petition will not lie against it for the loss of goods carried on its railway, except under a contract, or where the case falls within the statute under which it is in certain cases liable for the negligence of its servants (50 & 51 V. c. 16, s. 16), and in either case the burden is on the suppliant to make out his case. 2. By an arrangement between the consignee of the acid in question and the officers of the Intercolonial Railway, freight charges on goods carried by the latter were paid at stated times each month, and in case anything was found wrong a refund was made to the consignee. In the present case the consignee paid the freight on the acid, amounting to $135, no refund being made by the Crown. This amount was paid to the consignee by the suppliants, and they claimed recovery of the same from the Crown in their petition of right. The evidence shewed that by the arrangement above mentioned the freight was not payable on the transportation of the tank car, but on the acid contained in the car at the rate of 27 cents per 100 pounds of acid:—Held, that the Crown was only entitled to the freight on the number of pounds delivered to the consignee at Sydney; and that the balance of the amount paid by the consignee should be repaid to the suppliant with interest. 3. That, as the suppliants, while succeeding as to part of the amount claimed, had failed on the main issue in controversy, each party should bear their own costs. *Nicholls Chemical Co. of Canada* v. *The King*, 25 Occ. N. 82, 9 Ex. C. R. 272.

Payment for Services as Commissioner—*Servant—Public Office.*]—A person appointed under the provisions of R. S. C. c. 115, as a commissioner to investigate and report upon improper conduct in office of an officer or servant of the Crown, cannot recover against the Crown payment for his services as such commissioner, there being no provision for such payment in that enactment or elsewhere. 2. The service in such a case is not rendered in virtue of any contract, but merely by virtue of appointment under the statute. 3. The appointment partakes more of the character of a public office, than of a mere employment to render a service under contract, express or implied. *Tucker* v. *The King*, 22 Occ. N. 201, 7 Ex. C. R. 351, affirmed 32 S. C. R. 722.

Petition of Right—*Damage to Lands—Subsidence—Release of Claim.*]—In connection with the work of affording better terminal facilities for the Intercolonial Railway at the port of St. John, N. B., the Dominion Government acquired a portion of the suppliant's land and a wharf, the latter being removed by the Crown in the course of carrying out such works. For the lands and wharf so taken by the Crown, the suppliant was paid a certain sum, and he released the Crown from all claims for damages arising from "the expropriation by Her Majesty of the lands and premises, or the construction and maintenance thereon of a railway or railway works of any nature." One of the effects of the removal of the wharf was to leave a wharf remaining on the suppliant's land more exposed than it formerly had been

to the action of the waves and tides; but no sufficient measures were taken by the suppliant to protect his property or to keep it in a state of repair:—Held, that there was no obligation upon the Crown, under the circumstances, to construct works for the purpose of protecting the suppliant's property; and, as the injury complained of happened principally because the suppliant had failed to repair his wharf, the Crown was not liable therefor. *Vroom* v. *The King*, 24 Occ. N. 2, 8 Ex. C. R. 373.

Petition of Right—*Suppliant — Locus Standi.*]—The suppliant applied to be allowed to purchase certain lands under s. 31 of the Land Act, tendering the proper amount therefor. The application was refused on the ground that the lands had been granted to a railway company. The suppliant alleged that such grant was illegally issued and void, and the Crown allowed a petition of right to be brought:—Held, that the suppliant had no locus standi to obtain any relief. *Hall* v. *The Queen*, 7 B. C. R. 89, 480.

Postmaster's Salary—*Allowances — Interest — Civil Service Act.*] — By the Civil Service Act, R. S. C. c. 17, sched. B., a city postmaster's salary, where the postage collections in his office amount to $20,000 and over, per annum, is fixed at a definite sum according to a scale therein provided. No discretion is vested in the Governor-in-Council or in the Postmaster-Gerenal to make the salary more or less than the amount provided. Notwithstanding the statute, it was the practice of the Postmaster-General to take a vote of Parliament for the payment of the salaries of postmasters. For the years between 1892 and 1900, except one, the amount of the appropriation for the suppliant's salary was less than the amount he was entitled to under the statute:—Held, that he was entitled to recover the difference. 2. That the provisions in s. 6 of the Civil Service Act to the effect that "the collective amount of the salaries of each department shall in no case exceed that provided for by the vote of Parliament for that purpose," was no bar to the suppliant's claim, even if it could be shewn that if in any year the full salary to which the suppliant was entitled had been paid, the total vote would have been exceeded. Such provision is in the nature of a direction to the officers of the Treasury who are intrusted with the safe keeping and payment of the public money, and not to the Courts of law. Collins v. United States, 15 Ct. of Clms. 35, referred to. 3. The suppliant was not entitled to interest on his claim. 4. The provision in s. 12 of the Civil Service Amendment Act, 1888, to the effect that "no extra salary or additional remuneration of any kind whatsoever shall be paid to any deputy-head, officer, or employee in the civil service of Canada, or to any other person permanently employed in the public service," does not prevent Parliament at any time from voting any extra salary or remuneration, and where such an appropriation is made for such extra salary or remuneration, and the same is paid over to any officer, the Crown cannot recover it back. *Hargrave* v. *The King*, 22 Occ. N. 427, 8 Ex. C. R. 62.

Public Officer—*Assignment of Salary—Public Policy.*]—The provisions respecting the assignments of choses in action found in R. S. O. c. 51, s. 58 (5), (6), are not binding upon the Crown as represented by the government of Canada. 2. On grounds of public policy the salary of a public officer is not assignable by him. 3. Neither the librarian of Parliament nor the Auditor-General of Canada has power to bind the Crown by acknowledging explicitly or implicitly an assignment of salary by an officer or clerk employed in the library of Parliament. *Powell* v. *The King*, 25 Occ. N. 140, 9 Ex. C. R. 364.

Return of Moneys Paid by Mistake —*Action for.*] — The suppliant brought his petition of right to recover from the Crown the sum of $190, which he alleged he paid under mistake to the Crown in settlement of an information of intrusion in respect of certain lands occupied by him. He also claimed $500 for damages for the loss which he alleged resulted to him on the sale of the lands by reason of the proceedings taken against him by the Crown:—Held, that the suppliant's petition disclosed no right of action against the Crown, and that a demurrer should be allowed. Moore v. Vestry of Fulham, [1894] 1 Q. B. 399, followed. *Paget* v. *The King*, 21 Occ. N. 280, 7 Ex. C. R. 50.

CURATOR.

See BANKRUPTCY AND INSOLVENCY.

CURTESY, ESTATE BY.

See HUSBAND AND WIFE.

CUSTOMS ACT.

See REVENUE.

CUSTOMS DUTIES.

See REVENUE.

DAM.

See WATER AND WATERCOURSES.

DAMAGES.

Assessment of — *Writ of Summons — Statement of Claim—Non-conformity—Substituted Service — Order for.*]—By the indorsement on the writ of summons the plaintiff claimed damages for breach of an agreement by the defendant to convey certain land to the plaintiff. By the statement of claim and the plaintiff's evidence it appeared that her real claim was for breach of a subsequent parol contract. Under an order of a local Judge service of the writ and statement of claim were effected by posting them on the

30th November, 1900, in an envelope addressed to the defendant at a place in Ontario. On the 28th December, 1900, judgment was entered for the plaintiff for default of appearance to the writ, for damages to be assessed. No proceedings were taken upon the statement of claim either to enter judgment or a default note:—Held, that, according to the practice, no assessment could be made except upon the judgment for default of appearance, for nothing else was ripe for assessment; and the plaintiff could not have damages pursuant to the claim indorsed on the writ, because it appeared by the evidence that she had consented to the defendant conveying the land in breach of his covenant. The action was, therefore, dismissed, but without costs and without prejudice to a new action being brought upon the causes of action set forth in the statement of claim:—Semble, that the order for service by posting should not have been made, the material being quite insufficient, and there being no probability that the papers would reach him. *Alexander* v. *Alexander*, 21 Occ. N. 338, 1 O. L. R. 639.

Breach of Contract—*Delivery of railway bonds.*]—*Ray* v. *Port Arthur, Duluth, and Western R. W. Co., Ray* v. *Middleton*, 2 O. W. R. 345, 3 O. W. R. 160, 724.

Contract—*Breach—Assessment by Judge—Evidence—Guess — Appeal — Concurrent Findings of Courts Below.*]—The evidence in an action for breach of contract being insufficient to enable the trial Judge to assess damages, he was obliged to guess, as he stated, and his guess was $5,000. This was affirmed by a provincial appellate tribunal. The Supreme Court of Canada allowed an appeal and dismissed the action, the majority holding that the result of the absence of evidence was that the damages could be no more than nominal. Armour, J., dissenting, was of opinion that there should be a new trial. *Williams* v. *Stephenson*, 33 S. C. R. 323.

Death of Child—Fatal Accidents Act—Quantum of damages—Assessment by jury—Motion for new trial. *Renwick* v. *Galt, Preston, and Hespeler Street R. W. Co.*, 6 O. W. R. 413, 11 O. L. R. 158.

Death of Husband—*Estimate of Damages—Insurance Moneys Received by Plaintiff.*]—In an action by the widow of the victim for damages resulting from a quasi-délit, the Court or jury may take into consideration the amount of insurance paid to the plaintiff in their estimate of the damages which will be allowed, and it is open to the author of the injury to plead that the plaintiff has already received a considerable amount for insurance on the life of her husband. *Dominion Bridge Co.* v. *Konwaketasion*, 7 Q. P. R. 232.

Death of Husband—*Negligence—Solatium—Protection.*]—A widow in an action for the death of her husband by the defendant's negligence cannot claim damages as solatium doloris. 2. She may claim damages for the loss of protection and personal care of her husband. *Renaud* v. *Furness, Whithy & Co., Limited*, 6 Q. P. R. 76.

Death of Son—*Elements of Damages—Cost of Bringing Up.*]—A father suing for damages for the death of his son cannot include in the damages sustained, the amounts paid by him for the bringing up, clothing, maintenance, and education of the son, or for similar expenses. *Beaudet* v. *William Grace Co.*, 7 Q. P. R. 82.

Death of Son—Fatal Accidents Act—Negligence—Admissibility of evidence to shew intention of deceased to give financial aid—Disposition of deceased's mind—Financial ability—Excessive damages — Reduction—Consent of both parties—New trial. *Stephens* v. *Toronto R. W. Co.*, 6 O. W. R. 657, 11 O. L. R. 19.

Death of Son—*Measure of Damages—Dependence of Father—Misdirection—Reduction—New Trial.*]—See *Central Vermont R. W. Co.* v. *Franchère*, 35 S. C. R. 68.

Deceit—Measure of—Purchase of shares in company—Ascertainment of value—Subsequent events. *Pohnl* v. *Miller*, 5 O. W. R. 358.

Distribution of—*Tort Causing Death—Action by Widow—Intervention of Parent.*]—Where the wife of a person who has died in consequence of a tort or quasi-tort, has begun, by virtue of Art. 1056, C. C., an action for damages against the tort-feasors, the father or other relation of the deceased mentioned in such Article may intervene in the action to claim from the defendants damages for the loss which he suffers personally on account of such death, and may even, by such intervention, contest the right of the plaintiff to the damages which she claims. *Morin* v. *Mills*, Q. R. 18 S. C. 196.

Enticing and Harbouring Plaintiffs' Servants—Quantum of damages — General damage — Evidence — Assessment by referee—Appeal. *Gurney Foundry Co.* v. *Western Foundry Co.*, 6 O. W. R. 959.

Excessive Damages—*Misdirection—Appeal to Supreme Court of Canada—Reduction—Consent—New Trial.*]—Where there was misdirection as to the assessment of damages merely, and it appeared that the damages assessed by the jury were grossly excessive, the Supreme Court of Canada made a special order, applying the principle of art. 503, C. C. P., directing that the appeal should be allowed and a new trial had to assess damages, unless the plaintiff consented to the damages being reduced to a stated sum. *Central Vermont R. W. Co.* v. *Franchère*, 35 S. C. R. 68.

Excessive Damages—*Misdirection—New Trial.*]—If, in charging a jury, the Judge makes a statement calculated unnecessarily to magnify the importance of the matter in dispute, and suggests excessive damages, a new trial will not be granted, even though the Judge was in error in making the statement, if it appears from the verdict found that the jury, in assessing the damages, were not influenced by the charge. *Cormier* v. *Boudreau*, 35 N. B. Reps. 645.

Excessive Damages — *Trespass—Evidence—Findings of Jury—Equal Division of Court—Costs.*]—An action to recover damages for a wrongful and violent entry by

the defendants' servants upon the plaintiff's property and the wrongful seizure and appropriation of the plaintiff's chattels. The jury found that the defendants, by their servants, took possession of the property illegally and in violation of their agreement, and that the plaintiff was entitled to the value of the property taken, and they assessed the damages at $730, for which judgment was given by the trial Judge with costs. The evidence as reported did not disclose proof of the value of several of the chattels for the taking of which damages were claimed, and it did not appear anywhere how the $730 was made up. Upon a motion by the defendants to set aside the judgment and for a new trial:—Held, per Meagher and Ritchie, JJ., that the evidence of damage which was before the jury not having been reported to the Court, and in view of the violent and illegal manner of entry upon the premises, the Court was not in a position to decide that the damages were excessive. Per Townshend and Graham, JJ., that the damages should be reduced to conform with the proof of loss suffered disclosed in the evidence before the Court. Owing to the equal division of opinion, the motion was dismissed, but without costs. *Johnston* v. *Dominion Steel and Iron Co.*, 21 Occ. N. 311.

Expropriation of Land—*Assessment—Reservation of Recourse for Future Damages—Res Judicata—Right of Action.*]—A lessee of premises used as an ice house recovered damages from a city corporation for injuries by the expropriation of part of the premises. In his statement of claim he had expressly reserved the right of further recourse for damages. In an action brought after his death by his universal legatee to recover damages for loss of the use of the ice house during the unexpired term:—Held, that the reservation did not preserve any further right of action in respect of the expropriation, and the plaintiff's action was properly dismissed, as, in such cases, all damages capable of being foreseen must be assessed once for all, and a defendant cannot be twice sued for the same cause. City of Montreal v. McGee, 30 S. C. R. 582, and Chaudière Machine and Foundry Co. v. Canada Atlantic R. W. Co., 33 S. C. R. 11, followed. *Anctil* v. *City of Quebec*, 33 S. C. R. 347.

Flooding Land—*Measure of Damages—Duty of Claimant to Diminish.*]—Where there is, in the power of the person complaining, an obvious and inexpensive method of reducing, diminishing, or wholly doing away with the damages complained of, e.g., by a short transverse drain to prevent flooding of land, it is his duty to adopt it, and, in default of his doing so, he is only entitled to recover such loss as he would have suffered if he had taken proper measures to prevent or diminish the damages. *Filiatrault* v. *Village of Coteau Landing*, Q. R. 23 S. C. 62.

Inadequacy—*New Trial — Compromise Verdict.*]—A new trial on the ground of the insufficiency of the damages will not be granted unless it appears clearly to the Court that the smallness of the damages has arisen from mistake upon the part of either the Judge or jury, or from some unfair practice on the part of the defendant.—A verdict will not be set aside on the ground that it is a compromise verdict if it can be justified upon any hypothesis presented by the evidence. *Currie* v. *St. John R. W. Co.*, 36 N. B. Reps. 194.

Injury to Property—*Elements of Damages—Fees of Expert Witnesses — Notarial Protests.*]—The fees of expert witnesses employed to make examinations of property, plans, etc., necessary for the proof of the plaintiff's allegations of damage to property caused by the defendants' illegal acts, and also the costs of notarial protests, form part of the damages which the plaintiff is entitled to recover from the adverse party. *Décarie* v. *Town of Montreal West*, Q. R. 26 S. C. 16.

Lord Campbell's Act—*Action — Bar—Life Insurance.*]—The fact that a widow has, upon the death of her husband, obtained the proceeds of a policy of insurance upon his life, is not a bar to her recovering damages from the person responsible for the accident which caused his death. *Konwaketasion* v. *Dominion Bridge Co.*, 5 Q. P. R. 320.

Lord Campbell's Act — *Apportionment between Widow and Children — Other Provision for Widow.*] — An action brought against a railway company by a widow on behalf of herself and four infant children, aged respectively seven, five, three, and one year, to recover damages for the death of her husband through the company's alleged negligence, was settled by the company paying $4,800. On application to a Judge, the amount was apportioned by giving the widow $1,200, and each of the children $900, the widow also to be paid for the children's maintenance $200 a year half-yearly for three years, the fact of the widow having already received $1,000 for insurance on the husband's life being taken into consideration. *Burkholder* v. *Grand Trunk R. W. Co.*, 23 Occ. N. 155, 5 O. L. R. 428, 2 O. W. R. 267.

Lord Campbell's Act—*Death of Relative—Reasonable Expectation of Pecuniary Benefit.*]—The parents and sisters of a man who was killed by an electric shock whilst working in the defendants' works, and in consequence, as it was alleged, of defects in the appliances supplied by the defendants at the works, sued for damages for his death. The deceased, who was the only son of the rector of a small parish near Montreal, with an income of about $600 a year, had been given a college education and had returned home when about 21 years old. For a time he remained at home, earning nothing. Then he spent some time in the insurance business in Vermont. Then, on account of his father's illness, he went home, but soon left for Manitoba in search of occupation. There, after working at several things for about three years, he was employed by the defendants to manage their electric works at a salary of $115 a month, out of which he had to pay $45 a month to an engineer and sometimes to hire other assistance. He had been thus employed about three months when he met his death. The parents were getting old and were in failing health and it was not shewn whether they had or had not any means beyond the income of $600 a year. The deceased contributed nothing to the support of

the family during all the time he was in Manitoba; but, according to the father's evidence, he had been a great help to him when at home, and had assisted him in many ways in his parish work and in matters of business, and was "a noble, faithful son," efficient in every way, steady and industrious, and "an affectionate son and brother?"—Held, that there was nothing in all this to warrant the inference of a reasonable expectation of any pecuniary benefit to the plaintiffs from a continuance of the life of the deceased, and that the verdict of the jury in favour of the plaintiffs should be set aside. Sykes v. North Eastern R. W. Co., 44 L. J. C. P. 191, and Mason v. Bertram, 18 O. R. 1, followed. *Davidson* v. *Stuart*, 22 Occ. N. 266, 14 Man. L. R. 74.

Lord Campbell's Act—*Pecuniary Loss from Death of Son—Negligence—Evidence—Judge's Charge—Excessive Damages—New Trial.*]—In an action under Lord Campbell's Act for the benefit of the father of a man who lost his life as alleged by the negligence of the defendants, evidence was given to shew that the father, who was about 70 years old, was unable to earn his own living; that the son, who was 26, had always lived with his father, and for many years had paid for his board and lodging; that for the 15 months previous to his death, he had paid nothing, because, having gone into business for himself, his father wished him to keep the money to put into the business; that when the son went into business, the father advanced him $700; that the sale of the son's business realized $1,100, of which the father got $400 on account of his advance. The trial Judge left it to the jury in general terms to estimate what, if any, pecuniary damage the father had sustained by the death of his son; and the jury found a verdict for $3,500:—Held, that the amount of the verdict shewed either that the charge was too general in its terms, or the jury misunderstood the principles upon which damages should be assessed in cases such as this, and, therefore, that there must be a new trial on the question of damages, and, as the evidence of negligence on the part of the defendants was not altogether satisfactory, and the finding of the jury on the question of the damages did not entitle their opinion on the question of negligence to much weight, there must be a new trial on this point as well. 2. That, as a claim for $300, the balance due the father upon his advance, had not been mentioned in the particulars delivered under the Act, and was not referred to either in the plaintiff's opening, the Judge's charge, or in any other part of the case, it was impossible to say that the jury in assessing the damages had included this item; therefore, even admitting this claim to be a proper element of damage in cases under the Act, it must be submitted to the consideration of another jury. 3. That, outside of the debt, there was sufficient evidence to go to the jury of a pecuniary loss to the father by the son's death. *Runciman* v. *Star Line S. S. Co.*, 35 N. B. Reps. 123.

Measure of—*Accident to Person—Negligence of Crown's Servants—Pecuniary Benefit.*]—In the case of death resulting from negligence, and an action by the party entitled to launch the same under the provisions of R. S. N. S. 1900 c. 178, s. 5, the damage should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life. 2. Such party is not to be compensated for any pain or suffering arising from the loss of the deceased; or for the expenses of medical treatment of the deceased or for his burial expenses, or for family mourning. Osborn v. Gillett, L. R. 8 Ex. 88, distinguished. *McDonald* v. *The King*, 21 Occ. N. 581, 7 Ex. C. R. 216.

Measure of—*Breach of Contract—Evidence—New Trial.*]—In an action brought by the plaintiff to recover an amount claimed by him for work done and materials supplied in constructing a mill for the defendants, the defendants counterclaimed for damages arising from the defective performance of the work which the plaintiff was employed to do:—Held, that the defendants were entitled to damages suffered by reason of the loss of the use of the mill during the sawing season, but, as there was no evidence to fix the amount, and as damages were allowed to which the defendants were not legally entitled, there must be a new trial:—Held, that the plaintiff was not liable for damages not in contemplation of the parties, or not being the immediate result of the breach of contract, such as additional cost of sawing, or logs sold at a loss. *Bruhm* v. *Ford*, 33 N. S. Reps. 323.

Nervous Shock — *Impact without Outward Injury—Railway—Findings of Jury.*]—Action for damages for negligence. Plaintiffs (husband and wife) were being driven in an enclosed omnibus when crossing the tracks of the defendants; the omnibus was caught between the two parts of a freight train which was about to be coupled, when the driver of the omnibus was caught between the two sections of the train, and while considerable damage was done to the omnibus, neither of the plaintiffs suffered visible bodily injury, beyond a few slight bruises, but both complained of serious injury to their nervous systems as a result of fright:—Held, action should be dismissed as damages were result of mental shock only. Henderson v. Canada Atlantic R. W. Co., 25 A. R. 437, and Victorian Railway Commissioners v. Coultas, 13 App. Cas. 222, followed, but, in view of the unsatisfactory state of the law and the conflict in the decisions, no costs were allowed. *Geiger* v. *Grand Trunk R. W. Co.*, 5 O. W. R. 434, 6 O. W. R. 482, 10 O. L. R. 511.

Nervous Shock — *Personal Injuries—Damages not Severable—Judgment—Appeal—Waiver.*]—The movable portion of a fence erected by the defendant fell upon the plaintiff while passing along the street, and caused injuries for which damages were claimed. The trial Judge assessed the damages at $25, and ordered judgment in favour of the plaintiff for that amount. The plaintiff's solicitor took an order for judgment for the amount awarded, taxed his costs, and immediately demanded payment from the defendant under threat that, if not paid, judgment would be entered, and execution issued. Subsequently the plaintiff appealed from the judgment, in so far as it restricted the damages awarded to external injuries suffered by the plaintiff, and refused to allow damages for shock consequent upon such external injuries:—Held,

dismissing the appeal, that, in order to succeed, the plaintiff must have the whole judgment set aside, for errors alleged in the assessment of damages; that the case was not one in which the damages were severable; and that, if the trial Judge erred in not awarding greater damages, the only course open to the plaintiff was to appeal. *Flinn* v. *Keefe*, 37 N. S. Reps. 67.

Nervous Shock—*Physical Injury—Liability for.*]—Fear or nervous shock resulting in physical injury may render him who occasions it liable in an action for damages. Fear is not of itself a basis of an action for damages, because ordinarily it does not produce any physical injury, but if such injury results there is liability. Victorian Railway Commissioners v. Coultas, 13 App. Cas. 222, discussed. *Montreal Street R. W. Co.* v. *Walker*, Q. R. 13 K. B. 324.

Nuisance—*Exemplary Damages — Evidence—Appeal.*] — Where there has been a manifest disturbance of enjoyment and violation of rights of ownership, e.g., by the smoke, noise, and vibration caused by the operation of machinery on an adjoining property, the person so disturbed in his enjoyment is, even without proof of any precise amount of damages suffered, entitled to nominal or exemplary damages. 2. Moreover, on a question of the appreciation of damages, the Court of Appeal will not disturb the award of the Court below, in the absence of any special ground for doing so. *Montreal Street R. W. Co.* v. *Gareau*, Q. R. 13 K. B. 12.

Public Work — *Injury to the Person—Negligence—Aggravation of Injury by Unskilful Treatment—Crown.*]—Where a person who is injured through the negligence of a servant of the Crown on a public work, voluntarily submits himself to unprofessional medical treatment, proper skilled treatment being available, and the natural results of the injury are aggravated by such unskilled or improper treatment, he is entitled to such damages as would, with proper treatment, have resulted from the injury, but not to damages resulting from the improper treatment he subjected himself to. *Vinet* v. *The King*, 25 Occ. N. 139, 9 Ex C. R. 352.

Railway Accident — *Nervous Shock.*]—A railway company is liable, in an action by one injured in an accident while a passenger in the company's train, for damages and pecuniary loss consequent upon a fright resulting in a shock to the nervous system causing physical injury, if the fright was the result of the accident, and was reasonable and natural. *Kirkpatrick* v. *Canadian Pacific R. W. Co.*, 35 N. B. Reps. 598.

Reduction — *Consent—Costs.*]—The defendant company, instead of paying to the plaintiff the amount of damages sustained by a fire in her bakery, undertook to repair the damage, and on account of the faulty manner in which the work was carried out the plaintiff sued for the amount of the damages caused by the fire, and also for damages in respect of loss occasioned by reason of being unable to carry on the business. The plaintiff's chief witness stated that the injury to the business was $3,000, and the jury returned a verdict for her for that amount. On appeal the full Court, being of opinion that the amount of the damages was excessive, with the plaintiff's consent, reduced it to $1,000. Precise directions should have been given to the jury as to what they should have taken into account in estimating the damages, and, as the case had been allowed to go to the jury without such directions, without objection by the defendants' counsel and without contradiction of the statement as to the damage being $3,000, no costs of the appeal were allowed. *Murray* v. *Royal Insurance Co.*, 11 B. C. R. 212.

Reduction — *Consent—New Trial as to Quantum of Damages Only.*]—Court of Appeal pronounced judgment (5 O. W. R. 572) directing a new trial unless plaintiff consented to reduce the amount of the judgment recovered by plaintiff at the trial to $4,000, holding the amount of damages excessive. The certificate of this judgment not having issued, the Court reviewed the case and having regard to Con. Rule 786 ordered a new trial confined to the question of quantum of damages only. Watt v. Watt [1905] A. C. 115, followed, which held the Court had no jurisdiction to order new trial (without defendant's consent), depending upon the plaintiff reducing the damages recovered. *Hockley* v. *Grand Trunk R. W. Co.*, 6 O. W. R. 57, 10 O. L. R. 363.

Street Railways—Personal injuries — Excessive damages—New trial. *Witty* v. *London Street R. W. Co.*, 1 O. W. R. 288, 2 O. W. R. 578.

Trespass — "*Wilful*" *Acts—Measure of Damages—Judgment.*[—In an action of trespass for taking coal from a mine the judgment declared that the plaintiffs were entitled to recover damages from the defendants for and in respect of the wrongful and wilful trespass and conversion complained of in the plaintiffs' statement of claim: — Held, that "wilful" was not intended as an adjudication that the trespasses were wilful in the sense that would render the defendants liable to have damages assessed against them on the sterner rule; and, the defendants having entered the mine under a mistaken idea as to their rights, the milder rule was applied. The measure of damages should be the value of the coal at the mouth of the mine, less the cost of digging (hewing) it and transporting it there as a merchantable article. *Fleming* v. *H. W. McNeil Co.*, 23 Occ. N. 312.

Warranty — *Breach—Manufacture and Sale of Machine—Defects—Loss of Profits—Property not Passing.*] — The plaintiffs agreed to manufacture a goring loom fit for certain special work required by the defendants, and to deliver it by a certain time. The machine was not delivered until after the time fixed, and when delivered did not have certain fittings which were necesssary for its proper working, and there were certain defects in it which the defendants, after applying to the plaintiffs to remedy them, had to rectify themselves. In an action for the price of the loom:—Held, that the defendants should be allowed the sums paid in supplying the missing portions of the machine and for the services of an expert to put it in working

order; that, notwithstanding that the property in the machine remained in the plaintiffs until paid for, the plaintiffs never had supplied a loom properly constructed to do the work required of it, and to do which the plaintiffs well knew the machine had been ordered; that there was a warranty that it should be fit for the purpose; that the defendants were prevented from earning the profits they would have earned if the loom had been complete; and that, under the circumstances, the plaintiffs were liable to make such profit good. *Crompton and Knowles Loom Works* v. *Hoffman*, 23 Occ. N. 188, 5 O. L. R. 554, 1 O. W. R. 717, 2 O. W. R. 273.

See ACCOUNT—APPEAL—ASSAULT — ATTACHMENT OF DEBTS—BILLS OF SALE AND CHATTEL MORTGAGES — BOND — CHOSE IN ACTION, ASSIGNMENT OF—COMPANY — CONTRACT—COURTS—DEFAMATION — EXECUTORS AND ADMINISTRATORS—HUSBAND AND WIFE —INJUNCTION—INTEREST — LANDLORD AND TENANT—LUNATIC—MASTER AND SERVANT —MUNICIPAL CORPORATIONS—NEGLIGENCE— NUISANCE—PARTICULARS—PARTIES — PARTITION—PLEADING — RAILWAY — SALE OF GOODS—SHERIFF—SHIP—STREET RAILWAYS —TIMBER — TRESPASS TO LAND — TRESPASS TO PERSON—VENDOR AND PURCHASER — WASTE—WATER AND WATERCOURSES — —WAY—WRIT OF SUMMONS.

DEATH OF JUDGE.

See TRIAL.

DEBENTURES.

Company's Mortgage Bonds—*Interest —Action for— Evidence.*]—An action for interest upon a company's mortgage bonds may succeed upon production of the coupons, without the bonds from which they have been detached. *Connolly* v. *Montreal Park and Island R. W. Co.*, Q. R. 20 S. C. 1.

Illegal Issue—*Innocent Holder — Liability of School Trustees—Negligence—Finding of Jury—Charge.*]—A debenture of the defendants payable to bearer sealed with their corporate seal and signed by their chairman and secretary, was allowed to get into circulation without the authority or knowledge of the defendants, and without their receiving any value therefor. It was finally purchased by the plaintiff before maturity, who took it in good faith and gave full market value for it. In an action brought upon two of the interest coupons attached to the debenture, the trial Judge asked the jury the two following questions (among others), which were answered in the affirmative: "Did the bond come into the hands of the plaintiff as an innocent holder for value through the carelessness and neglect of the defendants, or those of their officers whose duty it was to have the bonds properly executed and issued, and in whose hands or custody the bonds should be detained until delivered to bona fide purchasers?" "Do you find that the board of school trustees, or their officers, were guilty of such negligence in connection with this bond, as that in your opinion it would be inequitable and unjust that the defendants should be permitted as against the plaintiff to set up a defence that the bond was not duly executed, or the issue thereof authorized by the board?" A verdict was thereupon entered for the plaintiff:—Held, that the verdict was rightly so entered. 60 V. c. 24, s. 159, in reference to the trial Judge unneccessarily expressing his own opinion upon the facts, commented upon. *Robinson* v. *St. John School Trustees*, 34 N. B. Reps. 503.

See ACCOUNT—COMPANY—MUNICIPAL CORPORATIONS—REGISTRY LAWS — SCHOOLS — TRUSTS AND TRUSTEES.

DECEIT.

See BILLS OF EXCHANGE AND PROMISSORY NOTES—CONTRACT—PRINCIPAL AND AGENT.

DECLARATION.

See PLEADING.

DECLARATORY JUDGMENT.

See JUDGMENT.

DEDICATION.

See MUNICIPAL CORPORATIONS.

DEED.

Absolute Conveyance of Land—Collateral security—Redemption—Waiver—Counsel—Mistake at Trial. *Sherlock* v. *Wallace*, 1 O. W. R. 54, 393.

Acknowledgment—*Justice of the Peace —Territorial Jurisdiction — Execution and Delivery of Deed.*]—A justice of the peace has no power to take an acknowledgment of a deed out of the county for which he is appointed a justice, and an acknowledgment stating that it was taken before W. E., "one of Her Majesty's justices in and for the county of V.," without anything further to shew that it was taken in the county, is bad; and an acknowledgment that the grantor "signed and sealed the within instrument," without stating that it was delivered or executed, is bad. *Tobique Salmon Club* v. *McDonald*, 36 N. B. Reps. 589.

Action to Set Aside — Improvidence —Absence of advice—Consideration—Costs. *Frank* v. *Hohl*, 2 O. W. R. 489.

Action to Set Aside — Improvidence —Lack of independent advice — Lease executed on Sunday—Part performance—Parol agreement. *Duprat* v. *Daniel*, 1 O. W. R. 561, 2 O. W. R. 940.

Action to Set Aside—Undue influence —Mental incapacity—Improvidence — Delay in bringing action—Costs. *Kellens* v. *Waffle*, O. W. R. 892.

Alteration after Execution—*Addition of Provision for Interest — Inscription en Faux.*] — The defendant inscribed en faux against the copy of a deed of donation filed in the suit and also against the original minute, alleging that the words "avec intérêt légal" had been inserted illegally after the execution of the deed. The terms of the deed had been discussed between the parties during two days, and there was a strong presumption that the subject of interest on the instalments payable under the deed had not been overlooked. In the original minute the words "avec intérêt légal" were added at the end of a line where there was barely space to crowd them in and moreover these words did not appear in a copy made by the notary a few days after the execution of the deed: — Held, that, under the circumstances and the facts apparent on the face of the original minute, the words "avec intérêt légal" constituted an addition (ajouté), which is null under the law regarding the execution of notarial instruments unless it be clearly identified or confirmed by the contracting parties; R. S. Q. art. 3648. *Nadon* v. *Auclair*, Q. R. 9 Q. B. 462.

Condition Subsequent — *Breach—Forfeiture—Assignment by Vendor before Revesting—Validity.*]—On the grant of a fee simple defeasible on breach of a condition, no estate is left in the grantor, but only a possibility of reverter, and, therefore, before breach there is nothing capable of assignment. After breach, where the deed does not provide for ipso facto forfeiture, the fee does not revest automatically, and until revesting by suit or otherwise there is nothing capable of assignment. Land was conveyed subject to certain conditions to be performed by the purchasers, and, in default of the performance of such conditions, the purchasers were to hold the land in trust for the grantor, and reconvey to him, notwithstanding that any prior breach may have been waived. The conditions were not performed. In an action by the assignee under seal of the vendor for a declaration that the purchasers held the land in trust for him, and for an order for the conveyance thereof to him:—Held, that after the conveyance there was no estate left in the grantor, but only a possibility of reverter, which was not assignable, and no action lay. *Clarke* v. *City of Vancouver*, 10 B. C. R. 31.

Construction—*Gravel — Subsequent Deposit.*]—In 1856 the owner of land by deed conveyed to a railway company "the gravel situate and being on and comprised within a certain part" of the land, with the right of way for a railway track and the free and unobstructed use thereof, and covenanted for quiet possession, free from incumbrances, of the gravel and other the premises conveyed: —Held, that the gravel deposited on the land since the date of the deed, owing to the action of the waters of a lake, did not pass by the deed. *Mann* v. *Grand Trunk R. W. Co.*, 21 Occ. N. 30, 32 O. R. 240. (See the next case.)

Construction—*Gravel—Deposit — New Trial.*]—On appeal by the defendants from the judgment in 32 O. R. 240, 21 Occ. N. 30, the Court, on the ground that there had been a misunderstanding as to the extent of the defendants' admission as to the removal of gravel, gave them the option of a new trial upon payment of the costs of the former trial and of the appeal, and in default dismissed the appeal with costs. *Mann* v. *Grand Trunk R. W. Co.*, 21 Occ. N. 226, 1 O. L. R. 487, 1 O. W. R. 230, 2 O. W. R. 361.

Construction — *Reservation — Right of Way.*]—J. H., sole owner and in possession of lot 267, sold to J. P. a certain parcel of land situated in the parish, etc., containing, etc., and bounded, etc., and being the northeast part of the lot 267, "with a reservation in favour of H. D., present for himself and his ayant cause, of twenty feet in the alley which is upon the land sold leading from the public road running south. H. D., although the act of sale recited that he was present, and although in fact he was present with the parties, did not sign it, and was not called upon to do so:—Held, that, in view of the ambiguity of the terms of the contract, and in order to give effect according to what appears to have been the intention of the parties, in the special circumstances shewn by the evidence, the clause containing the reservation should be construed thus: "With a reservation in favour of H. D. of the use of the alley which is upon the land sold for a length of twenty feet leading from the public road. *Dumais* v. *Thibault*, Q. R. 10 Q. B. 7.

Construction—Temporary grant of strip of land—Erection of building—Destruction or damage by fire—"Shall remain standing"—Rebuilding or repair. *Christie* v. *Cooley*, 4 O. W. R. 79, 6 O. W. R. 214.

Conveyance of Land — Action to set aside — Contest as to execution by person since deceased—Conflicting evidence—Action dismissed without prejudice to a new action. *McDonald* v. *McDonald*, 2 O. W. R. 708, 3 O. W. R. 552.

Conveyance of Land—Cutting down to mortgage—Account—Reference. *O'Brien* v. *Cornell*, 2 O. W. R. 544, 3 O. W. R. 161.

Conveyance of Land—*Recital—Garantie — Property not Passing — Cutting Down to Security—Presumption.*]—When it is recited in an acte d'obligation that an immovable is transferred to a creditor by way of garantie, it must be presumed, in the absence of a clear and precise agreement to the contrary, that the parties have intended to make a contract of security only, and that what the debtor intends to pass to his creditor is the possession of and not the absolute property in the immovable. 2. The creditor does not become the proprietor of the immovable if it is not paid for, but has only the right to possession for the purposes of his security, to receive the profits, and to apply them first upon the interest and then upon the principal amount. *Eglauch* v. *Labadie*, Q. R. 21 S. C. 481.

Conveyance of Land — Setting aside — Undue influence—Parent and child—Fraud—Consideration. *Vandusen* v. *Young*, 1 O. W. R. 55.

Conveyance of Land—Undue influence —Full disclosure. *Christian* v. *Poulin*, 1 O. W. R. 275.

Cutting Down to Mortgage—Absolute deed in form with—Bond to reconvey—Held only a mortgage. *Burr* v. *Bullock*, 2 O. W. R. 428.

Cutting Down to Mortgage—Improvidence—Fraud. *Holness* v. *Russell*, 1 O. W. R. 655, 744, 2 O. W. R. 334.

Cutting Down to Mortgage—Redemption—Condition—Revival of debt thrown off —Costs. *Rutherford* v. *Warbrick*, 2 O. W. R. 274.

Delivery—Retention by grantor—Possession by grantee—Evidence—Improvements—Executor and trustee — Breach of trust. *Humphries* v. *Aggett*, 1 O. W. R. 33.

Description — *Ambiguity — Charge on Homestead before Patent — Dominion Lands Act.*]—The written contract signed by the defendant for the purchase of machinery from the plaintiff provided for a lien or charge upon the "N. E. ¼ Section 2, Township 4, Range 14," without stating whether the range meant was 14 west or east of the principal meridian, both of which ranges are in this province, but the evidence shewed that it was range 14 west that was intended:—Held, that the expression "N. E ¼" sufficiently designated the north-east quarter, as such contractions are in daily use. 2. That in this case the description was sufficient to warrant the order for a charge on the N. E. ¼ 2-4-14 W.; for, (a) if judicial notice should be taken of the surveys that had been already made in Manitoba and of those which had not been made, then, as township 4 in range 14 east had not been surveyed into sections, township 4 in range 14 west must have been the one intended by the contract, and there was no ambiguity requiring evidence to explain; and (b), if judicial notice of such surveys could not be taken, then the ambiguity, if any, was a latent one, and oral testimony was admissible to ascertain what land was meant. It was suggested in argument that the defendant was merely a homesteader under the Dominion Lands Act, and had not received his patent, and that, under s. 42 of that Act, he could not validly create a charge on the land:—Held, that the defendant could not raise such an objection in this action, and that the plaintiff was entitled to an order for the charge on the land and the chance of realizing on it, though he might afterwards be defeated by the action of the Dominion Government. *Abell* v. *McLaren*, 21 Occ. N. 453, 13 Man. L. R. 463.

Description—*Boundary — Medium Filum Aquæ—Ascertainment of Centre Line.*]—The plaintiff and the defendant were owners of adjoining farms; the division line was a small stream. The dispute was as to the ownership of an island in the stream. Down to the 5th March, 1883, both parcels were owned by R., who on that day conveyed to the defendant the land lying south-east of the stream, describing it by metes and bounds, the boundary on the north-west being "the southerly edge of the stream." In 1884 R. conveyed to the plaintiff the residue of the lot by a description which expressly crossed the stream and ran along its south-easterly edge. At the time of this action there were signs of a channel on each side of the island, but the main stream at all times, and the whole stream in the dry seasons, flowed in a channel on the north-west side. It was contended by the plaintiff that in 1883 and 1884 the stream ran very largely in the southerly channel, and by the plaintiff that the northerly channel had always been the only regular one:—Held, that the description in the conveyance to the defendant entitled him to the medium filum aquæ as his boundary, and the plaintiff's deed, being subsequent, could not entitle him to claim anything beyond that boundary. The boundary line was, therefore, the centre line of the stream, and the position of that line was the matter to be determined. The centre line of whichever channel was the main channel in 1883 would be the centre line of the stream. The question left to the jury was whether there was any southerly channel at all, and they were told that, if they found there was, the plaintiff was entitled to succeed. They should have been asked to find, if there were two channels, which was the main channel in 1883. *Wason* v. *Douglas*, 21 Occ. N. 521, 1 O. W. R. 552, 2 O. W. R. 688, 3 O. W. R. 456.

Description — *Falsa Demonstratio — Water Rights.*] — By an indenture of lease lessees were given the right to "a sufficient supply of water for the purpose of propelling a wheel not exceeding forty-four inches in diameter, being the size of the present wheel upon the premises." The "present wheel" was forty inches in diameter; — Held, that the governing words were "not exceeding forty-four inches in diameter," and that the subsequent words "being the size of the present wheel upon the premises," should be rejected as falsa demonstratio. *Brantford Electric and Operating Co.* v. *Brantford Starch Works*, 22 Occ. N. 13, 3 O. L. R. 118.

Description—"*Intersection*" — *Dividing Line between Houses — Production — Ejectment—Tender of Deed after Action—Costs.*] —Action of ejectment brought to determine the boundary line between adjoining lots conveyed to the plaintiff and defendant respectively. Dispute over a nine-inch case of brick put around one of the houses, which extended that distance beyond what would have otherwise been the boundary between two houses. The deed from the North British Canadian Investment Co. to plaintiff describes the land sold to plaintiff as "commencing at a point on the western limit of Euclid avenue where it is intersected by the production easterly of the southern face of the northern wall of house number 232 (that is, where the northern wall of number 230 joins the southern wall of 232), said point being distant 32 feet and 6 inches more or less measured northerly along said limit of Euclid avenue from southern limit of said lot number 1; thence northerly along said avenue 20 feet 6 inches more or less to the intersection of production easterly of northern face of northern wall of house 232; thence westerly along said last production face of wall and limit between premises in rear of house numbers 232 and 234, in all 129 feet to eastern limit of lane; thence southerly, etc.:—Held, the word "intersect has a meaning, although rarely applied to it, to divide or separate two things, by passing between them:" Murray's

Dictionary; and it was in this latter sense that "intersection" was intended to be used in the above description, viz., "the dividing line between the two houses," and it must be followed no matter how devious its course may be. Judgment for plaintiff for land covered by the deed from defendant to him. *Weston* v. *Smythe*, 5 O. W. R. 537, 10 O. L. R. 1.

Discharge of Mortgage — Execution without understanding or advice—Repudiation—Setting aside—Evidence. *Bailey* v. *Bailey*, 5 O. W. R. 204.

Easement — *Agreement — Purchasers — Licence—Revocation—Repairs.*] — The lower and the upper half of a lot of land were respectively conveyed to separate purchasers. In the deed of the lower half the grantor reserved the right of way to convey water by aqueduct or otherwise from one of the springs on the lower lot to the upper lot. The easement was assigned in the deed of the upper lot. On the lower lot were two springs known as the front and back springs. It was agreed, and acted upon, by the purchasers of the lots that the back spring should be set apart for the exclusive use of the owner of the upper lot under the reservation in the deed of the lower lot. The plaintiff and defendant, becoming respectively the owners of the lots, entered into a parol agreement for the construction by the defendant of a pipe from the front spring to her house, to be tapped on her land by a pipe leading to the plaintiff's house:—Held, that the agreement between the original purchasers of the lots to limit the easement to the back spring was binding upon the defendant; and that the license to the defendant to use the front spring was revocable upon the plaintiff making equitable compensation fixed by the Court to the defendant for her expenditure under the license. Where license is given to lay pipes on another's land to convey water to the licensee's land, the burden of repair rests in law upon the licensee, and it is a revocation of the license to refuse to the licensee permission to go upon the licensor's land for the purpose of making repairs. *Miller* v. *Cronkhite*, 21 Occ. N. 150, 2 N. B. Eq. Reps. 203.

Gift — *Construction—"Tous les Meubles et Effets Mobiliers"—Bank Deposit.*]—The provisions of arts. 395, 396, and 397, C. C., defining the sense of the words "meubles," "meubles meublant," "biens meubles," "mobiliers," and "effets mobiliers," when they are employed by themselves, are declaratory, and the words are given as examples to aid the interpretation of the Judge in doubtful cases. When the parties to a deed employ several times the words "meubles et effets mobiliers" to indicate only movable effects, and not money or choses in action, the same words repeated anew in the same provision, even where preceded by the word "all," will be presumed to have been employed in the restricted sense which the parties have already given them, and will not be construed to include a deposit of money in a bank. *Séguin* v. *Montreal City and District Savings Bank*, Q. R. 12 K. B. 380.

Incapacity of Grantor — *Absence of Consideration—Conflict of Evidence—Relief.*]—Where at the time of the execution of a deed of conveyance the grantor was 70 years of age, was sick and in feeble health, and it was the opinion of some witnesses, though not of others, that he did not understand the nature of his act, and the effect of the deed was to deprive him of means of support, and the evidence was uncertain respecting the existence of adequate consideration for the deed and favoured the view that it was intended as a gift, the deed was set aside. *Winstowe* v. *McKay*, 25 Occ. N. 88, 3 N. B. Eq. 84.

Inscription en Faux — *Production of Original.*]—If an authentic deed is alleged to be false, an order will be made upon the person in custody of such deed to produce it in order that it may form part of the record in the case for the purposes of the inscription en faux. *Awde* v. *Charest*, 5 Q. P. R. 319.

Lost Deed—*Inference as to—Maintenance of Dyke—Liability for—Covenant Running with Land.*]—In 1847 T. R. purchased from R. a portion of a large tract of marsh land of which R. was owner. From the time of the purchase down to the time of his death, in 1886, T. R. contributed, either by the performance of work or in cash, in the proportion of one-seventh of the whole amount, towards the maintenance and repair of a dyke and aboiteau erected, prior to the time of the purchase, for the protection of the land against the sea. In an action brought by the plaintiffs, claiming under R., against defendant, claiming under T. R., to recover a proportion of the cost of rebuilding the aboiteau, it appeared that the dyke in question had never been brought under the operation of the Act, R. S. c. 42, "Of Commissioners of Sewers and Dyked and Marsh Lands," but that the provisions of the Act had been followed in relation to the calling of meetings of proprietors, the summoning of proprietors to perform work, and the apportionment of the cost of such work among the proprietors according to their acreage. There was some evidence of the existence of an agreement signed T. R., having reference to his liability to contribute towards the keeping up of the dyke and aboiteau, but, at the time of the commencement of the action, the agreement had been lost, and there was no evidence to shew the exact contents of the agreement:—Held, that, after the lapse of time, in view of the position of the parties, and the necessity of the work for their protection, the requirements of the Act, and the facts shewn in relation to payments made and work done, there was evidence from which to infer the existence of an agreement touching the keeping up and repair of the dyke and aboiteau, constituting a covenant running with the land by which the defendant was bound:—Held, also, the Judge of the County Court having found that the amount which the defendant was required to pay was not excessive, that such finding was supported by the evidence and should be affirmed. *Roach* v. *Ripley*, 34 N. S. Reps. 352.

Maintenance Bond — *Declaration of Lien.*]—Where land was conveyed in consideration of a bond by the vendee to maintain the vendor and wife for life, but the consideration was not expressed in the deed, a decree was made charging the land with a

lien for the performance of the agreement in the bond. *Duguay* v. *Lanteigne*, 25 Occ. N. 92, 3 N. B. Eq. 132.

Notarial Act — *Authentication — False Date—Nullity.*] — A notarial act binds the parties who have signed it, and the signature of the notary only has the effect of authenticating it. 2. The date of a notarial act is an integral and essential part of it, and the want of it nullifies the instrument. 3. When an act, to which several persons are parties, has been signed and executed by each of them on different days, a single date may be added to the act, namely, that of the day of the last signature, but it is more proper to give the several dates in the act. 4. A notarial act must bear the date of the signature of the parties, allowing the notary, if he has delayed his signature, to mention the day on which he has affixed it. Therefore, a notarial act signed by all the parties on the 2nd July, 1902, but signed by the notary on the 3rd July, 1902, should be dated the 2nd July, 1902, and if the notary dates the act on the 3rd July, 1902, because that is the date on which he has closed the transaction, the act will be declared false as an authentic act, the Court having no other alternative, and not having the power to substitute the true date of the completion of the act for the erroneous date which the notary has put to it. *Ordway* v. *Veilleux*, Q. R. 22 S. C. 197.

Notarial Act — *Illiterate Parties—Assent — Notary — Witness.*]—In order that a notarial act may be considered authentic, it is necessary that the assent thereto of parties who declare that they are not able to write, shall have been received in presence of the notary who is acting in the matter, and of a witness who has signed. 2. Such obligation in regard to the notary imports that the act has been read to the parties in the presence of the witness, or that a sufficient mention, in the presence of the parties, of what the act contains shall have been made to the witness before he attaches his signature, in order that he may be able to state that the parties who are not able to sign have given their consent; if it is otherwise, the act is not an authentic act, and will be declared invalid. *Cloutier* v. *Dulac*, Q. R. 24 S. C. 153.

Notary — *Copy — Translation.*]—A notary ought to deliver exact copies of his deeds, in the language in which they are written, and not translations certified to be correct. *Baker* v. *Gagnon*, 7 Q. P. R. 100.

Parent and Child—Consideration—Notice—Evidence — Veracity — Agreement — Laches—Possession of land. *Martin* v. *Kirby*, 6 O. W. R. 107.

Quit-claim — *Competing Purchasers — Priorities — Registry Act.*] — It is not a deed of quit-claim where the grantor remises, releases, and quit-claims unto the grantee, his heirs and assigns, a lot of land, and covenants that the land is free from incumbrances made by him, and that he will warrant and defend the same to the grantee, his heirs and assigns, against the demands of all persons claiming by or through the grantor; and the grantee under such a deed, if registered, will not be postponed under the Registry Act, 57 V. c. 20, to the equities of a prior purchaser, of which he had no notice. *Bourque* v. *Chappell*, 21 Occ. N. 132, 2 N. B. Eq. Reps. 187.

Rectification — *False Representation—Boundaries of Land Conveyed—Damages.*]—The plaintiff purchased from the defendant a tract of land which was supposed by the plaintiff, at the time of the purchase, to be bounded on the east by the LaHave river. In the deed to the defendant from his father the eastern boundary line was described as beginning at an oak tree on the western bank of the river, and running south nine degrees west, &c. This line was not identical with the course of the river, and left the title to a strip of land between the line described in the deed and the river still in the father. The defendant occupied and cultivated this strip for thirteen years after the making of his deed, and plaintiff continued the occupation and cultivation for a further period of five or six years, after the conveyance to him, when he was ejected. In the deed from defendant to plaintiff the description in defendant's deed was repeated with an addition in which it was stated that the land conveyed was "bounded on the east by the La Have river." In an action for rectification of the deed, and damages, on the ground of the defect in the defendant's title, the trial Judge found that the defendant represented that the land he was selling was bounded on the east by the river, and that this representation, which was false in fact, was material, and was relied on by the plaintiff, and he held the plaintiff entitled to the rectification claimed, and fixed the damages at $150. An appeal was dismissed, the Court (four Judges) being divided in opinion. *Ramsay* v. *Meisners*, 33 N. S. Reps. 339.

Rectification—*Mistake.*]—The plaintiff, intending to sell the whole of a piece of land, sold it under an oral contract describing it as the D. lot. The deed to the purchaser followed the description in the vendor's deed. After the vendee's death, and about ten years after the contract of sale was made, the vendor sought to have the deed rectified, on the ground that it contained more land than that known as the D. lot. The evidence did not shew that the D. lot did not embrace the whole of the land conveyed:—Held, that the bill should be dismissed. Principles upon which the Court proceeds in reforming deeds, considered. *Carman* v. *Smith*, 25 Occ. N. 75, 3 N. B. Eq. 44.

Reformation — Mistake. *Girardot* v. *Curry*, 1 O. W. R. 21.

Reformation — Mortgage — Non-conformity with contract for — Mistake. *Richardson* v. *West*, 1 O. W. R. 670.

Riparian Rights — *Building Dams—Penning Back Waters—Warranty—Improvement of Watercourses—Condition Precedent —New Grounds Taken on Appeal—Assessment of Damages—Interference by Appellate Court.*]—A deed of sale of lands bordering on a stream, with the privilege of constructing dams, &c., therein, provided that, in case of damages being caused through the construction of any such works, the seller or his successors in title to the adjoining lands

should be entitled to have the damages assessed by arbitrators, and the purchasers should pay the amount awarded:—Held, that, under the deed, the purchasers were liable not only for damages caused by the flooding of the lands, but also for all other damages occasioned by their building dams and other works in the stream; and that the provisions of art. 5535, R. S. Q., did not entitle them to construct or raise such dams without liability for all damages thereby caused: —Held, also, that an objection as to arbitration and award being a condition precedent to an action for such damages, which have been waived or abandoned in the Court of Queen's Bench, could not be invoked on an appeal to the Superior Court. On a cross-appeal, the Supreme Court refused to interfere with the amount awarded for damages in the Court below upon its appreciation of contradictory evidence. *Hamelin* v. *Bannerman*, 22 Occ. N. 7, 31 S. C. R. 534.

Security—Conveyance of lands—Cutting down to mortgage—Improvidence—Fraud. *Holness* v. *Russell*, 1 O. W. R. 655, 744, 2 O. W. 334.

Setting Aside — Improvidence—Family settlement—Costs. *Lockhart* v. *Lockhart*, 1 O. W. R. 819.

Sheriff's Deed — *Condition — Usufruct —Res Inter Alios Acta—Default of Acceptance — Pleading — Reply — Fraud.*] — The plaintiff alleged that in another suit, in which her husband was defendant, the present defendant purchased at sheriff's sale certain immovables, subject to a right of usufruct in her favour during her life, but that the defendant had entered into possession of the property and deprived her of the usufruct; and she asked that the defendant be ordered to give the possession of the property to her, and render her an account of the rents and profits. The defendant, by his plea, admitted that a clause existed in the sheriff's deed to the effect that the property was sold subject to a right of usufruct in favour of the plaintiff during her life, but that such clause was of the nature of res inter alios acta, and had never been accepted by the plaintiff, and that the defendant had since protested against the clause and repudiated it,—the plaintiff not being, in fact, entitled to the immediate usufruct, but only from the death of her husband, who was still living. The defendant further pleaded that previous to the sheriff's sale he became hypothecary creditor upon the property in question, by obligations granted to him by the husband, in which the plaintiff intervened and renounced all her rights upon the property in favour of the defendant. To this the plaintiff replied that it was the defendant himself who arranged for the sheriff's sale and contrived that the property should be sold subject to the plaintiff's rights as expressed in the sheriff's deed, his object being to keep bidders away and acquire the property much below its value. The defendant demurred to this part of the reply:—Held, that the demurrer was well founded, the allegations of fraud not being properly urged by reply to plea, in an action on a contract, but being grounds rather to support an action to set aside the sheriff's sale. 2. That the clause in the sheriff's deed relating to the plaintiff's right of usufruct was res inter alios acta, and could not avail her without acceptance by her, which had not been signified before the clause was repudiated by the defendant. *Hope* v. *Leroux*, Q. R. 18 S. C. 556.

See Assessment and Taxes — Attachment of Debts — Distress — Easement— Fraudulent Preference — Husband and Wife—Limitation of Actions — Opposition—Pleading—Registry Laws—Vendor and Purchaser—Voluntary Conveyance.

DEFAMATION.

I. Evidence, 542.

II. Pleading and Practice, 543.

III. Privilege, 554.

I. Evidence.

Admissibility — *Previous and Subsequent Publications.*]—In an action for libel evidence may be given by the defendant of a previous publication by the plaintiff connected with the libel complained of, but not of a publication subsequent to the libel—at any rate, where it makes no difference to the defendant. Stirton v. Gummer, 31 O. R. 277, and Downey v. Stirton, 1 O. L. R. 186, followed. *Downey* v. *Armstrong*, 1 O. L. R. 237.

Admissibility—*Publication of Previous Libel — Provocation — Subsequent Libel— Mitigation of Damages.*]—In a libel action the defendant, in order to mitigate the plaintiff's damages, may shew that he was provoked to libel the plaintiff, because the plaintiff had previously libelled him, but (Rose, J., dissentiente) no subsequent libel or slander can be given in evidence. Nor can the defendant be permitted to show that the plaintiff has attacked the character and reputation of others. It having been elicited in cross-examination of the plaintiff that the defendant had recovered damages for previous and subsequent libels before mentioned in an action against the proprietor of the newspaper of which the plaintiff was editor, the Judge told the jury to take that fact into consideration:—Held, not misdirection. *Downey* v. *Stirton*, 21 Occ. N. 119, 1 O. L. R. 186.

Conflicting Evidence — *New Trial.*]—In an action for damages for certain slanderous words alleged to have been spoken by the defendant, of and concerning the plaintiff, during the progress of a trial before a justice of the peace, six witnesses called by the plaintiff testified to the use of the words complained of, while four called on the other side, including the justice, testified that they had not heard the words used, and the defendant denied having uttered them. The County Court Judge treated the evidence for the defendant as a contradiction of that for plaintiff and gave judgment in the defendant's favour:—Held, that he erred in doing so, and that there must be a new trial. Weight should not be attached to the finding of the trial Judge on a question of fact where the reasons given disclose erroneous judgment in weighing the testimony. *Zwicker* v. *Zwicker*, 33 N. S. Reps. 284.

Discovery — Examination of defendant —Admission of publication—Refusal to give name of informant. *Sangster* v. *Aikenhead*, 5 O. W. R. 438, 495.

II. Pleading and Practice.

Damages — *Particulars.*]—Where in an action for libel the plaintiff claims damages generally, and makes no special allegation of real damages, the Court should assume that the damages sought are vindictive, and should not order particulars. *Gauvreau* v. *Csapais*, Q. R. 18 S. C. 135.

Declaration — *Several Counts — Particulars of Damages.*] — In an action for libel and slander based upon several different counts the plaintiff may be ordered to give particulars of the amount claimed on each distinct count. *Hogg* v. *Ross*, 5 Q. P. R. 339.

Declaration — *Particulars — Names of Persons Present—Prejudice.*]—In an action for slander, where the declaration mentions a person in whose presence the words complained of were spoken, the plaintiff is not obliged to give the first name of such person, unless it appears that confusion may arise without it. 2. The plaintiff is not bound to give the names of the persons in whose presence the words were spoken, if the particulars given are precise enough to permit the opposite party to defend himself without knowing such names. 3. The words "similar statements" in such declaration, coming after the enumeration of defamatory remarks of the defendant, need not be particularized. *Kennedy* v. *Shurtleff*, 3 Q. P. R. 514.

Defamatory Pleading — *Fire Insurance—Implication—Fraud—Arson.*] — The denial in a plea that a fire occurred accidentally and from cause unknown, does not imply or insinuate that the assured criminally set the fire. Allegations in a plea by an insurance company, that the assured made false representations in his application for insurance, made false solemn declarations after the loss, as to the value of the stock, with fraudulent intent, and that in swearing to false exaggerated statements, the assured did not swear to the truth and rendered himself guilty of fraud and his policy null, when pertinent to the issue, and pleaded in good faith and with probable cause, are not libellous or defamatory. *Morrison* v. *Western Assurance Co.*, Q. R. 24 S. C. 111.

Defamatory Statement in Pleading —*Right of Action—Good Faith—Relevancy —Determination of Previous Suit.*]—An action against a party for a libellous statement in a judicial proceeding, raises matters concerning the relation of the subject to the administration of justice, and, as such, is governed by the law of England. 2. Under the law of England, no damages can be recovered for injurious words, forming part of a judicial proceeding, pleaded in good faith, with probable cause and without malice, the words being relevant to the issue, although they may be subsequently shewn to be false and injurious:—Semble, an action for such injurious statements, instituted before the determination of the suit in which they were pleaded, is premature; but, in the present case, it was unnecessary to pronounce formally upon this point, the action being dismissed on other grounds. *Wilkins* v. *Major*, Q. R. 22 S. C. 264.

Defamatory Statement in Pleading —*Right of Action — Prescription.*]—A person complaining of a libellous statement in a pleading filed in a suit is not bound to postpone his action for damages until final judgment has been rendered in that suit:—Semble, were he so to delay, his action might be prescribed. *Wilkins* v. *Major*, Q. R. 22 S. C. 263.

Defamatory Words in Pleading — *Action Pending Original Action.*]—A party who complains of a libel contained in a pleading is not bound to postpone his action for such libel until the case in which the pleading was filed is decided, and such action, if taken, will not be dismissed as premature. *Wilkins* v. *Major*, 4 Q. P. R. 172.

Defence — *Denial — Justification —Innuendo—Hypothetical Case.*]—In slander, the words complained of were to the effect that the plaintiff, a vendor of patent pills, had paid $50,000 for his title as Senator of the Dominion, and was advertising that he was made Senator because of the benefits conferred by his discovery in pills. Innuendo, that he had corruptly bribed members of the government, and had purchased the office, etc.:—Held, that a defence that if the defendant did speak the words, they, even with the innuendo, were not libellous, and denying the innuendo; and saying that without it the words were not libellous, was not open to objection, and not embarrassing. 2. That a defence justifying the slander and asserting, in addition, that the plaintiff did pay the government $50,000, and did advertise as alleged, and that the particulars were well known to the plaintiff, but not to the defendant, was not embarrassing nor open to objection. 3. That the defendant was not at liberty to allege that the words actually spoken were different from those charged in the statement of claim, and to plead as to those other words something either by way of answer or in mitigation of damages; and a defence alleging that, if the defendant did speak the words, he did so not as stating a fact, but as stating a rumour generally believed, should be struck out. Beaton v. Intelligencer Printing and Publishing Co., 22 A. R. 97, distinguished. Rassam v. Budge, [1893] 1 Q. B. 571, followed:—Held, also, that the remaining paragraphs of the defence, which were pleaded to a hypothetical case, which might never arise, and could arise only on an amended statement of claim, were objectionable and should be struck out. *Pulford* v. *Wallace*, 21 Occ. N. 238, 1 O. L. R. 278.

Defence—*Fair Comment — Absence of Justification—Striking Out Defences.*]—In an action for alleged libel contained in an article in the defendants' newspaper, the defendants pleaded fair comment, but did not attempt in any way either to set up the facts upon which it was alleged the article was

fair comment, or allege that the statements of fact in the article complained of were true:—Held, that the defence was bad, and should be struck out. It is clear upon the authorities that a man may not invent his facts and then comment on them, and succeed upon the ground that, the facts being assumed to be true, the comment is fair. *Crow's Nest Pass Coal Co.* v. *Bell*, 22 Occ. N. 407, 4 O. L. R. 660, 1 O. W. R. 679.

Defence — Fair comment—Untrue statements of fact. *Conmee* v. *Lake Superior Printing Co.*, 2 O. W. R. 509, 543, 743.

Defence — Justification — Fair comment —Particulars — Examination for discovery —Motion to strike out defence—Embarrassment. *Chambers* v. *Jaffray*, 6 O. W. R. 441.

Defence — *Justification — Particulars—Appeal—Res Judicata.*]—A 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 defendant 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. *Bateman* v. *Mail Printing Co.*, 21 Occ. N. 359, 2 O. L. R. 416.

Defence—*Mitigation of Damages.*]—In an action for slander the defendant may allege facts and circumstances which occurred on the occasion in regard to which complaint is made, when such facts and circumstances are of such nature that, if proved, they will, if they do not altogether justify the conduct of the defendant, at least make the injury appear less grave and mitigate the damages. *Renault* v. *Lortie*, 3 Q. P. R. 495.

Defence—*Mitigation of Damages.*]—In an action for damages for slander the defendant may allege certain facts which, if they are proved, will go, if not to justify the alleged defamation, at least to mitigate the damages. *Dion* v. *Fafard*, 4 Q. P. R. 351.

Defence — *Privilege—Mitigation of Damages.*]—In an action for slander, the complaint was that the defendant had falsely and maliciously accused the plaintiff of stealing the defendant's newspaper. The defendant pleaded that "if he spoke the words complained of, which he does not however admit, but denies, they were so spoken in good faith and without any malice whatever towards the plaintiff, under the following circumstances"—setting out the circumstances which led the defendant to believe that the plaintiff had stolen his newspaper: — Held, that this was substantially a plea of privilege; and leave was given to add words claiming privilege. Switzer v. Laidman, 18 O. R. 420, distinguished: — Held, also, following Beaton v. Intelligencer Printing and Publishing Co., 22 A. R. 97, that a subsequent paragraph of the defence setting up the same facts in mitigation of damages was properly pleaded. *Vansycle* v. *Parish*, 21 Occ. N. 128, 1 O. L. R. 13.

Defence—Privilege—Scandalous and irrelevant statements. *Caldwell* v. *Buchanan*, 10 W. R. 682, 2 O. W. R. 839.

Defence — *Provocation — Set-off — Justification—Defence — Cross-action.*] — Rude and provoking words, but not reflecting upon the honour or credit of a person, do not justify or excuse defamatory accusations.—In an action to recover damages for slander, grounds of defence arising from provocation and set-off of injuries should be pleaded as defences to the principal action; and the defendant cannot support a cross-action for damages unless the injuries done by the plaintiff are more grave and damaging than those suffered by him. *Cleveland* v. *Sherman*, Q. R. 19 S. C. 270.

Defence — *Publication — Falsity.*] — Motion to strike out as false, frivolous, and vexatious, the following paragraphs of a defence in an action for libel: "The defendant does not admit that he is the publisher and editor of said newspaper." The fact of the defendant's being editor and publisher having been established by affidavit:—Held, that the paragraph could and should be struck out as false. *Lanos* v. *Landry*, 21 Occ. N. 312.

Disagreement of Jury—*Amendment by Adding Innuendoes.*]—An action for libel. The cause was tried, and the jury disagreed. The plaintiff applied after trial to amend the statement of claim, by adding further innuendoes as to the libel complained of, the defendant opposing the motion, on the ground that a new case was set up, and also on account of the delay:—Held, that the plaintiff was entitled to the amendment sought, on payment of costs. *Grant* v. *Grant*, 24 Occ. N. 95.

Discovery—Examination of defendant — Information as to source of libel. *Schmuck* v. *McIntosh*, 2 O. W. R. 237.

Discovery — Report of proceedings in Court—Examination of defendant—Malice or motive. *Bateman* v. *Mail Printing Co.*, 2 O. W. R. 242.

Finding of Jury — Meaning of words published — Defamatory sense — Damages. *Stone* v. *Jaffray*, 5 O. W. R. 725.

Joinder of Claim for Wages—*Particulars.*]—A claim for damages for defamation may be joined with a claim for wages due. 2. The plaintiff in an action for damages for defamation, who alleges that he has been defamed to certain institutions and persons, must give particulars shewing what institutions and what persons employed in such institutions are intended. *Gray* v. *Brommell*, 6 Q. P. R. 234.

Justification — Qualified privilege—Answer to public statement—Judge's charge—Perverse verdict. *Preston* v. *Journal Printing Co. of Ottawa*, 2 O. W. R. 923.

Justifying Words not Charged — *Striking out—Demurrer.*]—To an action for damages for slander the defendant may not plead facts tending to justify other words than those mentioned in the declaration. The elimination of allegations in a plea not amounting to justification, should be sought by demurrer, and not by a motion to strike them out. *Phillips* v. *Laviolette*, 4 Q. P. R. 396.

Letter to Newspaper—*Defence—Provocation by Utterances of Plaintiff Reported in Newspaper—Privilege — Mitigation of Damages—Counterclaim—Malice.*]—Plaintiff was alderman of the city of Ottawa, and a member of the building committee of the public library, and defendant was the contractor for the stone and mason work of the library building. The libel complained of was in the letter written by defendant to the editor of the Ottawa "Evening Journal," published in that newspaper on 23rd October, 1903, in which, after calling attention to certain statements made by plaintiff at a meeting of the committee criticizing the work upon the library building, defendant proceeds to charge in effect that plaintiff was actuated in his criticism by spite and bigotry; that plaintiff was himself an incompetent mechanic; that certain buildings were put up by plaintiff "of which he ought to be ashamed;" that plaintiff owed defendant an account which he had to force him to pay; that plaintiff was always in a quarrelling mood; and that "if the like of Alderman Hopewell was a fit man to inspect his work, it was time he quit building. Laughton v. Bishop of Sodor and Man, L. R. 4 P. C. 495, distinguished, Murphy v. Halpin, Ir. R. 8 C. L. 127, followed:—Held, that it was the duty of plaintiff as a member of the building committee to honestly criticize at meetings of the committee the workmanship on a building under its charge, and if such criticisms were not made in good faith and defendant felt aggrieved thereby, he could either resort to an action or communicate to the committee and such other persons as may have heard plaintiff's criticisms his defence thereto, accompanied with such retort upon plaintiff as may have been necessary as a part of his defence or fairly arising out of any charges made by plaintiff, and if in such retort defendant had reflected upon the conduct or character of plaintiff, it would be for a jury to say whether defendant acted in good faith and in self-defence, or was actuated by malice. But, he had no right to publish his defence and retort to the general public through the newspapers. In other words, the public as a whole, unlike the members of the committee and other persons who chanced to hear plaintiff, had no corresponding interest with defendant in the subject matter. . . . The facts set forth establish no defence on the ground of privilege, but many of them would be admissible in mitigation of damages, and limited to that purpose may be pleaded. . . . [Reference to Stirton v. Gummer, 31 O. R. 227.] Appeal allowed as regards counterclaim and dismissed as regards defence. *Hopewell* v. *Kennedy*, 4 O. W. R. 433, 25 Occ. N. 70, 9 O. L. R. 43.

Malice—*Bad Faith.*]—It is not legal to plead to an action for damages for defamation that the action is malicious and is the product of the hatred which the plaintiff bears to the defendant. *Melançon* v. *Archambeault*, 6 Q. P. R. 460.

Mitigation of Damages—*Provocation—Set-off.*]—An elector, who has made a complaint in respect of a voters' list, which a municipal council is revising, has the right to appeal from the decision of the council, but he has no right to say ostentatiously, while the council is sitting and with the object of intimidating it or ridiculing its decision, that he is going to appeal. If he does so, and the secretary-treasurer of the council, who has prepared the list and acted as clerk and adviser to the council, says to him that "it is easy for him to appeal because he is insolvent, he has not paid his taxes, and is already in debt to the municipality for costs," the manner in which this elector has acted will be taken into consideration by the Court in mitigation of damages in an action brought by the elector against the secretary-treasurer for slander on account of the words quoted.—2. A party against whom a debt cannot be set off because it is not liquidated, may, if he chooses, himself demand that it be set off. *Desmarais* v. *Geoffrion*, Q. R. 22 S. C. 229.

Newspaper — Discovery — Examination of defendant—Refusal to disclose name of correspondent. *Marsh* v. *McKay*, 2 O. W. R. 522, 614, 3 O. W. R. 48.

New Slanders Since Action—*Incidental Demand.*]—Slanders uttered by the defendant after the commencement of an action for damages for previous slanders cannot be made the subject of an incidental demand in the same action, but must be the subject of a separate suit. *Lefebvre* v. *Godin*, 5 Q. P. R. 279.

Nominal Damages—*Costs.*]—In slander, for words spoken imputing unchastity to the plaintiff and the commission of an indecent act by her in a public place under s. 177 of the Criminal Code, without claim for special damage, there was a verdict of $1 damages:—Held, that the defendant having denied the speaking of the words, and the only other defence being, that it was mere abuse spoken in the course of a quarrel between the parties, and the jury by their verdict having found both these questions in the plaintiff's favour, there was no reason for depriving her of the costs of the action in which she was successful. *Pickles* v. *Sinfield*, 24 Occ. N. 27.

Nominal Damages — Costs—Cause for depriving plaintiff of—Misconduct. *Ellis* v. *Sherrin*, 3 O. W. R. 938.

Notice Given by Public Crier — *Repair of Road—Malice.*]—The defendant gave notice to the plaintiff at the door of the parish church, as the congregation were issuing from high mass, by the public crier, to repair and maintain his road and keep it open, in default of which the defendant would take the necessary proceedings to compel him to do so. The plaintiff having claimed $195 damages for defamation on account of this notice, which he alleged had been given maliciously, the defendant, in his defence, admitted that he had given the notice, but denied having done so maliciously. Neither of the parties offered oral evidence, leaving the Court to decide the cause upon the record: —Held, that there being nothing to justify the defendant in giving such a notice, which should have been given privately through the municipal officers, and not publicly at the church door, the defendant was guilty of a tortious act for which he was liable to the plaintiff. *Hamel* v. *Lauzière*, Q. R. 22 S. C. 194.

Onus—Words not defamatory per se—Innuendo. *Lossing* v. *Wrigglesworth*, 1 O. W. R. 460.

Particulars.]—The plaintiff in an action to recover damages for defamatory words uttered in the presence of two persons specified and named, and also before "a large number of other persons," will be ordered, upon motion, to give the names of these persons, the dates upon which the words were spoken, and the place at which they were spoken. *Lefebvre* v. *Lefebvre*, 4 Q. P. R. 396.

Parties—*Joinder of Plaintiffs — Pleading — Striking Out — Several Rights of Action Arising Out of Same Transaction.*] — The plaintiffs, a married man and an unmarried woman, brought the action for damages in respect of alleged statements by the defendant on three different occasions that the plaintiffs had been criminally intimate, one of the occasions complained of being by letter to the female plaintiff. A motion to require the plaintiffs to elect which would proceed with the action, and to strike out the claim in respect of the letter to the female plaintiff as shewing no cause of action or as embarrassing, was refused, leave to amend being given to both parties. The plaintiffs thereupon amended by claiming for both of them damages in respect of another allegation to the same effect, on another occasion, for the male plaintiff special damage, and for the female plaintiff the benefit of R. S. O. 1897 c. 68, s. 5:—Held, that the plaintiffs were entitled to sue in one action for damages in respect of the statements made on three occasions, there being publication as to both, and these three being a series with a common question of law and fact, but that the joinder of the claim in respect of the letter to the female plaintiff, which gave rise at most to a cause of action in the male plaintiff, was improper, and that this claim, unless amended so as to be simply one in aggravation of damages, should be struck out as embarrassing. Order of Britton, J., 3 O. W. R. 421, as to the joinder of parties, affirmed, and order of Anglin, J., as to the pleadings, varied. *Agar* v. *Escott*, 24 Occ. N. 312, 8 O. L. R. 177, 3 O. W. R. 719.

Plea—*Character of Plaintiff.*]—In an action for damages to the reputation, the defendant may plead the evil reputation of the plaintiff. *Coté* v. *Desrosiers*, 6 Q. P. R. 65.

Post Card—*Threat of Action.*]—A person who, without malice, sends his debtor a post card, upon which there is a notice that the sender will sue the sendee if he does not pay, is not liable in damages although third persons have seen the card. *L'Heureux* v. *Héroux*, Q. R. 25 S. C. 126.

Privilege—*Discovery — Examination of Plaintiff—Relevancy of Questions—Mitigation of Damages—Rule 488.*]—In an action for slander, the defence, besides a denial of the material allegations of the statement of claim, was that the words were spoken without malice, in the belief that they were true, and under such circumstances as to make them a privileged communication. There was no justification. The words were: "He perjured himself and stole the money from the township;" and the innuendo was that the plaintiff had committed wilful and corrupt perjury for the purpose of procuring a reward of $5 from a municipal corporation, and had secured the reward by perjury:—Held, that certain questions put to the plaintiff upon his examination for discovery relating to the reward and directed to eliciting information as to the payment of it to the plaintiff; another question as to statements made by the plaintiff at meetings of the municipal council; another question as to the fact of the council having offered a reward to be paid to any one who killed a dog found worrying sheep; another question apparently intended to elicit information as to the particular times or occasions when the words were spoken; and other questions which might elicit information relevant to the defence of privilege—were all questions relevant to the issues raised on the pleadings, and should be answered by the plaintiff. Though a defendant may not be able to prove all that is necessary to be shewn to establish a defence of privilege, he is entitled to the benefit of what he does shew, in mitigation of damages, if it goes to that—subject, perhaps, to his having given the notice required by rule 488. *McKenzie* v. *McLaughlin*, 22 Occ. N. 92, 1 O. W. R. 58, 80.

Privilege—Justification — Denial of innuendo—Motion to strike out defences. *Goodwin* v. *Graves*, 4 O. W. R. 449, 473.

Privilege—*Public Interest — Provocation —Set-off.*]—A defendant has a right to plead to an action for slander that as a physician and a member of parliament he requires and is entitled to the esteem and confidence and consideration of his constituents and fellow citizens. 2. In an action for slander an allegation that everything which the defendant has said has been said in the public interest, in good faith, and without malice, and is a legitimate criticism on those who attacked his private character and attempted to tarnish it, if assisted in doing so, is not a valid defence and will be struck out upon petition

en droit. 3. Where a plea of set-off of injuries may be set up as a defence to an action or as mitigation of the damages claimed, it must be alleged and proved that the provocation received was the immediate cause and was of sufficient violence to make the defendant lose the control of his will. *Bissonnette* v. *Sylvestre*, 6 Q. P. R. 255.

Proof of Defamatory Words—*Verdict — New Trial — Aggravation of Damages — Evidence — Pleading.*] — Motion for a new trial in an action of slander upon the ground that the verdict was perverse. The defamatory words were proved, but the jury nevertheless found a verdict for the defendant, instead of giving nominal damages to the plaintiff:—Held, that a new trial should not be granted in order that the damages which the jury ought to have assessed should be assessed to the plaintiff. Another ground of the motion was that the Judge had refused to admit evidence offered by the plaintiff and directed to aggravate the damages:—Held, that, inasmuch as there was no allegation in the plaintiff's pleading to entitle him to give evidence of the acts of the defendant on which he wanted to rely to aggravate the damages, a new trial should not be allowed on this ground. It would be a highly inconvenient practice to require a defendant to go to trial at the risk of being met with a number of circumstances which the other side was permitted to give evidence of, without having set them forth in his pleading, and which might, if unanswered, seriously affect the damages. *Milligan* v. *Jamieson*, 22 Occ. N. 409, 4 O. L. R. 650.

Publication—*New Trial.*]—The defendant took a copy of an alleged libellous resolution to the editor of a newspaper, who dictated it to his stenographer, and handed the defendant's copy back to her. Before the stenographer extended his notes, another copy of the resolution was found in the office, and from it the printer set up the type:—Held, reversing the decision of Irving, J., who dismissed the action on the ground that it was not shewn that the defendant was the cause of publication, that there should be a new trial. *Mackenzie* v. *Cunningham*, 21 Occ. N. 251, 8 B. C. R. 36.

Publication — *Place where Damages Arise—Superior Court—District.*]—An action based upon a libel, and claiming damages incurred in a certain district other than that in which the defendant has his domicil and in which the newspaper containing the alleged libel is printed, may be begun in such district. *Gosselin* v. *Belley*, 4 Q. P. R. 233.

Several Libels—*Damages — Separation.*]—A plaintiff who claims damages by reason of a series of libellous paragraphs and articles which he sets forth, cannot be ordered to declare what amount of damages he claims for each of such paragraphs and articles. *Prévost* v. *Nationalist Printing Co.*, 6 Q. P. R. 428.

Special Damage—*What Constitutes.*]—The special damage required in an action of defamation must be such as would be the reasonable and natural result of the words used.—Where, therefore, the alleged defamatory words were that the plaintiff, who received an allowance for the maintenance of his wife's niece, from her father's estate, had put in an account of trifling matters, such as for candies, oranges, etc., the special damage alleged being that in consequence thereof the niece and wife had left him and refused to live with him:—Held, that such damage was not such as was recognizable at law, not being the natural and reasonable consequence of the words used. *Ludlow* v. *Batson*, 23 Occ. N. 151, 5 O. L. R. 309, 2 O. W. R. 41.

Statement of Claim — *Setting Out Whole Newspaper Article—Parts not Referring to Plaintiff—Innuendo.*] — The very words complained of in an action of defamation must be set out by the plaintiff, in order that the Court may judge whether they constitute a cause of action; it is not sufficient to give the substance or purport, with innuendoes; it is sufficient to set out the libellous passages, provided that nothing be omitted which qualifies or alters the sense; and, as the libel itself must be produced at the trial and the defendant is entitled to have the whole of it read, the plaintiff is entitled to set out in the statement of claim the whole article complained of.—Held, also, that certain words set out in another paragraph, which did not refer to the plaintiff, and tendered an issue not material, which might be embarrassing, should be struck out.—Deyo v. Brondage, 13 How. Pr. 221, referred to. *Hay* v. *Bingham*, 23 Occ. N. 112, 5 O. L. R. 224, 1 O. W. R. 822, 6 O. W. R. 447, 11 O. L. R. 148.

Trial—*Nonsuit after Verdict — Innuendo — Onus—Contradictory Evidence — "Blackmailing."*]—The word "blackmailing" is libellous per se, requiring no innuendo, and it does not lie upon the plaintiff to prove the falsity of the charge; for the purposes of the trial it is presumed in his favour, and the onus is on the defendant to prove it to be true, if justification is pleaded. Semble, the better view is, that colloquial use has broadened the meaning of the word so that it may not have a criminal connotation. In an action for two libels, where the words used in one were not libellous per se, and were not, fairly taken, capable of the meaning alleged in the innuendo:—Held, as to that, that where motions were made for a nonsuit both at the close of the plaintiff's case and after all the evidence was in, upon which judgment was reserved, the trial Judge had a right to give judgment dismissing the action, after a verdict rendered by the jury in favour of the plaintiff. But as to the other libel, where the truth of the charge was not admitted by the plaintiff or proved on uncontroverted evidence, and where the evidence as to the use of the word "blackmailing" was contradictory:—Held, that it was for the jury to pass upon the evidence, and the judgment dismissing the action on the ground that there was no evidence to go to the jury should be set aside and the verdict of the jury in favour of the plaintiff for $50 restored. Judgment in 32 O. R. 165, 20 Occ. N. 404, reversed in part. *Macdonald* v. *Mail Printing Co.*, 21 Occ. N. 495, 2 O. L. R. 278.

Truth—*Justification.*]—A defendant will not be cast in damages for defamation of character where the words complained of truly describe the conduct or an act of the

defendant. Thus a servant who has stolen wood from his master cannot have a verdict against the latter for saying, in a discussion relating to this theft of wood, "you are a thief." *Baron* v. *Laroche*, 3 Q. P. R. 450.

Understanding of By-standers of Words Spoken—*Question for Jury—Non-direction—Excessive Damages—New Trial.*]—In an action for defamation, in which the jury awarded the plaintiff $500 damages, the evidence shewed that the plaintiff was a tenant of the defendant, paying rent for the property occupied by her and receiving a certain sum in return for the support of the defendant, who boarded with her. The words complained of were alleged to have been spoken on the termination of this arrangement, when the plaintiff removed her goods from the house, and were alleged to be, "You stole my feather bed and silver spoons." The evidence of witnesses called by the plaintiff shewed that the words first used by the defendant were "You took my feather bed and silver spoons," but that when the plaintiff asked him the question, "Do you really blame me for stealing them?" the defendant replied, "Most undoubtedly I do." There was further evidence to the effect that the defendant was 85 years of age, very indistinct in his speech and hard of hearing and accustomed to make use of an ear trumpet, and that on the occasion of speaking the words complained of he did not use an ear trumpet. There was no evidence that the defendant correctly heard the question addressed to him by the plaintiff in the words used by her, or that he meant to accuse her of stealing, or that the words used by him might not have been used in a perfectly innocent sense:—Held, that this view of the question should have been placed before the jury by the presiding Judge, and they should have been asked to consider the question, in what sense the hearers understood the words used, and that there having been no such instructions there must be a new trial. Some of the remarks used by the presiding Judge were calculated to impress the jury with the idea that they had unlimited scope in relation to the question of damages, although this impression would be corrected to some extent by later instructions. The jury nevertheless awarded heavy damages in what the Court regarded as a mere petty squabble:—Held, that this was further reason for ordering a new trial. *McLean* v. *Campbell*, 37 N. S. Reps. 356.

Verdict for Defendant—Motion to set aside—Weight of evidence—Innuendo—Proof of—Jury—Reasonable verdict. *Kelly* v. *Journal Printing Co. of Ottawa*, 5 O. W. R. 83.

Verdict for $1—*Costs.*]—Action for libel in which the jury brought in a verdict in favour of the plaintiffs for $1. The plaintiffs' counsel applied for full costs of suit, which was opposed. By Rule 926, where any action is tried by a jury, the costs shall follow the event, unless, upon application made at the trial, for good cause shewn, the Judge or the Court otherwise orders:—Held, that the verdict of $1 recovered should not carry costs, but no costs should be allowed to defendants. *Manitoba Farmers' Hedge and Wire Fence Co.* v. *Stovel Co.*, 22 Occ. N. 186, 14 Man. L. R. 35.

Words Capable of Defamatory Meaning—*Question for Jury—Crime.*]—In an action for slander, if the words used by the defendant are capable of being reasonably understood in a slanderous sense, it should be left to the jury to find whether or not they were so used, and the plaintiff should not be nonsuited on the ground that the words did not necessarily impute the commission of a crime. *Cameron* v. *Overend*, 15 Man. L. R. 408, 1 W. L. R. 545.

Words Charging Criminal Offence—Performance of duty as assessor — Special damage—Words spoken after plaintiffs ceased to hold office—Intrinsic evidence of malice—Privileged occasion — Excessive language — Question for jury—Burden of proof—Misdirection—Belief in truth of words spoken—Reasonable belief—Justification — Evidence of falsity of words—Evidence in reply. *Crate* v. *McCallum*, 6 O. W. R. 825, 11 O. L. R. 81.

Words of Abuse—*Natural Signification—Innuendo—Necessity for Shewing Sense in which Words Understood.*]—The defendant, a tax-collector, having applied to the plaintiff for payment of certain taxes, was told by him that J. S. should pay them. He subsequently wrote and posted to the plaintiff a post-card stating: "I saw J. S. this morning; he said make the S. B. pay it." In an action for libel in which the plaintiff alleged that "S. B." applied to him and meant "son of a bitch:"—Held, that there was no reasonable evidence to go to the jury that the letters conveyed the meaning attributed to them by the plaintiff; they are words of abuse, but are, as often used, absolutely meaningless; they do not impute anything against the character of the mother, and are not a statement of a fact; and in their natural significance are not actionable; and the plaintiff had failed to prove his innuendo. *Major* v. *McGregor*, 23 Occ. N. 47, 305, 5 O. L. R. 81, 6 O. L. R. 528, 1 O. W. R. 839, 2 O. W. R. 866.

III. Privilege.

Interest — *Evidence of Actual Malice — Charge to Jury—Evidence.*]—On the trial of an action for damages for a libel alleged to be contained in a privileged communication, the Judge charged the jury as to the privilege, and added:—"If the defendant made the communication bona fide, believing it to be true, and the privilege existed that I have endeavoured to explain, then there would be no action against him:"—Held, that the plaintiff was entitled to a more explicit statement of the law on a point directly affecting the proof of an issue the burden of which was upon him. One portion of the communication containing the alleged libel might be read as importing a grave charge against the plaintiff or as an innocuous statement of fact:—Held, that, as, in order to prove malice, the writer's knowledge of the falsity of the fact was the material point, the sense in which he may have used the words was the governing consideration. The Judge's charge was not open to objection for want of an explicit reference to pre-existing unfriendliness between the parties as proof of malice, where the only evidence of unfriendliness consisted of hard things said of the defendant by the plaintiff.

Judgment in 32 N. S. Reps. 129 affirmed. *Miller* v. *Green*, 21 Occ. N. 254, 31 S. C. R. 177. (See the next case).

Interest—*Evidence of Actual Malice—Nondirection—Misdirection—New Trial.*] — The plaintiff, the local agent of an insurance company, voluntarily retired from his position, and another agent was appointed in his stead. Shortly afterwards the defendant, the general manager of the company, wrote to a policy holder, who was a client of the plaintiff, that the latter had been "removed from the agency . . because it was clearly necessary . . I now find that he has collected money which up to the present time we have been unable to get him to report." At the time this was written it was untrue, to the knowledge of the defendant, that the plaintiff had been dismissed and that he had collected money of the company for which they had been unable to get him to account: —Held, that the writing was libellous; but, if it was written bona fide, the occasion was privileged. 2. The trial Judge should have directed the jury that if it was proved that the defendant stated in his letter that which he knew to be false, it was evidence from which actual malice might be inferred, and, as he had not so directed, that there should be a new trial. 3. That evidence of altercations between the plaintiff and defendant was proper to be submitted to the jury as evidence of malice. 4. That an inference of malice could be drawn from evidence that the defendant knew that the plaintiff had used abusive language with respect to him in connection with their business relations. 5. That the trial Judge erred in directing the jury that it was not open to the plaintiff to put another construction upon the word "report" than the sense in which it would be understood by the plaintiff and defendant themselves. 6. That the Judge erred in his definition of malice in connecting it with the idea of "wreaking petty spite" upon the plaintiff, and in leaving the jury under the impression that the defendant's evidence as to the state of mind in which he wrote the letter was conclusive. *Miller* v. *Green*, 33 N. S. Reps. 517.

Interest—*Malice—Judge's Charge.*]— The plaintiff and defendant were members of the same cheese-making association. The plaintiff sued the defendant for slander for saying to the cheese-maker of the association that the plaintiff sent skimmed milk to the cheese factory. The defendant pleaded privilege. The Judge charged the jury that the occasion was privileged, and that the defendant was entitled to a verdict unless they came to the conclusion that he was actuated by malice; that they might take into consideration all the circumstances and all the evidence in coming to a conclusion as to whether the defendant acted from ill-will or not in reporting the matter to the cheese-maker:—Held, that this charge was entirely free from objection. *Preston* v. *Thompson*, 21 Occ. N. 464.

Interest—*Publication to Clerk—Finding of Jury.*]—One of the defendants, the secretary of a trade association, prepared a statement for circulation among the members of the association, and gave it to a person to copy. It contained an allegation that the plaintiff was unworthy of credit:—Held, that, as the publication to the members of the association was privileged, in the absence of malice, on the ground of interest, the publication to the copyist, though she was not a regular employé, was also privileged, being a reasonable means employed to make the communication to the others. Lawless v. Anglo-Egyptian Cotton and Oil Co., L. R. 4 Q. B. 262, followed:—Held, also, that the finding of the jury that "there was no ground of action" was in effect a finding that the words were not defamatory. *Harper* v. *Hamilton Retail Grocers' Assn.*, 21 Occ. N. 23, 32 O. R. 295.

Malice—*Privilege—Evidence—Meaning of Words — New Trial.*] — The defendant, the general manager of a life insurance company, wrote a letter to F., a policy-holder in the company, in which he stated that the plaintiff had been "removed" from his office as local agent of the company, and assigned as the reason for such removal that they had tried for a considerable time past to get the plaintiff to attend properly to their business, and that it was only because it was clearly necessary that the change was made. He stated, further, that, to give the plaintiff the opportunity of getting the benefit of commissions on outstanding business, certain matters had been left in his hands, but that he, the defendant, now found that the plaintiff had collected money which, up to the present time, they "had been unable to get him to report." This letter was handed by F. to the plaintiff, who, in addition to acting as the local agent of the company, was a solicitor and acted as F.'s legal adviser:—Held, in libel, that the trial Judge correctly directed the jury that if the statements made by the defendant in the letter in question, as to the reasons for dismissing the plaintiff, were made by him, knowing them to be false, there was malice, and his privilege was wholly gone. Held, also, that the reception of evidence of F., as to the meaning which she attached to the words of the letter, was not, under O. 37, r. 6, "a substantial wrong or miscarriage in the trial," and was not therefore ground for a new trial. *Miller* v. *Green*, 35 N. S. Reps. 117.

Master and Servant—*Malice.*]—A master is not necessarily liable in damages because, in the presence of fellow servants or even of casual bystanders, he accuses his servant of theft. Such an accusation is prima facie privileged, and to destroy the qualified privilege there must be some evidence of malice, such as want of belief in the accusation, intemperate language, seeking the opportunity to make the accusation publicly, or the like. *Gildner* v. *Busse*, 22 Occ. N. 137, 3 O. L. R. 561.

Moral and Social Duty — *Malice.*] — A niece wrote to her aunt, with whom she was on terms of great intimacy, and with whom she was in the habit of staying, a letter making, on the authority of a correspondent, statements derogatory to the character of a gentleman well known to niece and aunt, who was a frequent visitor at the aunt's house, and it was alleged on the one side and denied on the other that in the letter, which had been destroyed, the niece told the aunt "to spread this about town at once:" —Held, that such a moral and social duty existed as made the communication a privileged one; and that, though a direction to spread the statement about would be some

evidence of malice, it should be left to the jury to say whether that direction had been in fact given. *Fenton* v. *Macdonald*, 21 Occ. N. 228, 1 O. L. R. 422.

Newspaper — *Fair Comment — Truth of Statement.*]—The defendants published on p. 1 of their newspaper an article stating that some women from Seattle had been canvassing some time ago in Victoria for subscriptions for a bogus foundling institution, and on being questioned by the police had left town; on p. 8 of the same issue there was an article stating that two ladies for the past few days had been selling tickets for a recital by one Greenleaf, and that the tickets were being sold "in a manner similar to those for a recital by a gentleman of the same name nearly two years ago, which was ostensibly for the benefit of the Orphanage, but which the promoters were obliged to abandon." The manner of selling tickets was as a fact the same in both cases: — Held, that the article on p. 1 did not necessarily refer to the plaintiff, and that the article on p. 8 was fair comment on a matter of public interest, and was true. *Wiles* v. *Victoria Times Printing and Publishing Co.*, 11 B. C. R. 143.

Newspaper—Letter to—Defence — Provocation by utterances of plaintiff reported in newspaper — Privilege—Mitigation of damages — Counterclaim — Malice. *Hopewell* v. *Kennedy*, 4 O. W. R. 433.

Newspaper — *Misleading Statement — Public Interest—Damages—Costs.*]—The defendant published in a newspaper a statement that the plaintiff had in the Police Court pleaded not guilty to a charge of theft and had been remanded for enquête. As a matter of fact, the inquiry was held later in the same day, and the plaintiff was discharged. The item stating that she had been remanded, however, did not appear in the newspaper until the following day, and no mention was made of the fact that it had subsequently been discovered that the charge was unfounded. The defendant pleaded that the item was true and had been published without malice and in good faith and in the public interest: —Held, that, though the item was evidently published without malice and in good faith, yet, if it was in the public interest, it was equally so that the plaintiff's discharge should have been recorded. As there was no proof, however, of any pecuniary damage suffered by the plaintiff, judgment was given for $10 and costs as of a Circuit Court action of the lowest class. *Hearn* v. *Graham*, 23 Occ. N. 116.

Newspaper—*Publishing Company—Joint Liability of Manager.*] — The president and manager of a company incorporated for the publication of a newspaper, who is also the signer of the declaration required by arts. 2624 et seq., R. S. Q., may be held responsible in damages for a libel published in the newspaper, jointly with the company. *Mignerон* v. *La Patrie Publishing Co.*, 5 Q. P. R. 329.

Newspaper — *Recklessness — Absence of Actual Malice — Retractation—Damages.*] — Where a false report, implicating an entirely innocent person in the commission of a serious crime, has been published in a newspaper, not maliciously, but without any effort to verify the statements contained therein, the fact that the newspaper was about to go to press at the time the information was received is not a valid excuse for failure to investigate the truth of the charge; and the fact that subsequently a retractation and apology were published in the same journal, while it may be taken into consideration in the assessment of damages, is not a sufficient reparation for the wrong inflicted on an innocent person by a false accusation. The Court in such case will award exemplary damages to an amount in proportion to the degree of negligence proved. *Auburn* v. *Berthiaume*, Q. R. 23 S. C. 476.

Occasion Privileged—Proof of malice—Social or moral duty—Functions of Judge and jury — Excessive damages. *Clunis* v. *Sloan*, 1 O. W. R. 27.

Occasion Privileged—Master and servant. *Gildner* v. *Busse*, 3 O. L. R. 561, 1 O. W. R. 167.

Privilege — *Mercantile Agency.*]—In a mortgage foreclosure action, the Lion Brewery Company as second mortgagees were joined as defendants, and a mercantile agency published a notice or circular, distributed amongst its subscribers, that a writ had been issued against the Lion Brewery Company claiming foreclosure of a mortgage, and indicating by means of the words "et al." that there were other defendants:—Held, in an action by the company against the mercantile agency, that the publication was libellous and not privileged. *Lion Brewery Co.* v. *Bradstreet Co.*, 9 B. C. R. 435.

Privilege—*Proof of Malice—Understanding of Letter—Admissibility of Evidence—Misdirection — New Trial.*]—The defendant, local manager of an insurance company of which the plaintiff had been an agent, wrote to Mrs. F., a policy holder, a letter in which he stated, among other things, that he had relieved the plaintiff of his agency; that the plaintiff had collected money which he had not reported, etc. In libel it was shewn that the plaintiff had not been dismissed from the agency, but wanted larger commissions in continuing, which were refused, and that he was not a defaulter, but was dilatory in making his returns:—Held, that evidence of Mrs. F. of her understanding of the letter as imputing to the plaintiff a wrongful retention of money, was improperly received, and there was a miscarriage of justice by its admission. The Judge at the trial charged the jury that "if the meaning of the first part of the letter is that he dismissed the plaintiff, and you decide that he did not dismiss the plaintiff, and it was not a correct statement, that is malice beyond all doubt. The protection which he gets from the privileged occasion is all gone. He loses it entirely. The same way with the second part. If it is not true, it is malicious, and his protection is taken away:—Held, that this was misdirection; that the question for the jury was not the truth or falsity of the statements, but whether or not, if false, the defendant honestly believed them to be true; and that it was misdirection on a vital point. The majority of the Court were of opinion, Girouard and Davies, JJ., contra, that, as the defendant had asked for a new trial only in the Court below, the Supreme Court could not order judgment to be entered for him;

and a new trial was granted. Judgment in Miller v. Green, 35 N. S. Reps. 117, reversed. *Green* v. *Miller*, 23 Occ. N. 149, 33 S. C. R. 193.

Public Duty—*Municipal Councillor — Truth.*]—A municipal councillor has a right to make known to the council all the facts which may be reasons for not awarding a contract of the municipality to a person who is tendering for it; it is even his duty to do so; but the statement must be true, and if he makes false statements, he is liable for defamation. *Campeau* v. *Monette*, Q. R. 19 S. C. 429.

Publication—*Privilege—Copied Letter—Authority of Manager of Company—Damages —New Trial.*]—The manager of the defendant company handed to his stenographer to be type-written a draft letter written in the interest of the company, but unconnected with its ordinary business, which contained defamatory statements:—Held, that privilege was taken away by the publication to the stenographer, and the defendant company were liable for the act of the manager. Pullman v. Hill [1891] 1 Q. B. 524, commented on, but followed. New trial ordered for excessive damages unless the plaintiff consented to a reduction. *Puterbaugh* v. *Gold Medal Furniture Manufacturing Co.*, 23 Occ. N. 193, 24 Occ. N. 205, 5 O. L. R. 680, 7 O. L. R. 582, 1 O. W. R. 250, 2 O. W. R. 398, 3 O. W. R. 535.

Qualified Privilege — *Duty — Interest — Privileged Occasion.*]—A qualified privilege exists, when it is the duty of the person charged with slander to make a communication with another person who has an interest in the subject of the communication, or some duty in connection with it; or, secondly, where the defendant has an interest in the subject of the communication, and the person to whom the communication is made has a corresponding interest, or some duty in connection with the matter. Consequently, a communication made by the chairman of the school commissioners or his colleagues, respecting the character of the secretary-treasurer, if the statement were made to them alone, would be privileged. But the privilege ceases when the communication is made at a public meeting of the parish, at which many others, who were not interested, were present. *Hébert* v. *Jobin*, Q. R. 26 S. C. 193.

Qualified Privilege — Variance between pleading and proof—Nonsuit — Verdict of jury. *Tapp* v. *Brenot*, 3 O. W. R. 80.

Solicitor — *Innuendo—Amendment — Justification—Evidence — Privilege — Interest.*]—In an action for slander of the plaintiff as a solicitor, the evidence at the trial shewed that the defendant asked L. who his solicitor was, and upon L. mentioning the plaintiff, defendant said that if he had an honourable man like M. he might win his case. L. said that he would not change until he found some fault—that the plaintiff always did honourably with him, whereupon the defendant said that the plaintiff was "a dirty man." The words proved were different from those set out in the statement of claim, and the innuendo in the statement of claim was inapplicable. Leave was given to the plaintiff on the trial to amend, but no amendment was made:—Held, setting aside the verdict for the plaintiff, that, in the absence of evidence to shew how the words proved were spoken and understood, the Court could not frame an innuendo to conform to the evidence. On the trial the defendant called the plaintiff as a witness, and the plaintiff admitted that he had collected a sum of money for a client which he failed to pay over, and that he had given a note for the amount collected which he had also failed to pay and that a judgment had been obtained against him for the amount, which was unpaid at the time of the trial:—Held, that this evidence shewed conduct which was dishonourable to plaintiff as a solicitor and justified the language used by the defendant. If the words proved were spoken and understood in the sense that the plaintiff was not an honourable solicitor the defendant had substantiated a good defence:—Held, also, that the communication was a privileged one, L. being a person who had an interest in knowing it. *Tobin* v. *Gannon*, 34 N. S. Reps. 9.

DELAY.

See CONTRACT.

DEMURRER.

See PLEADING.

DEPOSIT.

See PARLIAMENTARY ELECTIONS.

DEPOSITIONS.

See EVIDENCE.

DEPUTY JUDGE.

See LOCAL JUDGES AND MASTERS.

DEPUTY POLICE MAGISTRATE.

See POLICE MAGISTRATE.

DEPUTY RETURNING OFFICER.

See PARLIAMENTARY ELECTIONS.

DESISTMENT.

Order—*Prothonotary — Stay—Judgment —Inscription.*] — The prothonotary has no jurisdiction to act upon or pronounce any

order whatever upon a desistment. 2. When a desistment is filed at the office of the Court, instead of at the hearing, it has the effect of staying the suit or preventing the continuation of the demand, but the defendant may apply to the Court for judgment in accordance with the desistment in order to obtain the right to an execution for costs. 3. An inscription for judgment upon a desistment is a regular way, if not the only way, of obtaining judgment thereon. *Majeau v. Mutual Fire Ins. Co. of the City of Montreal*, 6 Q. P. R. 21.

Party Represented by Solicitor—*Desistment by Party Himself.*]—A plaintiff who is represented by an attorney ad litem, cannot himself file a desistment from the suit. *O'Rourke* v. *Rourke*, 5 Q. P. R. 405.

See ATTACHMENT OF DEBTS—COSTS—EXTRADITION — JUDGMENT — LANDLORD AND TENANT—PROHIBITION.

DETINUE.

See TROVER AND DETINUE.

DEVISE.

See WILL.

DEVOLUTION OF ESTATES ACT.

Intestacy in Part—*Widow's Benefit*]—Where under a will there was an intestacy in part, viz., an intestacy as to the residuary estate:—Held, following In re Twigg (1892), 1 Ch. 579, that the Devolution of Estates Act did not apply, and the widow was not entitled to $1,000 under s. 12. *In re Harrison*, 21 Occ. N. 478, 2 O. L. R. 217.

Payment of Debts—*Real and Personal Property.*]—The Devolution of Estates Act, R. S. O. c. 127, vests the real as well as the personal estate of a deceased person in his personal representatives for the purpose of paying his debts; but, except in the case of a residuary devise of real and personal estate, which is especially provided for by s. 7, the order in which the different classes of property were applicable to the payment of debts before the passing of the Act, has not been disturbed by its provisions. *In re Hopkins Estate*, 20 Occ. N. 446, 32 O. R. 315.

Real Representative — *Caution—Sale of Land—Lapse of Year—Injunction.*]—Letters of administration to real estate of an intestate who died 18th October, 1900, were issued to the defendant on the 14th October, 1901. Prior to such issue the defendant advertised the lands of the deceased to be sold on the 22nd October, 1901, more than a year after the death of the intestate. No caution had been filed within the year under the Devolution of Estates Act; and it appeared that there were no debts:—Held, that the plaintiff was entitled to an injunction restraining the defendant from selling the plaintiff's interest in the lands, under the above circumstances. Clearly the defendant had no right to sell the lands at the time he proposed doing so, as, by the operation of the Devolution of Estates Act, the property had become vested in the heirs of the deceased. *Byer* v. *Grove*, 22 Occ. N. 28, 2 O. L. R. 754.

Sale of Lands by Administrator—Convenience of heirs — Duty of official guardian—Title—Vendor and purchaser. *Re Joyce*, 3 O. W. R. 816.

Sale of Lands by Administrator—*Non-concurring Adult Heirs—Official Guardian.*]—Application for a direction to the official guardian to approve of a sale of certain lands, made by the applicant as administrator of his deceased brother's estate, there being heirs who were sui juris, but had not concurred in the sale. The application was made under s. 16 of the Devolution of Estates Act, R. S. O. 1897 c. 127, as amended by 63 V. c. 17, s. 17, which gives the official guardian power to approve the sale in such case, as in the case of infants. There appeared to be no express objection to the sale by any of the heirs, but their concurrence had not been sought, because of the delay and expense which that would involve:—Held, that under the facts of this case, the proper course was for the official guardian to make the usual inquiries, and if no good reasons were advanced or discovered for withholding his approval, it should be given. *In re Bradley*, 23 Occ. N. 298, 6 O. L. R. 397, 2 O. W. R. 711.

Sale of Land by Administrators—Non-concurring heir — Consent of official guardian — Payment of amount of share — Debt of heir to estate—Statute of Limitations—Right to retainer — Payment into Court. *Re Booth*, 6 O. W. R. 503.

See ATTACHMENT OF DEBTS—DISTRIBUTION OF ESTATES—DOWER.

See EXECUTORS AND ADMINISTRATORS — HUSBAND AND WIFE—VENDOR AND PURCHASER.

DIRECTORS.

See COMPANY.

DISAVOWAL.

Pending Action—*Action in Disavowal—Exception to Form.*]—Where a disavowal is made in regard to a claim which is the subject of a pending action, it must be made in that action; and a direct action in disavowal will be dismissed upon exception to the form. *Gaucher* v. *Bazin*, 6 Q. P. R. 141.

DISCHARGE.

See ARREST—ATTACHMENT OF DEBTS—JUDGMENT DEBTOR — PRINCIPAL AND SURETY.

DISCHARGE OF MORTGAGE.

See DOWER.

DISCIPLINE.

See CHURCH.

DISCLAIMER.

See MUNICIPAL ELECTIONS.

DISCLOSURE.

See MANDAMUS.

Settlement—*Trust Deed — Construction —Equitable Estate in Fee of Settlor—Rule in Shelley's Case—Devolution of Estates Act —Distribution of Estate.*] — Motion under Rule 938 by trustees under a certain trust deed, executed by William Bower, since deceased, for an order determining two questions arising upon the construction of the trust deed, (viz.: (1) Who are to share in the trust estate as to the right heirs of William Bower according to the laws of descent in Ontario? (2) Whether under the trust deed the property vests in the administratrix of the estate of William Bower, under the Devolution of Estates Act, for the purpose of distribution. The trust deed conveyed to the applicants (and another trustee, since deceased) a farm of 80 acres, "to have and to hold the same, with the appurtenances unto the said parties of the second part (trustees), their heirs and assigns forever, to the use and upon the following trusts, namely, first, to lease and demise the said land and to pay the said rents and profits over to the said party of the first part (settlor) for his maintenance and support, annually, during the remainder of his natural life, and after the death of the said party of the first part, then in trust to convey and assign the said lands to such person or persons as the said party of the first part shall, by his last will and testament in writing executed by him so as to pass real estate in the Province of Ontario, limit and appoint, and in the event of his dying without making such will, then to hold the same in trust for the right heirs of the said party of the first part, according to the laws of descent in Ontario, in fee simple." William Bower died on 21st February, 1903, without having made a will, leaving as his next of kin a brother and two sisters, and the children of two deceased sisters:—Held, it was quite clear that the settlor was possessed of an equitable estate in fee simple in the lands described in the trust deed, which estate under the Devolution of Estates Act, vested in the administratrix. There being no disposition of the estate provided for under the deed upon the testator's death, the duty is cast upon the administratrix to proceed to realize upon and distribute the estate under the provisions of that Act. *Re Bower Trust*, 5 O. W. R. 383, 9 O. L. R. 199.

DISCONTINUANCE OF ACTION.

Desistment — *Order — Prothonotary — Jurisdiction — Judgment of Court.*] — The prothonotary has no jurisdiction to give a certificate or make an order upon a desistment; and therefore, when a desistment is filed with the clerk of the Court by a party, the opposite party must apply by way of inscription to the Court, in order to obtain a judgment in accordance with the desistment. *Mageau* v. *Montreal Mutual Assurance Co.*, Q. R. 24 S. C. 208.

Fraud on Solicitor—*Proof of.*] — A desistment from an action filed by a party without his attorney's knowledge or consent, will not be rejected on motion if no fraud is proved against the parties. *Gauvreau* v. *Computing Scale Co.*, 6 Q. P. R. 448.

Inscription for Judgment.]—When a discontinuance is filed and served, the only right the defendant has is to demand an act of discontinuance; and an inscription for judgment in pursuance of the discontinuance will be set aside on motion. *Bank of St. John* v. *Dion*, 6 Q. P. R. 227.

Offer to Pay Costs.]—A discontinuance, not accompanied with an offer to pay the costs, is insufficient and ineffective. *Moon* v. *Bullock*, 6 Q. P. R. 53.

Right of Defendant to Prevent — Specific performance—Payment of purchase money into Court by defendant—Right to judgment. *Lye* v. *McConnell*, 5 O. W. R. 326.

See ATTACHMENT OF DEBTS—COSTS.

DISCOVERY.

I. EXAMINATION OF PARTIES, 564.
II. INSPECTION, 576.
III. INTERROGATORIES, 577.
IV. PHYSICAL EXAMINATION, 578.
V. PRODUCTION OF DOCUMENTS, 579.

I. EXAMINATION OF PARTIES.

Action against Sheriff — *Examination of Sheriff's Deputy.*]—In an action against two sheriffs for neglect of duty as sheriffs, an order was made for the examination for discovery by the plaintiff of the deputy of one of the defendants, it appearing that that defendant had himself been examined and had deposed that certain acts, alleged to affect the matters in question, had been done by the deputy. Order 61 of the Supreme Court Rules should be read as supplemental to Order 31, and taken together they were authority for the order. *Hollingshead* v. *Armstrong*, 23 Occ. N. 73.

Action for Equitable Execution of Judgment—*Right to Attack Judgment — Absence of Fraud and Collusion.*]—In an action brought by a judgment creditor against the judgment debtors and one L. for the re-

covery, by way of equitable execution, of moneys claimed to belong to the judgment debtors, and to have been fraudulently transferred to L., an inquiry into the circumstances under which the judgment was recovered, cannot, in the absence of fraud and collusion in the recovery thereof, be insisted upon. A motion that a witness who, on examination for discovery, had refused to answer questions relating to such circumstances, should be compelled to attend and be examined at his own expense, was therefore refused. *Smith* v. *McDearmott*, 23 Occ. N. 204, 5 O. L. R. 515, 2 O. W. R. 316, 475.

Appointment for — *Attendance on Oath —Refusal to Answer—Subpœna.*]—Where a plaintiff, who had been served merely with an appointment for her examination for discovery, attended before a special examiner, voluntarily submitted herself for examination, and was sworn:—Held, that she was precluded from setting up, as a ground for her refusal to answer questions submitted to her, that she had not been served with a subpœna. Regina v. Flavelle, 14 Q. B. D. 364, followed. *Cooke* v. *Wilson*, 22 Occ. N. 168, 3 O. L. R. 299.

Appointment—*Service — Enlargement —Default of Attendance.*]—The plaintiff obtained from the proper officer an appointment for the examination for discovery of the defendant; the defendant's solicitor was served with a copy of the appointment more than forty-eight hours before the time appointed for the examination, but the defendant himself was not served. At the appointed time and place the plaintiff's solicitor attended before the officer, but neither the defendant nor his solicitor attended, and the officer enlarged the appointment until the next day (the 7th), and on the 7th, the defendant still not having been served, and neither he nor his solicitor attending, the officer enlarged the appointment until the 8th. On the 7th the defendant was served with the appointment for the 8th, and with a subpœna, and was paid his conduct money, and his solicitor was on the 7th notified by letter of the enlargement till the 8th:—Held, that the defendant was in default for not attending for examination on the 8th. Rules 443 and 446 construed. *Reid* v. *Watters*, 21 Occ. N. 22, 19 P. R. 310.

Attendance out of County—Further examination—Locus. *McKinnon* v. *Richardson*, 2 O. W. R. 244, 275.

Burden of Proof—*Right to Examine Defendant before Plaintiff.*]—In a case in which the burden of proof is upon the plaintiff, he may object to be examined for discovery by the defendant before he has himself examined the defendant. *De Martigny* v. *Biencens*, Q. R. 21 S. C. 317, 4 Q. P. R. 352.

Company — *Directors—Account of Profits — Postponement of Consequential Discovery—Production of Documents.*] — The statement of claim set forth a single cause of action, based upon the proposition that the defendant C. and his associates, as to the transactions detailed in it, in the circumstances under which those transactions took place, stood in a fiduciary relation to the defendant company, which prevented them from making any profit for themselves out of the purchase of certain businesses acquired by them and afterwards transferred for a large sum of money to the defendant company, and the relief claimed was an account and payment by the individual defendants of the difference between the aggregate of the price paid by them and what was paid by the company to them. It was admitted that the individual defendants received from the defendant company a sum in cash and stock far in excess of what they paid for the businesses, and the only matters really in controversy were the fiduciary relationship with the company and the liability of the defendants other than the defendant company, to account for the profit made by them on the transfer to the company of the properties, and, if liability were established, the amount for which they were answerable:—Held, that discovery as to the details of the expenditure made by the individual defendants in acquiring the businesses, should be postponed until their liability to account asserted by the plaintiff had been established. *Bedell* v. *Ryckman*, 23 Occ. N. 167, 5 O. L. R. 670, 2 O. W. R. 86, 148, 289.

Corporation — *Miners' Union—Pleading —Dual Capacity—Subpœna—Conduct Money —Objection.*]—A miners' union entered an appearance in an action, and by statement of defence raised the objection that it was not shewn that the defendant was a legal entity capable of being sued:—Held, that defendant by so pleading must be deemed, before the trial of the action, to be a corporation for the purposes of the litigation, and so compellable to make discovery. Where it is sought to examine for discovery in his dual capacity, one of the defendants in an action, who is also secretary of another defendant, two subpœnas are not necessary. On examination for discovery, if the witness has an objection, such as the payment of insufficient conduct money, he should take the objection before the examiner, and he will not be allowed to raise it on an application to compel his attendance to answer questions which he has refused to answer. *Centre Star Mining Co.* v. *Rossland Miners' Union*, 9 B. C. R. 190.

Creditor's Action — Fraud—Pleading General relief—Transfer of assets of debtor —Amendment. *Traders Bank of Canada* v. *Sleeman*, 2 O. W. R. 127, 133.

Criminating Answers— *Maintenance.*] —Maintenance is an indictable offence in the province of Ontario; and in an action to recover damages for maintenance, the plaintiff is not entitled to obtain from the defendants upon examination for discovery such answers as would tend to subject them to criminal proceedings. In such an action no discovery of the matters charged could be had which would not involve the defendants in matters leading up to the offence; and, therefore, the examination should not be allowed to take place at all. *Hopkins* v. *Smith*, 21 Occ. N. 377, 1 O. L. R. 659.

Defendant—Defamation — Privilege — Husband and wife. *Williamson* v. *Merrill*, 4 O. W. R. 528, 5 O. W. R. 64.

Defendant — *Scope of Examination — Contract—Breach—Denial — Damages.*] —

Motion by plaintiffs to compel defendant to answer certain questions put to him on his examination for discovery. The statement of claim alleged (1) an agreement by defendant to devote his whole time to the service of plaintiffs from 1889 to August, 1903; and (2) breach of said agreement "by carrying on business on his own behalf both alone and in partnership with others." Plaintiffs ask an account of such dealings, and resulting profits, and damages for breach of contract. The statement of defence denies any such agreement, and says that, if defendant was to devote his whole time to plaintiffs' business, he did so, and denies his having engaged in any other business on his own account. By these pleadings two issues are distinctly raised: 1. Was there such an agreement between the parties as alleged in the statement of claim? 2. Was defendant guilty of a breach of the same? Plaintiffs must prove both to entitle them to a decree. The questions which defendant refused to answer were directed to the second point. The refusal was on the ground that plaintiffs were not entitled to an answer until they had proved the agreement. Plea held bad. See Graham v. Temperance and General Life Assurance Co., 16 P. R. 536, at p. 539:—Held, Defendant must attend at his own expense and answer the questions so far as necessary to prove the second point. But this would not extend to going into any such detail as will be proper enough on a reference as to profits and damages, nor would defendant necessarily be required to produce his books. *Sheppard Publishing Co.* v. *Harkins*, 4 O. W. R. 250, 277, 25 Occ. N. 45, 8 O. L. R. 632. See also 5 O. W. R. 482.

Defendant Withdrawing after being Sworn—*Order to Appear Again — Excuse.*]—A party to an action subpœnaed for examination for discovery before a special examiner and paid his conduct money for the day may be compelled to attend and testify in the same manner as a witness. One of four defendants, all of whom were subpœnaed for half past ten in the morning and attended and were sworn, after being excluded from the examiner's chambers, waited while the others were being separately examined until after three in the afternoon, and then, without communicating with the examiner, went away and did not attend for examination:—Held, that a local Judge's order requiring him to attend again for examination was right. *Campbell* v. *Scott*, 23 Occ. N. 113, 5 O. L. R. 233, 2 O. W. R. 144.

Disclosing Names of Witnesses — *Questions as to Indemnity for Costs.*]—On an examination of a plaintiff for discovery under Rule 379 of the King's Bench Act, he cannot be compelled to disclose the names of his witnesses, or to answer questions as to whether he has received from persons or corporations, not parties to the action, assistance or promise of assistance or indemnity as to the costs of the action, or as to whether he consulted before action with such other persons as to bringing the suit. *Gibbins* v. *Metcalfe*, 23 Occ. N. 98, 14 Man. L. R. 364.

Liquidator of Company—*Action against Company — Production of Books.*] — The official liquidator of a company sued for an act attacked as a fraud may be examined for discovery, and compelled, upon subpœna to that effect, to produce the books of the company in his possession. *Ward* v. *Montreal Cold Storage and Freezing Co.*, 4 Q. P. R. 47.

Officers of Bank—Local manager—Teller. *Bartlett* v. *Canadian Bank of Commerce*, 1 O. W. R. 68, 162.

Officer of Benefit Society — *Clerk of Subordinate "Camp."*] — Motion by defendants to set aside an appointment issued by plaintiffs for the examination of one Harley Field as an officer of defendants. The action was brought to recover from defendants the amount of a policy upon the life of plaintiffs' son, payable to plaintiffs:—Held, by the constitution of defendants the governing body is the "Head Camp," which alone has power to form subordinate camps and issue charters to them. The "Head Camp" consists of one delegate from each subordinate camp and eleven officers who are elected every two years by the members from among their own number. This has absolute jurisdiction over all members. Every subordinate camp has similar officers, who are elected annually by the members. These officers are paid by the subordinate camps such compensation as they see fit. The dues of the members are payable monthly to the clerk of the subordinate camp and handed to the banker. But no clerk or banker can be installed until he has given security to the satisfaction of the Head Camp's three head managers. The clerk and banker of the subordinate camps are the persons by whom the dues of the members are collected and remitted to the Head Camp. In the present case, Field is the clerk of the Woodstock camp, of which deceased was a member; but he was not the clerk during the lifetime of insured. It is not easy to see what information he can give; but, if he is the proper officer to examine, he must prepare himself accordingly. After reading through the by-laws of the Order, and the material filed, I think plaintiffs' view is right, and that the clerk and banker of the subordinate camp are officers of this Order, and liable to examination. Motion dismissed with costs. *Readhead* v. *Canadian Order of Woodmen of the World*, 5 O. W. R. 55, 9 O. L. R. 321. Appealed twice, but both dismissed. See 5 O. W. R. 90 and 169.

Officer of Defendant Bank — *Local Agent — Previous Examination of Principal Officer.*] — Action by the liquidator of the Palmerston Pork Packing Co. to set aside a chattel mortgage given by the company to defendants. The general manager of defendants was examined for discovery. He knew nothing of the facts. Subsequently on 5th November, 1904, the inspector was examined with no better results. Plaintiff now moved for an order for the examination under Rule 439 (2) of Mr. Campbell, the agent of defendants who was in charge of the Palmerston branch, and was present at the giving of the mortgage in question:—Held, where a corporation or other company is a party to an action, it would seem reasonable and convenient that the company should suggest for examination the officer or servant best qualified to give all information to which the opposite party is entitled. Such officer should prepare himself by obtaining full knowledge of all relevant facts, so that the examining

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party may be in as good a position as if contending with an individual. Order granted for examination of Campbell. *Clarkson* v. *Bank of Hamilton*, 4 O. W. R. 442, 9 O. L. R. 317.

Officer of Company—*Agent of Unincorporated Association.*] — The plaintiffs sued "The Tanners' Association," a syndicate, not incorporated, made up of a number of trading partnerships and incorporated companies. One of the companies appeared and defended in their own name "sued as the Tanners' Association:"—Held, that the agent of the association or syndicate could not be examined by the plaintiffs for discovery as an officer of the association or of the company defending. *Ahrens* v. *Tanners' Association*, 23 Occ. N. 261, 6 O. L. R. 63, 2 O. W. R. 464, 479, 513.

Officer of Defendant Company — *Charter—Forfeiture—Production of Membership Roll—Privilege.*]—In an action against an incorporated club, for a declaration that they were using their premises as a common betting house contrary to the provisions of the Criminal Code, 1892, and for a revocation of their charter:—Held, that the Evidence Act of Ontario, R. S. O. 1897 c. 73, s. 5, applied, and that the president of the club was not bound to produce upon his examination for discovery the membership roll of the club, he having stated under oath that its production might lead to a criminal prosecution against him. D'Ivry v. World Newspaper Company of Toronto, 17 P. R. 387, and Hopkins v. Smith, 1 O. L. R. 659, followed. Forfeiture of the charter being claimed, on that ground also a refusal to produce the roll was justifiable. *Attorney-General for Ontario* v. *Toronto Junction Recreation Club*, 24 Occ. N. 172, 7 O. L. R. 248, 3 O. W. R. 287, 4 O. W. R. 72.

Officer of Defendant Company — Re-examination. *Small* v. *Shea's Yonge Street Theatre Co.*, 3 O. W. R. 420.

Officer of Defendant Foreign Company.]—An order cannot be made for the examination for discovery of an officer of a foreign corporation residing in a foreign country, even when the foreign corporation has attorned to the jurisdiction of the Courts of this province. Order of Master in Chambers, 4 O. W. R. 233, reversed. *Perrins, Limited*, v. *Algoma Tube Works, Limited*, 24 Occ. N. 373, 8 O. L. R. 634, 4 O. W. R. 233, 289.

Officer of Defendant Lumber Company—Refusal to answer questions—Motion to strike out defence—Motion to compel officer to attend for re-examination—Jurisdiction of Master in Chambers. *McWilliams* v. *Dickson Co. of Peterborough*, 6 O. W. R. 424, 702, 706.

Officer of Defendant Manufacturing Company—Action for tolls — Timber Slide Companies Act—Penalty or damages. *Pickerel River Improvement Co.* v. *C. Beck Manufacturing Co.*, 5 O. W. R. 181, 183.

Officer of Defendant Railway Company—*Conductor.*]—The plaintiff's claim being that, while employed as a brakesman on one of the defendants' trains, he went under one of the cars, by order of the conductor in charge, for the purpose of adjusting some chains, and that, while so engaged, the train was started without warning to him and caused him injury:—Held, that the conductor, in the circumstances, was an officer of the railway company within the meaning of Rule 387 of the King's Bench Act, and must attend and submit to be examined as to his knowledge of the matters in question. *Gordanier* v. *Canadian Northern R. W. Co.*, 24 Occ. N. 379, 15 Man. L. R. 1.

Officer of Defendant Railway Company — *Station Agent—Section Foreman — Clerk.*]—A station agent is an officer of a railway company within the meaning of Rule 21 of the Judicature Ordinance, N.W.T., and liable to be examined for discovery. A section foreman is not such an officer, nor is the chief clerk in the office of a general superintendent. *Eggleston* v. *Canadian Pacific R. W. Co.*, 5 Terr. L. R. 503.

Officer of Railway Company—*Engine-driver—Rules 439, 461 (2).*]—Held, reversing the decision of a Divisional Court, 4 O. L. R. 43, 22 Occ. N. 162, that inasmuch as the engine-driver never was in charge of the train, never assumed the duties of conductor, and never acted for the defendants in relation to the control, conduct, and management of the train in such a way as to make him responsible to the defendants except for the management of his engine, he was not an officer of the company examinable for discovery under Rule 439; Maclennan, J.A., dubitante. Speaking generally, the officer of the corporation who, if there was no action, would be looked upon as the proper officer to act and speak on behalf of and to bind the corporation in the kind of transaction or occurrence out of which the action arises, would primâ facie be the proper officer to be examined in the first instance under Rule 439. *Morrison* v. *Grand Trunk R. W. Co.*, 23 Occ. N. 9, 5 O. L. R. 38, 1 O. W. R. 180, 263, 329, 758.

Officer of Unincorporated Society—*Production of Minutes—Interest of Persons not Parties.*]—In an action against some of the members of an unincorporated musical society for infringement of the copyright of a musical composition, the secretary-treasurer, one of the members sued, stated in his examination that he had taken minutes of meetings of the members of the society, at which proceedings took place relating to the performance of the composition in question, and that he had handed these and other documents referring to the same matters to the advocate for all the defendants:—Held, against the objection that this defendant was not bound to produce these documents because they concerned persons other than the defendants, viz., the members of the society, not sued,—that this defendant was bound to produce them. It is not a ground for resisting production that a person, not before the Court, has an interest in the document. *Carte* v. *Dennis*, 4 Terr. L. R. 357.

Parties—Default of attendance — Motion to dismiss action—Proof of default—Affidavit of solicitor — Cross-examination — Ex parte certificate of examiner. *Johnston* v. *Ryckman*, 1 O. W. R. 720, 2 O. W. R. 1080, 1113, 3 O. W. R. 198.

Parties — Re-examination — Special circumstances. *Smith* v. *Lake Erie and Detroit River R. W. Co.*, 2 O. W. R. 217.

Parties — Amendment — Relevancy of questions—Defamation—Privilege — Mitigation of damages. *McKenzie* v. *McLaughlin*, 1 O. W. R. 58, 80.

Party — Disclosing names of witnesses — Modified rule—Relevant fact. *Williamson* v. *Merrill*, 4 O. W. R. 528, 5 O. W. R. 64.

Party—*Inscription in Law.*]—When allegations in a pleading are attacked by means of an inscription in law, one of the parties cannot be examined for discovery by virtue of art. 286, C. P., by his opponent, on the facts which are the subject of such allegations; and if such examination has been commenced upon other facts, it will be adjourned until judgment has been rendered on the inscription in law. *United Shoe Machinery Co.* v. *Brunet*, 7 Q. P. R. 268, 284.

Party—Production of documents — Relevancy — Contract — Construction. *Westmoreland Coal Co.* v. *Hamilton Gas Light Co.*, 6 O. W. R. 817.

Party — Relevancy of question — Counterclaim. *Hamilton Provident and Loan Society* v. *White*, 3 O. W. R. 687.

Party—Scope of examination—Production of books—Relevancy—Damages. *Blumenstiel* v. *Edwards*, 3 O. W. R. 772, 5 O. W. R. 341, 796.

Party—*Time for—Inscription—Trial.*] — The preliminary examination of the opposite party under art. 286, C. P., cannot take place after the filing of an inscription for final examination and hearing on the merits; inscription being a proceeding which forms part of the trial of a cause. *Jobin* v. *Potvin*, 6 Q. P. R. 117.

Past Officer of Company—*Order Compelling Attendance—Order of Foreign Court.*] —R. S. C. c. 140 extends to parties as well as witnesses; and the person who was manager of the defendant company at the time when the transactions in dispute in the action took place, as such officer, is a quasi party and stands for the person to be examined for discovery for the defendant company. And an order to compel him to attend and be examined in pursuance of an order of a Manitoba Court, which he had refused to do, was made as on an ex parte application. *In re Kirchoffer* v. *Imperial Loan and Investment Co.*, 24 Occ. N. 230, 7 O. L. R. 295, 3 O. W. R. 390.

Past Officer of Company — *Rule 439 (a)—Rule 485.*]—There is no power now under Rule 439 (a), as substituted by Rule 1250 for Rule 439 (1), to make an order for the examination for discovery of a former officer or servant of a corporation party, nor is there power to make such an order under Rule 485. *Cantin* v. *News Publishing Co. of Toronto*, 24 Occ. N. 398, 8 O. L. R. 531, 4 O. W. R. 162, 217.

Patent of Invention—*Agents—Production of Documents.*]—In an action for damages for the infringement of a patent of invention the defendants pleaded among other defences that the invention was in public use prior to the application for letters patent; that the patent was void for want of novelty; that the patent was not at the commencement of the action a valid and subsisting patent; that the plaintiff had not since the expiration of two years from the date of his patent commenced and after such commencement continuously carried on in Canada the manufacture of the patented invention; that the plaintiff had after the expiration of one year from the granting of the patent imported or caused to be imported into Canada articles made in accordance with the patent:—Held, that the defendants were entitled to the fullest discovery from the plaintiff, and that he was bound to give information as to agreements and transactions made and carried on between him and certain agents employed by him for the manufacture and sale of the patented invention, especially as to the time at which and the terms upon which the patented invention was manufactured in Canada under the patent; and the plaintiff, having refused upon his examination for discovery to answer questions relating to these matters, was ordered to attend for re-examination at his own expense. The plaintiff was also ordered to make and file another affidavit on production, and to produce for inspection statements received by him from such agents. *Parramore* v. *Boston Manufacturing Co.*, 22 Occ. N. 415, 4 O. L. R. 627, 1 O. W. R. 643, 716.

Person Actually Interested—*Nominal Plaintiff.*]—When the plaintiff in an action is only a prête-nom and does not know the facts of the case, an examination before trial of the person actually interested will be allowed. *Barbeau* v. *Viau*, 7 Q. P. R. 151.

Person for Whose Immediate Benefit Action Defended—*Action against Assignee for Creditors — Examination of Assignor—Reference for Trial—Power of Reference to Order Examination.*]—Appeal by defendant from order dismissing appeal from certificate of Neil McLean, official referee, of his ruling in the course of a reference that plaintiff was entitled to examine for discovery one David E. Starr, against whose assignee for the benefit of creditors this action was brought, to establish the right of plaintiff to rank upon the insolvent estate:—Held, Rule 440 and Rule 466 are in pari materia and provide that a person for whose immediate benefit an action is prosecuted or defended is to be regarded as a party for the purpose of examination and for the purpose of discovery. Under the Rules examination for discovery may be "before the trial" (Rule 439), and production may be ordered "at any time pending the action or proceeding" (Rule 463.) Rule 440 has been construed to apply to a debtor who has assigned his estate for the benefit of creditors, even though the estate may be insolvent. In Macdonald v. Norwich Union Ins. Co., 10 P. R. 462 (1884), Mr. Justice Rose held, that such an assignor might be treated as one to be immediately benefited by the litigation. This decision was followed in 1897 by McColl, J. (afterwards Chief Justice of British Columbia), in Tollemache v. Hobson, 5 B. C. R. 214; see Johnston v. Ryckman, 7 O. L. R. at p. 523, 3 O. W. R. 198. There would be no difficulty in supporting this order to examine the debtor Starr for discovery,

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and have him make production of papers if the action had not been referred. This cause being at issue, all the matters were referred by order of 6th April, 1904, to be tried before a referee, pursuant to s. 29 of R. S. O. 1897 c. 62. The whole cause and all its issues were thus before the referee to be tried, and, having regard to the original scope of the Rules in question, it is competent for an order to issue for the purpose of examining the assignor with a view to the proper trial of the cause. The referee has plenary power to deal with the cause under the statute, and, in addition, under Rules 648, 665, 666, 667, and 669. The reference being before trial and for the purpose of trial, the referee can properly direct one to be examined for discovery who is a party or who is to be treated as a party to the litigation.—Appeal dismissed.—Meredith, J., dissented on both grounds. *Garland* v. *Clarkson*, 5 O. W. R. 62, 9 O. L. R. 281.

Person for Whose Benefit Action Defended—*Rule 440.*]—Rule 440, providing that a person for whose immediate benefit an action is prosecuted or defended shall be regarded as a party for the purpose of examination, is difficult of application where the plaintiff seeks to examine a person for whose benefit it is said that the action is defended. Where the action was for infringement of a patent of invention for a certain heater, and the statement of defence denied the infringement and set up that the right to manufacture the heater was acquired by the defendants from C. & Co., and it did not appear that anything had been done by C. & Co. in reference to the action before or after it was brought:—Held, that the members of the firm of C. & Co. were not persons for whose immediate benefit the action was defended: at the most, a successful defence might relieve them from a possible liability to the defendants. *Moffat* v. *Leonard*, 24 Occ. N. 401, 8 O. L. R. 519, 2 O. W. R. 787, 3 O. W. R. 633, 4 O. W. R. 201, 5 O. W. R. 259.

Plaintiff—Absence from province—Place of residence—Offer to submit to examination abroad—Stay of action—Concurrent proceedings under Railway Act. *Maclean* v. *James Bay R. W. Co.*, 5 O. W. R. 440, 495.

Plaintiff Resident Abroad—*Demand—Description in Writ—Travelling Expenses.*]—Where the plaintiff is described in the writ as being "of No. 8 rue Alfred de Vigny, in the city of Paris, in the republic of France," it is not incumbent on his attorney to "declare where such party then is" under Art. 361, C. P., but it is for the opposite party to have him examined under a commission. Where a party is absent and under Art. 361, C. P., service of summons upon articulated facts may be made upon his attorney; such attorney may demand the necessary funds to pay his client's travelling expenses under Art. 370, C. P. *Menier* v. *Whiting*, Q. R. 18 S. C. 113.

Plaintiff Resident Abroad — *Place of Examination — Order—Discretion.*] — The plaintiff resided at Cleveland, in the State of Ohio, and the defendant and the solicitors for both parties in the county of Oxford, Ontario, where also the cause of action arose:—Held, that the local Judge for that county has jurisdiction under Rule 477 to make an order, upon the application of the defendant, requiring the plaintiff to attend for examination for discovery at Windsor, Ontario; that it was unnecessary for the defendant to shew special circumstances to obtain such an order; that it was a proper exercise of discretion to name Windsor, as a place "just and convenient" for the purpose; and that the local Judge properly took judicial notice of the geographical situation of Windsor. *Lick* v. *Rivers*, 21 Occ. N. 166, 1 O. L. R. 57.

Questions on Examination — *Assignment of Chose in Action—Interest of Assignor—Nominal Plaintiff.*]—In an action to recover a money demand assigned to the plaintiff, the defence alleged that the plaintiff was only a nominal plaintiff and that no consideration had been given for the assignment, and the plaintiff on his examination for discovery objected to answer questions relating to the consideration and to the interest of the assignors:—Held, that the question should be answered. *Boggs* v. *Bennett Lake and Klondike Navigation Co.*, 8 B. C. R. 353.

Relevancy of Questions — *Defamation—Wrongful Dismissal.*]—The plaintiff had, as a member of the medical board of the defendants, recommended a certain woman as a nurse, and she was employed by the defendants. Subsequently, the defendants, having been informed that the plaintiff had introduced the woman under an assumed name, and had previously been living in adultery with her, dismissed the plaintiff from their medical board, and withdrew permission to him to deliver lectures to the nurses, by a resolution of their board of directors, in which the grounds of their action were stated to be that the plaintiff had "recommended as a nurse a woman who was not a fit and proper person for the position, and had in doing so done injury to the hospital, and for other reasons" not specified in the resolution. The plaintiff sued for wrongful dismissal and for libel. In their defence the defendants set up that the alleged libel was privileged, and that they had received information to the effect that the plaintiff had been living in adultery with the woman in question some time previous to his appointment. Upon his examination for discovery the plaintiff was asked several questions as to his former relationship with the woman. These he refused to answer. Upon an application to compel him to answer:—Held, that the plaintiff was bound to answer all questions the answers to which would tend to shew whether or not the woman in question was or was not a fit and proper person to be employed as a nurse, even though the fact sought to be proven had occurred previously to the plaintiff's appointment, and that evidence tending to shew that the woman had been living in adultery or leading an immoral life was evidence bearing on that issue, especially as the adultery was alleged to have been committed with the plaintiff himself, and he would therefore be aware of it and of the fact that the woman was not a fit or proper person when he recommended her appointment. *Ings* v. *Calgary General Hospital Trustees*, 4 Terr. L. R. 58.

Scope of Examination—*Cross-examination—Rule 703—Retroactivity.*]—Upon the examination for discovery of the defendants certain questions were objected to, on the

ground that they were in the nature of cross-examination. On the 30th May, 1900, an order was made requiring the defendants to answer the questions objected to, from which the defendants appealed. Owing to some doubt as to the construction to be placed on the Rules providing for examinations for discovery, on the 15th June, 1900, Rule 703 was amended so as expressly to sanction cross-examination:—Held, dismissing the appeal, that the examination for discovery under Rule 703 (even before the amendment) was in the nature of a cross-examination, but limited to the issues raised in the pleadings. Carroll v. Golden Cache Mines Co., 6 B. C. R. 354, overruled. The amendment of 15th June, 1900, is retroactive. *Bank of British Columbia* v. *Trapp*, 20 Occ. N. 464, 7 B. C. R. 354.

Scope of Examination—*Rule 703.*]—The action was to set aside the will of Alexander Dunsmuir, on the grounds of insanity and undue influence exercised by the defendant, who was the beneficiary under the will. On the examination for discovery of the defendant, he refused to answer questions in reference to the nature and extent of the subject matter of the will, the business and personal relations that existed between him and his deceased brother, the history of their dealings with the property, the mode in which the deceased brother managed his affairs, and the circumstances leading up to and surrounding the execution of the will:—Held, that the questions must be answered or the defence would be struck out. The examination for discovery under Rule 703 is a cross-examination both in form and in substance, and a party being examined must answer any question the answer to which may be relevant to the issues. *Hopper* v. *Dunsmuir*, 23 Occ. N. 275, 10 B. C. R. 23.

Scope of Examination—*Specific Performance — Denial of Contract—Tender—Financial Means.*]—In an action for the specific performance of an alleged contract for the sale and purchase of a vessel for $5,000, one-half of which was to be paid in cash at the execution of the bill of sale and delivery of the vessel, and credit given for the remainder of the purchase money without any security upon the vessel or otherwise, the plaintiffs alleged a tender to the defendants of $2,500 in payment of the down instalment. Defences in denial of contract and of fraud were, among others, set up:—Held, that, as the defendants absolutely refused to carry out the contract, and denied their obligation to do so, the question whether there had been a tender in fact was immaterial, in an equity action such as this; and, therefore, the plaintiffs were not obliged upon examination for discovery to answer questions as to the source from which they had obtained the money alleged to have been tendered. The defendants also sought to examine the plaintiffs as to their means, to shew that they were persons of no means, which, it was contended, would be a circumstance to induce the Court to refuse to adjudge specific performance, even if the contract were proved:—Held, that the defendants were not entitled to such discovery, no such issue being raised upon the record, and it not being alleged that the contract was entered into upon the belief or representation that the plaintiffs were persons of means. *Bentley* v. *Murphy*, 21 Occ. N. 590, 2 O. L. R. 665.

Second Trial — *Rule 439.*]—A party to an action may be orally examined before the trial touching the matters in question: Rule 439:—Held, that a trial which has proved abortive by the disagreement of the jury or by the granting of a new trial is not a trial within the meaning of the Rule. Leitch v. Grand Trunk R. W. Co., 12 P. R. 541, 671, 13 P. R. 369, considered. Where the defendant had not been examined before the first trial, and the judgment thereupon had been set aside and a new trial ordered, the plaintiff was allowed to examine the defendant before the second trial:—Semble, that if there had been an examination of the defendant before the first trial, a second examination might be an abuse of the process of the Court. *Clarke* v. *Rutherford*, 21 Occ. N. 189, 1 O. L. R. 275.

Stage of Cause.]—The preliminary examination of a party to an action may take place after the inscription of the cause. *Bourassa* v. *Lambert*, 5 Q. P. R. 375.

Time for—*Day before Trial.*]—The preliminary examination of a party may take place the day before that fixed for examination and hearing. *Ward* v. *Jasmin*, 5 Q. P. R. 130.

Withdrawal of One Defendant after Being Sworn — Order to appear again. *Campbell* v. *Scott*, 5 O. L. R. 233, 2 O. W. R. 144.

II. Inspection.

Action for Negligence—*Defect in Elevator—Witness.*]—In an action for damages for injuries alleged to have been caused by the defects of an elevator situated on the property of the defendants, the Court cannot allow the plaintiffs the privilege of having the elevator inspected by a person whom they intend to call as a witness. Such an inspection is not an expertise under art. 392, C. P. C.; and it cannot be allowed under art. 289. Gareau v. Montreal Street R. W. Co., Q. R. 8 Q. B. 409, followed. *Dubois* v. *Horsfall*, Q. R. 18 S. C. 138.

Action for Work and Labour—*Experts.*]—In an action for the value of work done for the defendant to his house, where he complains of bad workmanship and alleges that he will be obliged to spend a certain sum to put the work done in good condition, the plaintiff cannot have an order to enter the defendant's house with experts to examine the work done. *Adams* v. *Prévost*, 3 Q. P. R. 516.

Inspection of Defendants' Premises —Survey and plan—Rule 571. *Hellwell* v. *City Dairy Co.*, 6 O. W. R. 480.

Machine in Dispute—*Order for Production—Deposit to Cover Expense.*]—When an action is brought to revendicate a machine which the defendant says is in his factory, but which the bailiff charged with the writ has been unable to find or seize, the Court is without power to order the defendant to exhibit the machine in his premises, because art. 289, C. P., does not authorize a compulsory entry on the premises of a party. Gareau v. Montreal Street R. W. Co., 1 Q.

P. R. 536, followed. The Court will not, in such a case, order the defendant to bring the machine to Court, because such a course would subject him to expense which he is not bound to bear. Nevertheless, an order for inspection will be granted in such a case, ordering the defendant to bring the machine to Court, when the plaintiff has deposited an amount sufficient to cover the expense of removal. *United Shoe Machinery Co.* v. *Caron*, 6 Q. P. R. 100.

III. INTERROGATORIES.

Absence of Defendant — *Delay—Foreign Commission.*]—In case of absence of the defendant, the attorney upon whom service of interrogatories sur faits et articles has been made may demand a delay in order that his client may appear and reply, or ask that the plaintiff shall interrogate the defendant upon a commission rogatory, in default of which the faits et articles will be taken pro confessis. *Hall* v. *Fenton*, 4 Q. P. R. 344.

Answer—*Reference to Answer of Co-defendant—Exceptions.*]—To an interrogatory to set out particulars of a claim of debt by the defendant C. against the defendant company, the defendant C. answered that he believed that schedules (which contained the information sought) attached to the answer of the defendant company were true:—Held, allowing an exception for insufficiency, that, the interrogatory relating to a matter within the defendant's knowledge, he should have made positive oath of the correctness of the schedules, or that they were correct to the best of his knowledge, information, and belief, accounting for his inability to swear positively to their correctness. *Lodge* v. *Calhoun*, 25 Occ. N. 89, N. B. Eq. 100.

Answers — *Exceptions — Costs—Will.*]—The bill alleged that the testator by his will bequeathed a fourth part of his estate to be divided equally among the four children of his son who were living at the date of the will; that the plaintiff was one of the children, and a beneficiary under the will. The defendants, trustees under the will, to interrogatories whether the plaintiff was not one of the four children of the son mentioned in the will, and living at the date thereof, and beneficially entitled thereunder to some and what interest in the estate, after admitting the will, answered that they did not know that the plaintiff was one of the children of the son, that she was living at the date of the will, and that she was beneficially entitled to an interest in the estate, although they were so informed and believed:—Held, sufficient. Specific information should be given in answers upon facts within the knowledge of the party answering, and the matter should not be left to inference. Where some exceptions were allowed, and others overruled, costs were allowed to each party. *Crosby* v. *Taylor*, 24 Occ. N. 241, 2 N. B. Eq. Reps. 511.

Company — *Officer.*] — Interrogatories must be addressed to a corporation which is a party to the action, and not to one of its officers. *Lambe* v. *Electric Fire Proofing Co. of Canada*, 6 Q. P. R. 397.

Default — *Pleading.*] — A defendant in default for a reply to interrogatories sur faits et articles cannot obtain permission to plead until he has been relieved from his default. *Hall* v. *Fenton*, 4 Q. P. R. 356.

Ex Parte Order.]—Summons by the defendants to set aside an ex parte order giving the plaintiffs leave to deliver interrogatories to be answered by the defendants' manager:—Held, discharging the summons, that an order for leave to deliver interrogatories under Order XIII., Rule 6, may be made ex parte. *Charles T. Daily Co.* v. *British Columbia Market Co.*, 21 Occ. N. 321, 8 B. C. R. 1.

Judgment on, for Default of Answer —*Discretion.*]—The Court has a discretion as to admitting interrogatories upon default to appear and answer them, and is not imperatively obliged to admit them upon such default. *Caron* v. *Gaudet*, 6 Q. P. R. 105.

Order for—*Amendment.*]—An order for interrogatories "sur faits et articles," signed by the prothonotary, may be amended by him only. *Tongas* v. *Quinn*, 7 Q. P. R. 34.

Penal Action.]—The defendant in an action qui tam for a penalty under art. 5639, R. S. Q., is not bound to respond to interrogatories sur faits et articles; and in this case a motion to take the interrogatories pro confessis was dismissed, but without costs. *Rossignol* v. *Morel*, 3 Q. P. R. 407.

Secretary of Corporation — *Authority to Answer.*]—The answers of the secretary of a corporation to interrogatories sur faits et articles will be struck out of the record if he has not been authorized by the corporation to answer; a delay should be granted to allow the secretary to renew his answers after having procured the necessary authorization. *Dumont* v. *College of Physicians and Surgeons of Quebec*, 4 Q. P. R. 81.

Service Abroad—*Statute—Repeal—Answers—Capias.*]—The provisions contained in s.-s. 6 of s. 63 of s. 83 of the Revised Statutes of Lower Canada is abrogated. 2. A party who is served in Ontario with interrogatories, and at the same time accepts conduct money, thereby consents to go to the place where he is summoned to answer the interrogatories, and cannot oppose a motion to have the interrogatories taken pro confessis if he does not so answer. 3. Interrogatories may be served, in an action in which a capias is issued, immediately after the filing of a petition to quash the capias. *Carbonneau* v. *Bernard*, 6 Q. P. R. 309.

IV. PHYSICAL EXAMINATION.

Bodily Injuries — *Accident.*] — In an action to recover damages for bodily injuries resulting from an accident, the Court has no power to order the plaintiff to submit himself to a physical examination by a surgeon, if he refuses to do so. *Mousseau* v. *City of Montreal*, 4 Q. P. R. 38.

Bodily Injuries—*Assault.*]—In an action to recover damages for bodily injuries caused in an assault the Court will order the plaintiff to submit himself to surgical examination. *Baxter* v. *Davis*, 4 Q. P. R. 153.

V. Production of Documents.

Action for Penalties.]—It is improper in an action to recover penalties under the Extra-Provincial Corporations Act, 63 V. c. 24 (O.), to issue the usual præcipe order for production of documents by the defendants. Such an order having been issued, it was held that the defendants were not bound to file an affidavit and claim privilege, but were entitled to have the order set aside. *Johnston* v. *London and Paris Exchange*, 23 Occ. N. 245, 6 O. L. R. 49, 2 O. W. R. 468, 492, 501.

Affidavit — *Copy of Document.*]—Under 53 V. c. 4, s. 60, and form 10, an affidavit of discovery should negative possession of a copy of a document. *Burden* v. *Howard*, (*No. 2*), 23 Occ. N. 266.

Affidavit — Defunct company—Accountant. *Waterall* v. *Union Petroleum Co.*, 6 O. W. R. 740.

Affidavit — Identification and description —Schedules—Mortgages. *Farmers' L. and S. Co.* v. *Scott*, 2 O. W. R. 23.

Affidavit — *Materiality — Examination of Parties—Scope of—Contents of Document —Costs of Examination.*]—The plaintiff alleged a contract of partnership with the defendant J. for the promotion of a company to buy plant and carry on a manufacturing business, and that the defendants R. and C. had maliciously caused a breach of the partnership contract; he claimed an account and damages. The defendant R., on examination for discovery, said that he had obtained agreements to sell from various companies, which were afterwards assigned to a newly incorporated company, not a party to this action. The plaintiff alleged that these agreements were, in fraud of him, substituted with variations, for agreements previously entered into between the same companies and J.; also that R. and C. paid $20,000 to J. to induce him to act with them; and it appeared from R.'s examination that he and C. drew a cheque upon their bank account in favour of J., which was paid:—Held, that the agreements and the cheque and a memorandum prepared by R. were material to the plaintiff's case, and should be produced or accounted for in the defendants' affidavits of documents. 2. That R. and C. ought not, as a matter of discretion, to be ordered to disclose facts which would become material only when the plaintiff should have established his right to damages. 3. That the plaintiff was entitled to know from R. and C. whether they paid money to J.; whether it was their own money, or, if not, whose it was; and for what it was paid. 4. That the plaintiff was entitled to know the amount paid by R. and C. to the M. company for their business, it being alleged by the plaintiff that he and J. had obtained a prior option upon it. 5. That the plaintiff was entitled to know from C. the nature of the agreements made for the purchase of the properties; if they were in writing, and he had access to them in his capacity of director of the company which was formed, he should inform himself of their contents so as to be able to answer as to them, or should produce copies; but, if he had no right of access, he was not bound to state his mere recollection of them:—Semble, that where an examination is unnecessarily long, the costs of it should be entirely disallowed. Decision of Meredith, C.J., 22 Occ. N. 117, varied. *Evans* v. *Jaffray*, 22 Occ. N. 133, 3 O. L. R. 327, 1 O. W. R. 29, 158, 2 O. W. R. 678, 3 O. W. R. 877, 6 O. W. R. 733.

Affidavit — *Necessity for—Agent's Commission.*]—In an action for compensation for services rendered in finding a purchaser for property, where one of the defendants is a corporation, and must have under its control all records, proceedings, and correspondence, if any exist, relating to communications with the other defendant, it is impossible to say, under all the circumstances, that discovery was not necessary or might not be helpful in the trial, and an affidavit of documents will therefore be ordered. *Wood* v. *Dominion Lumber Co.*, 37 N. S. Reps. 250.

Affidavit on Production — *Documents Relating to Plaintiff's Title—Protection.*]—The plaintiff's manager made an affidavit on production of documents in which he objected to produce a certain agreement (referred to in the statement of claim) between the plaintiffs and their assignors whereby the property in question in the action was assigned to the plaintiffs; on the ground that such document "relates exclusively to the title of the plaintiffs and to the case of the plaintiffs in this action, and not to the case of the defendants, nor does the said document tend to support the defendants' case, nor does it, to the best of my knowledge, information, and belief, contain anything impeaching the case of the plaintiffs:"—Held, not sufficient to protect the document from production. Combe v. Corporation of London, 1 Y. & C. C. C. 631, followed. Quilter v. Heatly, 23 Ch. D. 42, specially referred to. *Diamond Match Co.* v. *Hawkesbury Lumber Co.*, 21 Occ. N. 342, 1 O. L. R. 577.

Affidavit — *Order.*] — Where inspection is sought of documents supposed to be in the possession of the opposite party, an order should be obtained under s. 59 of 53 V. c. 4, for discovery by affidavit as to what documents are in the opposite party's possession, when an order may be made under s. 61 for their production. *Cushing Sulphite Co.* v. *Cushing*, 23 Occ. N. 138, 2 N. B. Eq. Reps. 458.

Affidavit — Partnership — Account — Special agreement — Master and servant—Profit sharing—Statement furnished by master—Impeaching for fraud. *Cutten* v. *Mitchell*, 6 O. W. R. 497, 552, 10 O. L. R. 734.

Affidavits — Privilege—Confidential communications — Solicitor and client. *Hall* v. *Laplante*, 2 O. W. R. 490.

Affidavit — *Privilege—Confidential Communications—Solicitor and Client.*] — There has been a progressive development of the particularity required in the description of correspondence between a solicitor and his client in order that it may be protected from discovery by reason of privilege. As the affidavit on production cannot be contradicted, the grounds upon which the privilege is claimed must be set forth explicitly and fully, so that the Court may judge as to whether the documents so described are properly withheld from production. The affidavit must not

only state that the correspondence is confidential and of a professional character, but the nature of it must be set forth, without any ambiguity whatever, in order that there may be no doubt as to its being privileged. Where the solicitors were acting as agents for the sale of defendant's land in question in this action, shortly before the first of the letters for which the defendant claimed privilege was written:—Held, that the defendant, in order to protect the correspondence, should give some more definite description of it than that it was written "in reference to the matters which are now in question in this action." Gardner v. Irwin, 4 Ex. D. 49, O'Shea v. Wood, [1891] P. 286, and Ainsworth v. Wilding, [1900] 2 Ch. 315, followed. *Clergue v. McKay*, 22 Occ. N. 64, 148, 162, 3 O. L. R. 63, 478, 1 O. W. R. 178, 241, 2 O. W. R. 647, 3 O. W. R. 860.

Appeal — *Discretion.*]—An appeal from the decision of Weatherbe, J., refusing the plaintiff's application for discovery of documents. The defendants contended that there was nothing to indicate the existence of any documents to be discovered, and also that there was no appeal, the order being discretionary with the Judge below:—Held, that an appeal can be asserted in such cases; and that the Judge below erred in refusing discovery. *Wood* v. *Dominion Lumber Co.*, 24 Occ. N. 238.

Better Affidavit.]—*Murphy* v. *Lake Erie and Detroit River R. W. Co.*, 1 O. W. R. 827, 2 O. W. R. 444.

Breach of Contract—Correspondence relating to similar contracts. *Denison* v. *Taylor*, 2 O. W. R. 386, 469.

Correspondence after Action Begun —Information for defence—Privilege — Examination for discovery—Undertaking to produce. *Slater Shoe Co.* v. *Wilkinson*, 1 O. W. R. 591.

English Practice—Payment of costs of discovery—Incorporated company—Selection of officer to make affidavit on production. *Canadian Bank of Commerce* v. *Carbonneau* (Y.T.), 1 W. L. R. 262, 399.

Identification — *Description in Affidavit.*]—Where discovery of documents is made, it is not enough to make them up in sealed bundles marked A and B, but the documents must be identified by a mark or number and so described in the affidavit. *Cushing Sulphite Co.* v. *Cushing*, 23 Occ. N. 231, 2 N. B. Eq. Reps. 466.

Letters — Privilege — Contracts similar to that in question—Trade combination—Security for costs—Increase in amount—Discretion. *Cascin Co.* v. *Hunsley*, 3 O. W. R. 59, 178, 235, 412.

Letters between Solicitor and Client —*Privilege.*]—Letters passing between a solicitor and his client, who was the common grantor of the plaintiff and defendant, in respect to the property in dispute, which had passed into the possession of the defendant from the executor of the writer, after his decease, are not privileged from production. *Platt* v. *Buck*, 22 Occ. N. 374, 4 O. L. R. 421.

Mortgage — Estoppel — Fraud — Discovery limited as to date by affidavit on production — Account — Preliminary issue — Better affidavit. *Canadian Bank of Commerce* v. *McDonald* (Y.T.), 1 W. L. R. 271, 506.

Motion—*Necessity for.*] — A defendant cannot demand, by motion, the production of the documents invoked by the plaintiff in support of his claim, the plaintiff not being in a position to proceed with his action until such documents have been produced. *Lemay* v. *Labelle*, 4 Q. P. R. 189.

Motion to Compel—*Documents Relied on by Plaintiff—Pleading.*]—A defendant not being bound to plead to the action whilst documents invoked by the plaintiff are not produced, a motion to compel production of such documents is idle (inutile). *Montreal Watch Case Co.* v. *Imperial Button Works, Limited*, 7 Q. P. R. 279.

Non-materiality of Documents—*Foreign Commission—Inspection.*]—Where discovery, as distinguished from production for the purpose of inspection, of documents, is sought, an affidavit of such documents must be given, though their production when applied for could be successfully opposed on the ground of immateriality. Documents within the jurisdiction of the Court will not be ordered to be produced before a commissioner for taking evidence abroad except in very special circumstances. Where inspection of documents had been given by consent, an application to the Court for further inspection was granted, and the Court declined to give effect, as too technical, to an objection that a demand in writing for inspection had not been made prior to the application to the Court. *Cushing Sulphite Co.* v. *Cushing*, 23 Occ. N. 231, 2 N. B. Eq. Reps. 469, 472.

Order for — *Default — Proof of—Contempt of Court—Attachment.*] — Before an attachment can be issued for contempt in not producing documents for inspection on an examination for discovery, an order for production for inspection has to be made. An order for production of books for inspection must state the time, or time after service thereof, within which the books are to be produced, and the copy thereof served must be indorsed with notice of the consequence of neglect or refusal to obey the same. *Smith* v. *McKay*, 4 Terr. L. R. 202.

Order for Production — *Motion to Dismiss Action—Indorsement of Notice.*] — In order that a party taking out an order for discovery may invoke the provisions of s. 184, J. O. 1893, though only with the object of having a plaintiff's action dismissed or a defendant's defence struck out, the order must be indorsed in accordance with s. 311. *Doidge* v. *Town of Regina (No. 2)*, 2 Terr. L. R. 337.

Ownership of Land—*Filing of Documents of Title.*]—A party who alleges that he is the owner of certain land, without alleging title or proofs in support of his allegation, will not be ordered, upon motion to that effect, to file his document of title to the property, and proceedings will not be suspended in order to compel him to file such documents. *Molson* v. *City of Montreal*, 5 Q. P. R. 339.

Penalty.]—*Johnston* v. *London and Paris Exchange*, 6 O. L. R. 49, 2 O. W. R. 468, 492, 501.

Place of Production.]—Where an order has been made for the production of document, the document should be produced in the city or town in which the writ was issued, but a Judge has a discretionary power to order production somewhere else to prevent inconvenience and prejudice to a party's business operations. *Davies-Sayward Mill and Land Co.* v. *Buchanan*, 24 Occ. N. 107, 10 B. C. R. 175.

Practice —*Application to Dismiss Action —Failure to Indorse Notice on Order.*]— Rule 330 applies to orders for discovery of documents, not only where the remedy sought for non-compliance is attachment, but also where the remedy sought is dismissal of the action or striking out of the defence. Where therefore a copy of such an order served was not indorsed as provided, an application to dismiss the action for non-compliance with the order was refused. *Leadley* v. *Gaetz*, 5 Terr. L. R. 484.

Privilege — Contemplated litigation — Affidavit on production. *F. T. James Co.* v. *Dominion Express Co.*, 4 O. W. R. 418.

Privilege — Information and documents obtained before action. *London Life Ins. Co.* v. *Molsons Bank*, 1 O. W. R. 457, 2 O. W. R. 34, 3 O. W. R. 858.

Privilege—Reports of officers of company —Contradictory affidavit on production—Examination of officer of company — Affidavit made by a different officer. *Bain* v. *Canadian Pacific R. W. Co.* (Man.), 2 W. L. R. 235.

Privilege—*Solicitor and Client—Fraud.*] —There is no valid claim of privilege in regard to the production of documents passing between solicitor and client, when the transaction impeached is charged to be based upon fraud. Williams v. Quebrada Railway, Land, and Copper Co., [1895] 2 Ch. 751, followed. And where the action was by a mortgagor to set aside as fraudulent a sale under the power in the mortgage and for redemption:—Held, that an admission made by one of the defendants, though sufficient to entitle the plaintiff to redeem, not being of efficacy against some of the other defendants, did not remove the issue of fraud from the record so as to enable the defendant making the admission to escape discovery. *Smith* v. *Hunt*, 21 Occ. N. 237, 1 O. L. R. 334.

Production of Documents—*Privilege— Evidence Produced in Contemplation of Litigation.*]—Appeal by plaintiffs from order of local Judge at Perth requiring plaintiffs to file a further and better affidavit on production. Defendants were owners of land through which a roadway runs, and the question to be determined in the action was whether such roadway was a public highway or not:—Held, that defendants were not entitled to such production and inspection. While the information was not obtained for the purpose of supporting an action expressly contemplated at the time the instructions were given to the solicitors, it must have been contemplated at the time the instructions were given to the solicitors, that if the report of the solicitors was that a highway existed, an action would be brought against the defendants for obstructing it, if they persisted in disputing that it was a highway, in which event the information obtained by the solicitors would be necessary to assist them in prosecuting such action. The immediate purpose of the information was to aid the solicitors in forming an opinion as to the legal rights of plaintiffs in reference to the road, and such information obtained by the solicitors for that purpose was privileged from production in an action brought as the result of the opinion formed by the solicitors. Southwark v. Quick, 3 Q. B. D. 315; Leroyd v. Halifax, [1895] 1 Ch. 686.] The appeal allowed, with costs to the successful party in the action. *Township of Elmsley* v. *Miller*, 5 O. W. R. 651, 717, 10 O. L. R. 343.

Railway—*Affidavit on Production made by Officer — Cross-examination on — Claim of Privilege — Reports of Officials Respecting Accident—Duty of Officer to Inform Himself —Disclosing Names of Witnesses.*]—Reports made by the employees of a railway company to their superior officers in accordance with its rules concerning an accident resulting in death, and immediately thereafter, are not privileged from production in an action against the company for damages arising out of the accident, if they were made in the discharge of the regular duties of such employees and for the purpose of furnishing to their superiors information as to the accident itself, and were not furnished merely as materials from which the solicitor of the company might make up a brief, and an officer of the company who has made an affidavit on production of documents, must, on his cross-examination on such affidavit, furnish such information concerning them that the Court may be in a position to decide, on a further motion whether they are privileged or not. If any of the information sought on such examination, and to which the plaintiff is entitled, is not within the knowledge of the deponent, he must ascertain the facts and give the information. That the names of some of the defendants' witnesses would be disclosed if the questions were answered, is not a sufficient reason for refusing to answer. Questions as to whether reports had been sent in as to the condition of the locomotive before the accident, and as to repairs thereto, must also be answered. *Savage* v. *Canadian Pacific R. W. Co.*, 15 Man. L. R. 401, 1 W. L. R. 441.

Railway Company — *Accident—Reports of Servants—Privilege.*]—A company sued in damages on account of an accident may be compelled to produce at the trial all reports of the accident made by its employees in the ordinary course of their business, or of their duty, but not its reports made at the request or instance of its solicitor, in answer to inquiries made by the latter, with a view to and in contemplation of anticipated litigation. *Stocker* v. *Canadian Pacific R. W. Co.*, 5 Q. P. R. 117.

Relevancy — *Denial — Sufficiency of Affidavit.*]—When a party to an action has made and filed an affidavit on production of documents, in the ordinary form, in obedience to an order to produce served upon him, the opposite party must be satisfied with such affidavit unless he can shew, from admissions or former statements on oath of the affiant,

that there is a reasonable suspicion that he has in his possession or power other documents relating to the matters in question.—The party seeking discovery cannot get an order for a better affidavit merely by shewing that there are in the possession or power of the opposite party letters or other documents not mentioned in the affidavit which might contain relevant matter, in the face of the statement in the affidavit that there are none such. *Muir* v. *Alexander*, 24 Occ. N. 410, 15 Man. L. R. 103.

Security for Costs of Production — English rules — Special provisions of Yukon rules — Practice. *Canadian Bank of Commerce* v. *Carbonneau* (Y.T.), 1 W. L. R. 262, 399.

Time for—*Particulars.*]—If a plaintiff, at the time of the return of his action, does not file the documents invoked in support of his demand, the defendant may make a motion for their production and for particulars. *Thibault* v. *Poulin*, Q. R. 21 S. C. 126.

DISCOVERY OF FRESH EVIDENCE.

See EVIDENCE.

DISCRIMINATION.

See ASSESSMENT AND TAXES — CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS.

DISMISSAL OF ACTION.

Default of Election under Order — Appeal—Extension of time for election after default. *Bank of Hamilton* v. *Anderson*, 2 O. W. R. 1127, 3 O. W. R. 301, 389, 709, 4 O. W. R. 146.

Default of Statement of Claim — Practice — Time—Costs—Leave to proceed—Terms—Amendment. *Thibadeau* v. *Lindsay*, 2 O. W. R. 431.

Delay in Delivery of Statement of Claim—Irregular delivery—Validating order—Terms—Possession of land—Improvements. *City of Toronto* v. *Ramsden*, *City of Toronto* v. *McDonell*, 5 O. W. R. 381, 413.

Delay in Going to Trial — Excuse — Leave to proceed—Terms—Costs. *Meldrum* v. *Laidlaw*, 5 O. W. R. 87.

Failure to Proceed to Trial—Breach of undertaking—Excuse for delay—Terms—Costs. *Bayly* v. *Wellington Dressed Meats Co.*, *Hanrahan* v. *Wellington Dressed Meats Co.*, 4 O. W. R. 203, 6 O. W. R. 725.

Money Paid into Court — *Order Permitting Withdrawal—Recourse for Balance.*]—An action will not be dismissed on motion, after judgment has been rendered permitting the plaintiff to withdraw the sum paid into Court by the defendant to purchase peace, and reserving the recourse of the plaintiff for the balance of the amount claimed. *Laplante* v. *De Lery Macdonald*, 6 Q. P. R. 463.

No Reasonable Cause of Action—Dismissal of servant — Mechanics' lien — Company. *Berridge* v. *Hawes*, 2 O. W. R. 619, 741.

Want of Prosecution—Excuse for delay—Merits—Locus pœnitentiæ—Terms. *Stratford* v. *Young*, 3 O. W. R. 620, 786.

Want of Prosecution—Excuse for delay — Poverty — Negotiations for settlement — Amendment — Statement of claim—Criminal conversation. *Milloy* v. *Wellington*, 3 O. W. R. 37, 561, 4 O. W. R. 82, 6 O. W. R. 437.

Want of Prosecution—Negotiations for settlement—Several defendants. *Burnham* v. *Hays*, 2 O. W. R. 535.

See MASTER IN CHAMBERS — NOTICE OF ACTION—PAYMENT OUT OF COURT—PUBLIC MORALS—TRIAL.

DISMISSAL OF SERVANT.

See MASTER AND SERVANT.

DISQUALIFICATION.

See JUSTICE OF THE PEACE — MUNICIPAL CORPORATIONS.

DISQUALIFICATION OF CANDIDATE.

See PARLIAMENTARY ELECTIONS.

DISSOLUTION OF MARRIAGE.

See HUSBAND AND WIFE.

DISTRACTION OF COSTS.

See COSTS—SOLICITOR.

DISTRESS.

Payment by Tenant after Distress to Mortgagee of Landlord — *Distress Lawfully Begun—Continuation after Payment—Validity of Payment—Bailiff—Counterclaim — Costs of Distress — Costs of Action for Illegal Distress.*]—Action by tenant against landlord and bailiff for an injunction restraining defendants proceeding with a distress for rent, and for damages. Defendant Ireland, being the owner of a farm of 90 acres in the township of Brighton, conveyed it by way of mortgage to C. R. W. Biggar and others, trustees. Later defendant Ireland demised the same premises, by lease under seal, to

plaintiff for 5 years, at an annual rent of $150. Rent became in arrear and landlord distrained. Landlord's mortgagee notified tenant to pay rent to him, as his mortgage was overdue, and threatened tenant with proceedings if he did not so pay him the rent. Under this compulsion tenant paid landlord's mortgagee the rent due:—Held, the position was the same as if plaintiff, after defendant had distrained his goods, had paid the rent to the landlord himself. The distress was originally lawful, and the landlord was entitled to retain it until, not only the rent, but the costs of the distress, should be paid. Until payment of these plaintiff was not entitled to any relief. Upon the question whether plaintiff was entitled to pay his rent to the mortgagees or not, the defendant Ireland failed. On the other hand defendants were entitled to be paid their costs of distress before a replevin or injunction could properly be granted, because the seizure and proceedings down to the time plaintiff paid his rent to the mortgagees were proper and regular; and they were entitled to retain a sufficient quantity of the goods until the costs of distress were paid. In these circumstances, there was no cause of action against the bailiff, and the action should be dismissed as against him. *Puffer* v. *Ireland*, 5 O. W. R. 447, 10 O. L. R. 87.

Sale of Land — *Instalments of Purchase Money — Rent — Default — Construction of Deed.*]—A deed by which the owner of land lets it for five years, the grantee to pay taxes, assessments, and assurances, in which it is stipulated that on default of payment within sixty days after the falling due of each yearly sale, the grantee will lose all advantage, is, in spite of its being called a "promesse de vente et bail," nothing but a sale of the land, voidable under certain conditions, and a distress in eviction by the grantor, claiming rent and an indemnity, will be dismissed upon exception to the form, such action not being between landlord and tenant. *Irving* v. *Monchamps*, 3 Q. P. R. 430.

See ASSESSMENT AND TAXES — CRIMINAL LAW—LANDLORD AND TENANT—MORTGAGE.

DISTRIBUTION OF COSTS.

See COSTS.

DISTRIBUTION OF ESTATES.

Ab-intestate Succession—*Inventory — Notary.*]—The choice of a notary to proceed to the inventory of an ab-intestate succession belongs to the most diligent party especially if another party, who has had the control of the estate for some time, has failed to complete the inventory; however, the latter being the choice of the majority of the interested parties, will be appointed to assist the other notary in his inventory. *Mallette* v. *Mallette*, 5 Q. P. R. 422.

Acceptance of Succession — *Renunciation.*]—An heir, who has accepted a succession under benefit of inventory, cannot afterwards renounce to it. *In re Mathieu and Montreal Loan and Mortgage Co.*, 6 Q. P. R. 69.

Ascertainment of Next of Kin of *Intestate — Questions as to Legitimacy of Uterine Brother—Marriage Laws of State of New York—Bigamous Marriage of Wife of Absentee—Statutes — Presumptions.*] — Action for a declaration of plaintiffs' status and rights as next of kin of one George W. Todd, who died intestate at Hamilton, leaving a considerable fortune. Plaintiffs and defendants other than the company (administrators) were grandchildren of one Philinda Ellison, whose matrimonial experiences give rise to the question raised by defendants as to the legitimacy of plaintiffs' father, Parley Hunt the younger. Philinda Ellison first married one Gideon Todd in 1820. By him she had issue Mary Ann Todd, the mother of defendants, and George W. Todd, the intestate. In 1824 Gideon Todd deserted his wife and caused a story to be published that he had been drowned. Believing him dead, Philinda Todd in 1826 entered into marriage relations with Parley Hunt the elder, which continued until her death in 1833. Of this marriage Parley Hunt the younger was born in November, 1829, more than 5 years after Gideon Todd had deserted his wife, who always remained unaware that he was not in fact dead. He returned many years afterwards to his former home, in the State of New York, where all the parties were domiciled. The estate of George W. Todd consisted entirely of personalty. Parley Hunt the younger, was born in November, 1829, and died in 1896. On 3rd May, 1895, the legislature of the State of New York passed the following statute, chaptered 531 of the laws of that year:—"1. All illegitimate children, whose parents have heretofore intermarried, or shall hereafter intermarry, shall thereby become legitimatized and shall be considered legitimate for all purposes. Such children shall enjoy all the rights and privileges of legitimate children. Provided, however, that vested interests in estates shall not be divested or affected by this Act. 2. All Acts and parts of Acts inconsistent with this Act are hereby repealed. 3. This Act shall take effect immediately." There could be in 1895 no vested interests in the estate of George W. Todd, who did not die until 1903. Nemo est hæres viventis. The proviso in s. 1, therefore, does not, for the purposes of this case, exclude Parley Hunt the younger from the beneficent operation of the statute. Although illegitimate when born, the subsequent intermarriage of his parents in 1830 legitimatized him for all purposes. His issue can, therefore, claim through him as a half brother of the intestate George W. Todd. Judgment entered declaring plaintiffs to be of the next of kin of George W. Todd, deceased, and for payment to them of their costs of this action by defendants other than the Trusts and Guarantee Co., who will have their costs as between solicitor and client out of the estate of the intestate. *Hunt* v. *Trusts and Guarantee Co.*, 5 O. W. R. 405, 6 O. W. R. 1024, 10 O. L. R. 147.

Contestation of Collocation—*Leave to File after Time—Affidavit.*]—Where a motion for leave to file, after the time has expired, a contestation of collocation, has been dismissed because the contestation is not accompanied by an affidavit, it is not sufficient for the contesting party to file such affidavit, but he must apply to the Court for leave to file a contestation supported by an affidavit. *Labelle* v. *Ouimet*, 5 Q. P. R. 232.

Devolution of Estates Act—*Collateral Relations—Per Capita Distribution — Half-blood — Double-blood.*] — An intestate was possessed of both real and personal property, and left no wife, child, father, mother, uncle, or aunt. His next of kin were cousins, some of whom were the children of his father's half brother, and one of whom was the niece both of his father and mother:—Held, that the estate should be distributed equally among the cousins. Under the Devolution of Estates Act the whole estate is to be distributed as personal property is now distributable. Collateral relatives, in the same degree of kinship take equally in their own rights, not by way of representation; those of the half blood take equally with those of the whole blood, and those of the double blood take no more. *In re Adams*, 24 Occ. N. 59, 6 O. L. R. 697, 2 O.W. R. 1156.

Devolution of Estates Act — *Relatives of the Half Blood.*]—In the distribution under the Devolution of Estates Act of the real and personal estate of an intestate, brothers and sisters of the half blood share equally with those of the whole blood. *In re Wagner*, 24 Occ. N. 19, 6 O. L. R. 680, 2 O. W. R. 1084.

Intestacy — *Next of Kin—Ascertainment —First Cousins once Removed.*]—Application by the administrator of the estate of Isabella McEachren, deceased, for an order for the administration and distribution of her said estate, consisting of about $3,000 personalty and $300 realty, which came to her on the part of neither parent. Isabella McEachren died intestate and unmarried. There were 2 daughters of a deceased sister of the intestate's father and 16 or more grandchildren of the deceased brothers and sisters of the intestate's mother The intestate's father and mother were dead. No brothers or sisters, or children of such, survived her. The question was whether the 16 grandchildren of the brothers and sisters of the intestate's mother, were entitled to participate, by representation of their deceased parents, with the 2 daughters of the deceased sister of the intestate's father, in the distribution of the estate. Falconbridge, C.J.,: — Held, that there was no representation of collaterals of this class, and that the 2 daughters of the deceased sister of the intestate's father took to the exclusion of the 16 grandchildren of the deceased brothers and sisters of the intestate's mother. The Statute of Charles, being in force here, was applicable to the present case. The word "prospectively" in sec. 37 of the Devolution of Estates Act does not exclude the operation of the Statute of Charles by making applicable secs. 38 to 55 of the Devolution of Estates Act to descents subsequent to 1886, the word having reference to the period prospectively from 1852 to 1886. *Re McEachren*, 6 O. W. R. 393, 10 O. L. R. 499.

Intestacy — Next of kin—Action for administration—Issue as to legitimacy—Administratrix—Costs. *Wall* v. *Wall*, 5 O. W. R. 503.

Intestate's Estate—*Rights of Widow—Second Husband and Child—Devolution of Estates Ordinance — Married Women's Property Ordinance—Land Titles Act—Imperial Intestates' Estates Act.*]—The Devolution of Estates Ordinance, c. 13 of 1901 (assented to 12th July, 1901), provides:—"1. The property of any man hereafter dying intestate and leaving a widow, but no issue, shall belong to such widow, absolutely and exclusively, provided that prior to his death such widow had not left him and lived in adultery after leaving him. 2. This section shall apply to the property of any person who died before the date of the coming into force of this Ordinance, in case no portion of the estate of such person has been distributed:"—Held, that s.s. 2 does not apply to a case where the widow died previously to the passing of the Ordinance, although no portion of the estate of the deceased husband had been distributed at the time of its passing. The Ordinance respecting the personal property of married women, C. O. 1898, c. 47, provides that "a married woman shall in respect of personal property be under no disabilities whatsoever heretofore existing by reason of her coverture or otherwise, but shall in respect of the same have all the rights and be subject to all the liabilities of a feme sole:"—Held, that notwithstanding this provision a husband is entitled to the whole of his deceased intestate wife's undisposed of personal property upon taking out letters of administration. Section 3 of the Land Titles Act, 1894, 57 & 58 V. c. 28 (D.), which provides that "land in the Territories shall go to the personal representatives of the deceased owner thereof in the same manner as personal estate now goes, and be dealt with and distributed as personal estate," does not convert realty into personalty, but refers only to the manner of distribution. The Imperial Intestates' Estates Act, 53 & 54 V. c. 29, is not in force in the Territories. Where, therefore, S. died on the 24th December, 1899, intestate and without issue, leaving as his next of kin his father, and also his widow, who having married B., died on the 22nd April, 1901, leaving a child by B., the property of S. was directed to be distributed as follows:—One-half of the personal property to the deceased's father and the other half to B. for his own benefit, on his taking out administration to his deceased wife: one-half of the real property to the deceased's father and the other half to the administrator of the widow's estate to be distributed, one-third to B. and two-thirds to her child. *In re Steidel*, 5 Terr. L. R. 303.

Judgment — *Contestation — Motion to Set Aside—Preliminary Exception—Deposit —Creditor.*]—A motion to set aside a contestation of a judgment of distribution is a preliminary exception, and must be accompanied by the deposit mentioned in Art, 165, C. P. 2. A party making such a motion will be permitted to make a deposit upon giving notice of it to the opposite party. 3. The contestation of a judgment of distribution by a creditor, who has not filed his claim, will be set aside if it is not accompanied by the deposit required by Art, 674, C. P. *Labelle* v. *Ouimet*, 5 Q. P. R. 150.

Legacy—*Saisie-Conservatoire.*]—A legatee is not entitled to issue a saisie-conservatoire where he alleges simply that he has good grounds for claiming the amount of his legacy and for bringing into the custody of the Court all movables and money belonging to the estate of the deceased. *Rochon* v. *David*, 6 Q. P. R. 290.

Legitimation of Bastard — *Heirship of Parent.*]—A father is one of the heirs of his natural child legitimated by a subsequent marriage with the child's mother. *Lamoureux* v. *Aymard*, Q. R. 24 S. C. 24, 5 Q. P. R. 432.

Opposition — *Collocation of Married Woman—Personal Service—Judgment.*]—An opposition in distribution against the placing on the list of a woman who lives apart from her husband, must be served upon her and not upon her husband only. 2. A collocation which has been confirmed constitutes a judgment which cannot be attacked by an opposition in distribution. *Décary* v. *Bro dit Pominville*, 5 Q. P. R. 203.

Personalty—*Next of Kin — Married Women's Property Act.*]—Where a child dies intestate and unmarried entitled to personal estate, leaving a father, mother, brother, and sister, the father is entitled as the next of kin in the first degree to the whole of the personal estate exclusive of all others. This rule of construction, as to the distribution of personal property, has not been in any way altered by any provision of the Married Women's Property Act, 1895. *Lewin* v. *Lewin*, 36 N. B. Reps. 365.

Renunciation of Succession — *Registration—Residuary Legatee.*]—It is only in regard to third persons that the lack of registration renders a renunciation to a succession invalid, and in an action against a residuary legatee who renounces to the seccession after the expiry of the delays to make inventory and deliberate, and subsequently pleads a renunciation to the succession, the plaintiff cannot have such renunciation set aside on the ground of non-registration. Turner v. Renouf, 6 Q. P. R. 175. See also *Renouf* v. *Turner*, Q. R. 24 S. C. 194.

Report — *Dispensing with—Powers of Prothonotary.*]—The power to pay the money without report of distribution is given to the prothonotary alone, and not to the Judge or Court. *Gravel* v. *Melancon*, 5 Q. P. R. 388.

Report on — *Collocation—Contestation—Evidence—Proceedings in Action.*]—Upon a contestation of a collocation of a report on distribution, the Court will consider all the proceedings in the action subsequent to the writ of summons. *Pelletier* v. *Michaud*, Q. R. 20 S. C. 413.

Rival Claims to Succession—*Dilapidation of Property—Remedy against—Sealing up—Curator.*]—When the property of a succession is dilapidated or in danger of becoming so, the only remedy which creditors or heirs have is to cause the property to be sealed up; they cannot, so long as the time for making an inventory and deliberating has not expired, where several persons are claiming the succession, obtain the appointment of a curator. *Lamoureux* v. *Aymard*, Q. R. 24 S. C. 24, 5 Q. P. R. 432.

See BANKRUPTCY AND INSOLVENCY — DEVOLUTION OF ESTATES ACT — DOWER —EXECUTION — EXECUTORS AND ADMINISTRATORS — WILL.

DISTRICT COURTS, ONTARIO.

See COURTS.

DISTURBING PUBLIC MEETING.

See CRIMINAL LAW.

DITCHES.

See WATER AND WATERCOURSES.

DIVIDENDS.

See COMPANY.

DIVISION COURTS.

See ATTACHMENT OF DEBTS — BANKRUPTCY AND INSOLVENCY—COURTS—LIMITATION OF ACTIONS — PROHIBITION.

DIVISIONAL COURTS.

See APPEAL—COURTS.

DIVORCE.

See HUSBAND AND WIFE.

DIVORCE COURT.

See COURTS.

DOCK.

See MUNICIPAL CORPORATIONS.

DOCUMENTS.

See CRIMINAL LAW—DISCOVERY—EVIDENCE.

DOG.

Injury by — *Scienter—Damages—Infant — Status of Tutor.*]—Action of damages caused to a minor by the bite of a dog. The action was brought in the name of a tutor, duly appointed to the minor for that purpose. It appeared in evidence that the doctor's and chemist's bills, which constituted the actual damage sued for, had, in fact, been partly paid by the father, and that the

tutor had disbursed nothing. It was contended on behalf of the defendant that the action should be dismissed on the ground that it was not in evidence that the tutor (i.e. the plaintiff) had disbursed anything or had actually suffered any loss:—Held, that, as the father, if the tutor recovered damages, would have a claim against him for any sums he had disbursed for the minor as a result of the accident, it was immaterial whether anything had in fact already been paid by the tutor:—Held, further, that it was not incumbent upon the plaintiff to prove that the dog was a vicious dog. *Hades* v. *Edmundson*, 21 Occ. N. 444.

Injury by—*Scienter — Findings of Jury —Damages—Misdirection.*]—In an action to recover damages from the owner of a dog, which had bitten the plaintiff, a child a little over five years of age, the jury, in answer to questions, found that the dog had attempted to bite one G. B., and that the defendant had knowledge of this before the plaintiff was bitten; that the dog had never, before the injury to the plaintiff, evinced a cross, savage, or vicious disposition, to the knowledge of the defendant; that the dog was in the habit of jumping upon or against people, and in such acts scratching them, and that the defendant knew this before the plaintiff was injured; that one of the acts of jumping on or against people referred to one W. B.; that the defendant knew of it before the plaintiff was injured, and that the dog did not do it playfully; that they considered that if G. B. had left the dog alone he would not have attempted to bite him:—Held, that the answers established that the defendant had kept the dog after he had knowledge that he was apt to do injury to mankind. The Judge, in charging the jury, told them that if they thought the scars on the plaintiff's face, caused by the bite, were likely to be permanent, and that such lasting disfigurement might effect her prospects of making a good marriage, they might consider such possible loss of marriage in assessing the damages:—Held, misdirection, as such damages were too speculative and remote. The jury were further directed that in assessing the damages they might take into consideration the financial position of the defendant and the condition in life of the plaintiff:—Held, misdirection. *Price* v. *Wright*, 35 N. B. Reps. 26.

See HUSBAND AND WIFE — JUSTICE OF THE PEACE.

DOMICIL.

Change — *Service of Process—Nullity—Prejudice.*]—Where a young man of full age who used to live with his father, but left to pursue his studies in a foreign city for a number of years, taking with him all his effects with the exception of a few books used by him when a student; and proposes on the completion of his studies to settle in one of several countries, and has no intention of returning to his father's domicil, he is held to have his domicil in such foreign city, and service at his father's domicil is irregular and null, and such nullity amounts to prejudice. *Robert* v. *Dufresne*, 7 Q. P. R. 226.

Origin — *Change — Intention — Proof of—Residence—Permanency of.*]—The domicil of origin adheres until a new domicil is acquired, and the onus of proving a change of domicil is on the party who alleges it; the change must be animo et facto, and the animus to abandon must be clearly and unequivocally proved; although residence may be decisive as to the factum, it is equivocal as regards the animus; the question is one of fact, to be determined by the particular circumstances of each case. Where a deceased person (in respect of whose estate a question of his domicil at the time of his death arose in an action by his widow to obtain a share of it) had his domicil of origin in Ontario, but went to live in the province of Quebec upon a farm owned by his father:—Held, upon the evidence, that he had not so adopted the farm as his home as to effect a change of domicil. *Coyne* v. *Ryan*, 21 Occ. N. 498. (Affirmed by C. A., 22, Occ. N. 12.)

Origin — *Choice — Abandonment—Husband and Wife—Alimony—Writ of Summons —Service out of Jurisdiction — Rule 162 (c).*]—In an action for alimony the defendant was served with the writ of summons in November, 1900, in the State of California, where he had gone to reside in September, 1899. He was born in the State of Pennsylvania, and was married to the plaintiff in the State of New York in 1889. For seven or eight years before the marriage he had lived in Canada, most of the time in Ottawa. After the marriage the plaintiff and defendant went to Europe for several months, and afterwards resided for short periods at two places in different States in America. In 1891 they came to Canada, and bought property at a village in Ontario, which was their home from that time on, although during several winters thereafter they went to different places in the United States, where each did something to earn money, but always came back to the Ontario home in the spring. The plaintiff still continued to reside there, and said she never at any time had any intention of changing permanently her residence or place of abode. The defendant swore that in September, 1899, he sold all the property he had in Canada, and went to the United States to reside, where he had ever since resided, was now residing, and intended to reside, and that he had no property of any kind in Ontario. The defendant had since going to California instituted proceedings there against the plaintiff for a divorce:—Held, that the defendant's domicil of origin was in the United States; that he acquired a domicil of choice in Ontario; that, upon the evidence, he had not abandoned that domicil; and therefore he was still domiciled within Ontario, within the meaning of Rule 162 (c), and service of the writ upon him out of Ontario was permissible. *Bonbright* v. *Bonbright*, 21 Occ. N. 339, 497, 1 O. L. R. 629, 2 O. L. R. 249.

See ASSESSMENT AND TAXES — BILLS OF EXCHANGE AND PROMISSORY NOTES — CONTRACT — COURTS — FISHERIES — SHIP — STATUTES.

DOMINION JURISDICTION.

See CONSTITUTIONAL LAW.

DOMINION LANDS.

See ASSESSMENT AND TAXES.

DOMINION LANDS ACT.

See CROWN—DEED.

DONATIO INTER VIVOS.

See GIFT.

DONATIO MORTIS CAUSA.

See GIFT—HUSBAND AND WIFE—REVENUE.

DOWER.

Admeasurement of—*Sum in Lieu of — Commissioners' Report—Motion to Confirm — Affidavits.*] — Under 53 V. c. 4, s. 237, et seq., a widow will not be compelled to take money in lieu of land because such a course will be more satisfactory or profitable to the owner of the land subject to dower. Affidavits upon questions of fact inquired of or relevant to an inquiry by commissioners to admeasure dower cannot be read on a motion to confirm their report. *In re Kearney*, 21 Occ. N. 415, 2 N. B. Eq. Reps. 264.

Assignment by Infant Devisee—Executor—Devolution of Estates Act—Lease by husband. *Allan* v. *Rever*, 4 O. L. R. 309, 1 O. W. R. 459.

Bar—*Infant Wife — Purchaser for Value —Consideration—Married Woman's Real Estate Act.*]—A purchaser for value is one who obtains a property for a valuable, as distinguished from a merely good, consideration; and where there is no question of bona fides involved, the question of the adequacy of the consideration cannot be inquired into. Where a son, who had left his father's farm, returned upon his father's request and promise of remuneration and helped the father to work the farm, and remained with him working in that way upon a further request and promise of a conveyance, and the father afterwards married a girl under 15, and then conveyed a part of the farm to the son, the wife, who was still under 15, joining to bar her dower:—Held, that the consideration, having become executed by the son having done his part, was a substantial and valuable consideration sufficient to make the son a purchaser for value, within the meaning of s. 5 of the Married Woman's Real Estate Act, R. S. O. 1897, c. 165; and therefore, the wife having been found to have known what she was doing when she executed the release of dower, was not entitled to dower out of the land conveyed to the son. Judgment in 6 O. L. R. 259, 23 Occ. N. 285, 2 O. W. R. 699, affirmed. *Crossett* v. *Haycock*, 24 Occ. N. 310, 7 O. L. R. 655, 3 O. W. R. 616.

Bar in Mortgage—*Release of Equity of Redemption — Release after Action.*]—The plaintiff joined with her husband in executing a mortgage of land, and released her dower in due form. The defendant took an assignment of the mortgage, and, subsequently, received from the plaintiff's husband a release of his equity of redemption, in which the plaintiff did not join:—Held, that the plaintiff could not assert a claim for dower against the defendant as long as the mortgage remained on foot, her only remedy being to redeem. As to a release executed by the defendant after the commencement of the action, the plaintiff's right must be determined by the condition of things existing at the time of action brought. *Thompson* v. *Thompson*, 37 N. S. Reps. 242.

Customary Dower — *Authorization by Interdicted Husband — Registry Laws — Sheriff's Sale—Vendor and Purchaser—Warranty—Succession—Renunciation — Donation by Interdict.*] — The registration of a notice to charge lands with customary dower must, on pain or nullity, be accompanied by a certificate of the marriage in respect of which the dower is claimed, and must also contain a description sufficient to identify the lands sought to be affected. A sale by the sheriff, under execution against a debtor in possession of an immovable under apparent title, discharges the property from customary dower which has not been effectively preserved by registration validly made under the provisions of Art. 2116, C. C. Per Taschereau, C.J.:—Neither the vendor nor his heirs, who have not renounced the succession, nor his universal donees, who have accepted the donation, can, on any ground whatever, attack a title for which such vendor has given warranty: — Semble, that voluntary interdiction, even prior to the promulgation of the Civil Code of Lower Canada, was an absolute nullity, and that the authorization to a married woman to bar her dower is not invalidated by the fact that her husband had been so interdicted at the time of such authorization. *Rousseau* v. *Burland*, 23 Occ. N. 38, 32 S. C. R. 541.

Customary Dower — *Declaration—Registration—Marks woman—Payment of Debts —Partition — Interest—Heirs—Purchaser.*] —1. The registration of a declaration signed by mark in the presence of a single witness is sufficient to preserve the right to customary dower. 2. The doweress has the right to obtain possession of the part of the land devoted to her customary dower, even if there are debts which may be the basis of a claim when partition is made later. 3. The doweress, taking the part of the lands appropriated to her customary dower, will be obliged to pay interest to the heirs upon such portion of her debts as may be attributed to her part of the lands; but such an arrangement should be made with the heirs, and such payment is due to them, and not to a purchaser, who has only a remedy en garantie against his grantor. The Quebec Act 47 V. c. 15, which declares that after the 1st January, 1884, rights of customary dower shall be avoided and extinguished as against purchasers, if the declaration required by law has not been registered, should be interpreted as limited to cases, where a purchaser subsequent to the 30th June, 1881, has registered his title before the registration

of the declaration of the dowress. *Toupin v. Vézina*, Q. R. 9 Q. B. 406.

Election — *Gross Sum—Proceeds of Sale of Testator's Land.*] — The owner of land died intestate leaving a widow and an infant child. The widow administered, and, with the consent of the official guardian, sold and conveyed the land in March, 1899, barring her dower in the deed of grant, and the whole of the purchase money was paid into Court to the joint credit of herself and of the official guardian, she reserving her right to elect between receiving the value of her dower or a distributive share of the estate, one of which it was clearly understood she would be entitled to be paid out of the fund in Court. In September, 1900, the widow executed a document wherein she elected to take the value of her dower in lieu of "any other interest she might have in her husband's undisposed of real estate." She died in April, 1901:—Held, that the administrator of the widow's estate was entitled to receive out of the moneys in Court the value of the widow's dower, computed according to the annuity tables. *In re Pettit*, 22 Occ. N. 300, 4 O. L. R. 506, 1 O. W. R. 464.

Equitable Charge — *Legacies—Mortgage.*]—A testator devised a farm to his son, subject to the payment by him of certain legacies. The son mortgaged the farm, his wife joining to bar her dower, and paid the legacies out of the proceeds. The son died seised of the farm, and the mortgage was then in force:—Held, that the son took under the will the legal seisin in the farm, and not a mere equitable estate, and that his widow was entitled to dower out of the full value of the land. *In re Zimmerman*, 24 Occ. N. 234, 7 O. L. R. 489, 3 O. W. R. 509.

Equitable Estate — *Voluntary Conveyance by Husband.*]—It is only when the husband dies beneficially entitled thereto that the wife acquires any right to dower in an equitable estate, and the husband can therefore deal as he pleases with such an estate; a voluntary conveyance thereof, even though made with the object of preventing the wife acquiring any right to dower, being unimpeachable by her. *Fitzgerald* v. *Fitzgerald*, 23 Occ. N. 85, 5 O. L. R. 279, 1 O. W. R. 17, 2 O. W. R. 68.

Equity of Redemption — *Conveyance by Husband Alone—Discharge of Mortgage.*] —On the 8th February, 1881, the owner of land subject to a mortgage, dated 29th January, 1879, in which his wife had joined to bar dower, made a second mortgage in which his wife did not join. A portion of the moneys advanced upon the second mortgage were applied in payment of the first mortgage, and the first mortgagees executed a discharge, which was registered on the 5th March, 1881. On the 30th September, 1881, the owned executed a conveyance of the land to the plaintiff, the grantor's wife joining therein to bar her dower. Neither the plaintiff nor his grantor paid the principal money due under the subsisting mortgage, and the mortgagees in the exercise of the power of sale on the 27th February, 1892, contracted to sell the land to the defendant, who had ever since been in possession as purchaser. The plaintiff's grantor died on the 19th September, 1901, leaving his wife surviving him, and the plaintiff, claiming as assignee of the wife's right to dower by virtue of the conveyance of 30th September, 1881, brought this action for dower on the 11th September, 1902:—Held, that, as the law stood on the 29th January, 1879, the wife, having joined in the mortgage of that date and thereby barred her dower, could become entitled to dower out of the equity of redemption only in the event of her husband dying beneficially entitled; and, as long as the mortgage subsisted, her husband could by a subsequent conveyance defeat her dower in the equity, which he effectively did by the second mortgage; and this was not affected by 42 V. c. 22 (O.), which became law on the 11th March, 1879. 2. The second mortgage having been executed and delivered for some weeks before the execution of the discharge of the first, the effect of the registration thereof was not to revert the premises in the mortgagor, but in the second mortgage. *Anderson*, v. *Elgie*, 23 Occ. N. 278, 6 O. L. R. 147, 1 O. W. R. 550, 638, 2 O. W. R. 584.

Interest in Lands — *Locatee of Crown Lands—Bond to Convey—Unpatented Lands—Unregistered Assignment — Public Lands Act—Evidence—Corroboration.*] — A locatee of Crown lands executed a bond in favour of his son, in consideration of services rendered, that the land should, at his death, be conveyed to the latter, on condition that he paid the Crown dues, which he did. The father afterwards married, and after his marriage obtained the patent:—Held, that his widow was not entitled to dower inasmuch as he had no more than the right of enjoyment for life with the fee held as trustee for his son. A locatee of land transferred all his interests therein to his son by assignment, which assignment was deposited, but not registered in the Crown lands office:—Held, that, notwithstanding R. S. O. 1897 c. 26, s. 19, the omission to register did not invalidate the transfer as against the assignor; and it operated so as to prevent the father from dying beneficially entitled, and so defeated any claim of the widow under the Dower Act. The facts rested mainly upon the evidence of the son, and his evidence did not require corroboration under R. S. O. c. 73, s. 10. *Brown* v. *Brown*, 24 Occ. N. 289, 8 O. L. R. 332, 3 O. W. R. 795.

Interest in Lieu of—Devolution of Estates Act—Election — Exercise by assignee of dowress. *Re Boismier*, 3 O. W. R. 355.

Land Contracted to be Sold by Testator — *State of Nature—Right to Dower—Executors—Payment to Widow for Release.*]—The testator was the owner in fee at the time of his death of a timbered lot containing 100 acres, from 15 or 20 acres of which he had taken the timber; a part of the cleared land had been prepared for cultivation, and the seeds planted, but, owing to the nature of the soil, with little or no result. The testator had contracted to sell the whole lot for $2,000, and after his death the purchaser called on the executors to receive the balance of the purchase money and to make title. The widow claimed her dower, and her claim was compromised by the executors at $390, which they paid her, and

she released her dower; they then conveyed to the purchaser under s. 24 of the Trustees and Executors Act, R. S. O. 1897 c. 129:—Held, that the lot was not in a state of nature at the time of the death, and the widow's dower attached upon the whole of it; she was entitled to have one-third of such part as was not woodland assigned to her, and one-third of such part as was woodland, with the right to take from the woodland fire wood for her own use and timber for fencing the other part; the executors had the right, under s. 33 of R. S. O. c. 129, to apply the money of the estate in the purchase of the release of the widow's dower; and were entitled to charge the estate with the $390. *In re McIntyre, McIntyre* v. *London and Western Trusts Co.*, 24 Occ. N. 268, 7 O. L. R. 548, 1 O. W. R. 56, 3 O. W. R. 258.

Lease made by Deceased Husband —*Priorities — Assignment of Dower—Rights of Executor and Devisee—Devolution of Estates Act.*]—A dowress whose dower has not been assigned has no estate in the land out of which she is entitled to dower, but, as soon as her dower is properly assigned, she is entitled to claim possession of the land assigned to her in priority to persons claiming under leases created by her husband, without her assent, during the coverture. Stoughton v. Leigh, 1 Taunt. 402, followed. Where a testator, dying in August, 1901, devised land to his son, and probate of the will was granted to the executor named therein, and the son in April, 1902, executed a conveyance of a part of the land to the testator's widow for her life, as and for her dower, the executor not assenting thereto:—Held, that the conveyance was of no avail, for the only person who could assign dower was the executor, in whom, under s. 4 of the Devolution of Estates Act R. S. O. 1897, c. 127, the whole inheritance of the testator vested. *Allan* v. *Rever*, 22 Occ. N. 294, 4 O. L. R. 309, 1 O. W. R. 459.

Mortgaged Land — *Sale — Purchase Money.*]—The testator in his lifetime purchased property subject to a $10,000 mortgage, which he assumed, but subsequently made a new mortgage, in which his wife joined to bar dower, and paid this mortgage off. He afterwards made a further mortgage for $1,650.58, in which his wife also joined to bar dower. He subsequently entered into an agreement for the sale of the property for $16,000, receiving $500 on account. The agreement was carried out by his executrix, the purchase money being applied in paying off the two mortgages, taxes, etc., leaving a balance of $2,150.52:—Held, that the wife was entitled to dower only out of the residue of the estate after satisfying the charges; and that such balance must not be treated as merely personal estate so as to prevent the widow from claiming her dower therein. *In re Williams*, 24 Occ. N. 91, 7 O. L. R. 156, 1 O. W. R. 534, 2 O. W. R. 47, 3 O. W. R. 251.

Petition for Admeasurement of—*Intituling.*]—A petition for admeasurement of dower should not be intituled as though it were a suit between the dowress and the devisees. *In re Woodman*, 21 Occ. N. 509.

Reference—Report — Judgment — Costs —Sale of land. *Lachance* v. *Lachance*, 1 O. W. R. 518, 778.

DRAINAGE.

See MUNICIPAL CORPORATIONS.

DRAINAGE REFEREE.

See REFEREES AND REFERENCES.

DRAINS.

See NUISANCE—WATER AND WATERCOURSES.

DURESS.

Payment under Threat of Criminal Prosecution — *Error — Ratification.*] — About the time a dissolution of partnership was imminent, one of the partners was accused of embezzling funds, and, supposing that he was liable for an alleged shortage, and under threat of criminal prosecution, he signed a consent that the amount should be deducted from his share as a member of the firm. He was denied access to the books and vouchers, and some weeks afterwards, upon settlement of the affairs of the partnership, the amount so charged to him was paid over to the other partners. It was subsequently shewn that this partner had made his returns correctly, and had not appropriated any part of the missing funds:—Held, that he was entitled to recover back the amount so paid in an action condictio indebiti, as both the consent and the payment had been made under duress and in error; and, further, that there had been no ratification of the consent to the deduction of the amount by the subsequent payment, because the denial of access to the books and vouchers caused him to continue in the same error which vitiated his consent in the first place; and further, that, even if the consent could be regarded as amounting to an agreement, it would be avoidable for error as to fact. *Migner* v. *Goulet*, 21 Occ. N. 137, 31 S. C. R. 26.

DUTIES.

See CONSTITUTIONAL LAW—REVENUE.

DYING DECLARATION.

See CRIMINAL LAW.

EARLY CLOSING.

See CONSTITUTIONAL LAW, II. 6.

EASEMENT.

Ancient Lights—*Prescription—Unity of Possession—Evidence — Onus—Presumption —Commencement of Statute.*]—A right to the

access and use of light to a house cannot be acquired under the Prescription Act by the lapse of time, during which the owner of the house or his occupying tenant is also occupier of the land over which the right would extend. In an action to establish a right to ancient lights, the burden of proof in the first place is on the plaintiff to shew uninterrupted use for twenty years, and then the burden is shifted to the defendant to shew such facts as negative the presumption of ancient lights. Remarks as to the time from which the twenty years' prescription began to run. *Feigenbaum* v. *Jackson*, 8 B. C. R. 417.

Deed—*Registration — Renewal—Road — Discontinuous, but Apparent Servitude—Aggravation.*]—Default to renew the registration of the instrument creating a servitude, does not effect the extinction of such servitude, unless a real, discontinuous, and non-apparent servitude is in question.—2. In the present case the servitude, while discontinuous, was apparent; it was indicated by a road, and the Act 44 & 45 V. c. 6, ss. 5, 6, 7, does not apply to servitudes discontinuous but apparent, and consequently it was not necessary to renew the registration of the instrument which constituted it.—3. It cannot be said that there is aggravation of the servitude by the fact that the place where it is sought to be maintained changes little by little by reason of the fact that the water of a river breaks the land and makes more distant, little by little, the place where the gravel is found which is to be taken out according to the terms of the instrument creating such servitude. *Perry* v. *Simard*, Q. R. 21 S. C. 322.

Light—*Servitude — Contract — Interference with Enjoyment of.*]—A notarial deed made between the parties and intituled "Convention et Accord," contained among other provisions the following: "The parties, their heirs and those claiming under them, shall respectively have the right to maintain forever the windows (ouvertures) which actually exist in their said dwelling houses built on said lots Nos. 120 and 119, and will have the right to change the places of the same according to their respective need, but they will not have the right to construct more of them than they now actually respectively have:"—Held, that the deed above mentioned created an easement for light in favour of the covenantees. 2. It follows that nothing may be done which would limit the enjoyment of this easement or make it more inconvenient; the condition of the place cannot afterwards be changed so as to render the right illusory.—3. Thus the construction of a new roof on the house at such a height that it takes away almost all the light and air obtained from a window of which the existence and enjoyment were assured by such deed, constitute an obstacle to the enjoyment of such easement. 4. As a consequence he having a right to this easement can demand that this new construction be removed and the removal should be to such an extent that, after it has been done, the person having a right to the easement will enjoy it to the same extent as before. 5. The easement of light covenanted for by the plaintiff places on the defendant, the owner of the servient tenement, the implicit obligation not to build in such a manner as to destroy the enjoyment of the easement by the plaintiff. *Thibault* v. *Gourde*, Q. R. 26 S. C. 185.

Light—*Servitude — Right of View.*]—A conveyance of land fronting on public highways, with the right of passage merely over a private lane, does not create a servitude entitling the grantee to make windows or other openings in walls built on the line of the lane. *Lesperance* v. *Gone*, 25 Occ. N. 138.

Non-apparent Continuous Servitudes—*Building Restrictions—Necessity for Renewal of Registration—Party Wall—Deed —"Fastened."*]—Clauses in a deed of sale, prohibiting building in certain materials, or for certain purposes, do not create servitudes. 2. The words "établissements qui pourraient être de nature à incommoder les voisins et devenir un sujet de plainte," imply some substantial inconvenience exceeding ordinary grievances such as neighbours living together are obliged to endure. 3. A proprietor has a right, under Art. 520, C. C., to occupy nine inches of his neighbour's land for a foundation wall eighteen inches in thickness. He has also the right to erect upon his line a building which cannot serve as a mitoyen wall, such as a wooden brick-encased wall, but subject to the obligation of demolishing such wall at his own cost, in the event of his neighbour constructing a mitoyen wall between their respective properties; and even where the previously existing wall was quite sufficient for his purposes, he will still be obliged to contribute one-half of the cost of the mitoyen wall if he use it. 4. The word "fastened" (scellé) in Art. 534, C. C., is sufficiently complied with by a window fixed to the wall with nails or screws, and these covered by a moulding of plaster which is, itself, fastened in such a way as not to be removable without being broken. 5. The deed creating a servitude must sufficiently indicate the dominant property without extrinsic aid. Judgment in Q. R. 19 S. C. 292 affirmed. *Sicotte* v. *Martin*, Q. R. 20 S. C. 36.

Projecting Eaves—*Descending Water and Snow—Common Owner—Conveyances by —Grant and Reservation of Rights.*]—The plaintiff's predecessor in title, owning a lot of land, built two houses thereon, with a passageway between them, and the eavestrough and part of the eaves of the defendant's house projecting over the passageway. He then conveyed to the defendant's predecessor in title the westerly house, "with the privilege and use of the projection of the roof . . . as at present constructed," and covenanted for the quiet and undisturbed enjoyment of the projection, and that, on any sale or conveyance of the house to the east, he would "save and reserve the right . . . to such projection." Subsequently he conveyed the easterly house, with the land between the two houses, to the plaintiff, "subject to the right . . . to the use of the projection . . . as at present constructed:—Held, that the defendant was not bound to prevent the snow and water discharged from the clouds upon his roof from falling from it upon the plaintiff's land, and that the easement of shedding snow and water, as had been done ever since the defendant's house was built, was necessary to the reasonable enjoyment of the property granted; that the grantor could not insist upon the grantee altering the construction of the roof so as to prevent the snow and water coming

down, and the plaintiff stood in no higher position than the grantor; that the projection of the roof over the plaintiff's land carried with it the necessary consequence that water and snow falling upon the roof must to a large extent descend upon the land below; and the action was dismissed with costs. *Hall* v. *Alexander*, 22 Occ. N. 178, 3 O. L. R. 482, 1 O. W. R. 204.

Right of Way—*Agreement—Evidence—User.*]—The plaintiff claimed a right of way over a private road 700 feet in length, in part on land of defendant adjoining plaintiff's land, and leading from a public highway to lots comprised in part by defendant's land, sold by defendant's predecessor in title, B., under a conveyance reserving to the grantees the use in common of the road. The evidence of plaintiff's predecessor in title, K., was that, shortly after the sale of these lots, he moved back on his land his farm house and fence, to widen the entrance of the private road at its junction with the highway, under an agreement with B., concurred in, as he believed, by the owners of the lots, that he, K., should have for so doing a right of way with them over the road. B. denied that an agreement was concluded, or that the matter ever proceeded beyond negotiation, and his evidence was corroborated by H., a former owner of the lots, and by drafts of an agreement containing alterations indicating that the parties were merely in treaty, and providing for the maintenance of the road by K. in common with the owners of the lots, an obligation disclaimed by plaintiff, and for a conveyance by K. of the part of his land to be used for widening the entrance. This conveyance was never made, and the land was included in the conveyance from K. to the plaintiff. The road had been used, from the time of the alleged agreement, by K. and plaintiff in connection with the farm house, until it was torn down, situate about 200 feet from the public highway, and the plaintiff had used, but not without interruption, the road for about 13 years, for a considerable part of its length. Shortly after the date of the alleged agreement, fences with gates, crossing the road at separate points, were erected by H. without objection by K.: —Held, that the plaintiff's bill for an injunction to restrain the defendant from obstructing plaintiff in the use of the road, should be dismissed. *Fairweather* v. *Robertson*, 23 Occ. N. 232, 2 N. B. Eq. Reps. 412.

Right of Way—Reconveyance—Indemnity—Party wall — Prescription — Chimney. *Lane* v. *George*, 4 O. W. R. 539.

Right of Way—Repairs—Dominant and servient tenements—Water—Right to flow of —Injunction. *Burrell* v. *Lott*, 1 O. W. R. 181, 3 O. W. R. 115.

Right of Way — *User — Prescription—Railways—Crossing.*]—A railway line passed over the northern half of lots 32, 33, and 34, respectively, of the 8th concession of North Dumfries, having a trestle bridge over a ravine on lot 34, near the boundary of 33. G., the owner of lot 33 (except the part owned by the railway company), for a number of years used the passage under the trestle bridge to reach a lane on the south half of lot 34, over which he could pass to a village on the west side, his predecessor in title, who owned all these lots, having also used the same route for the purpose. The company having filled up the ravine, G. brought this action for a mandatory injunction to compel the defendants to reopen it:—Held, reversing the judgment of the Court of Appeal, 27 A. R. 64, 20 Occ. N. 56, that such user could never ripen into a title by prescription of the right of way, nor entitle G. to a farm crossing on lot 34. *Guthrie* v. *Canadian Pacific R. W. Co.*, 21 Occ. N. 222, 31 S. C. R. 155.

Servitude—*Change of Level—Injury to Lower Land—Remedy.*]—The owner of the lower parcel of land is not liable for damage suffered by the owner of the higher parcel by reason of the lessee of the lower parcel having changed the level, the latter not being the agent or representative of the owner of the parcel. 2. The owner of the higher parcel cannot even require the owner of the lower to pull down at his expense the obstructions created by his tenant; he can only demand the power to destroy them himself at his own charges, reserving his recourse in damages against the lessee who did the mischief. Judgment in Q. R. 11 K. B. 173 varied. *Kieffer* v. *Ecclésiastiques du Séminaire des Missions Etrangères*, Q. R. 13 K. B. 89 [1903] A. C. 85.

Servitude — *Enclave — Right of Way—Necessity.*]—A proprietor whose land is enclosed on all sides by that of others, and who has no communication with the public road, cannot claim a way over the land of a neighbour which does not offer the shortest crossing, unless it be established in evidence that the shortest crossing would be too inconvenient for the use of the enclosed proprietor. Judgment in Q. R. 17 S. C. 522 affirmed. *Boyer* v. *Perras*, Q. R. 10 K. B. 313.

Servitudes — *Building Restrictions — Necessity for Renewal of Registration — Party Wall — Deed — "Fastened."*] — 1. Clauses in a deed of sale, prohibiting building in certain materials, or for certain purposes, do not create servitudes; and, even assuming that they do, such servitudes, being continuous non-apparent servitudes, are extinguished, as regards subsequent purchasers of the immovable sold, by want of renewal of registration. 2. The words "établissements qui pourraient être de nature à incommoder les voisins et devenir un sujet de plainte," imply some substantial inconvenience exceeding ordinary grievances obliged to endure. 3. A proprietor has a right, under Art. 520, C. C., to occupy nine inches of his neighbour's land for a foundation wall eighteen inches in thickness. He has also the right to erect upon his line, a building which can not serve as a mitoyen wall, such as a wooden brick-encased wall, but subject to the obligation of demolishing such wall at his own cost, in the event of his neighbour constructing a mitoyen wall between them; and even where the previously existing wall is quite sufficient for his purposes, he will still be obliged to contribute one-half of the cost of the mitoyen wall if he use it. 4. The word "fastened" (scellé) in Art. 534, C. C., is sufficiently complied with by a moulding of plaster which is, itself, fastened in such a way as not to be removable without being broken. 5. The deed creating a servitude

must sufficiently indicate the dominant property without extrinsic aid. *Sicotte* v. *Martin*, Q. R. 19 S. C. 292.

Street—*Private Way—Right of Access—Payment — Reservation — Indemnity—Covenant—Future Payments.*]—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 corporation 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 a sum in instalments for the right of access. Judgment of MacMahon, J., 1 O. L. R. 382, 21 Occ. N. 290, affirmed. *Palmer* v. *Jones*, 21 Occ. N. 556, 2 O. L. R. 632.

Water Supply—*Servitude—Contract—Rescission.*]—In the year 1880 R., who was building an aqueduct, found it necessary to pass over D.'s land, and bound himself, in consideration of being permitted to do so, to supply D. with as much water for the use of his house, as he had a right to expect from the proper working of the aqueduct, on payment of $4 per annum. In 1902 R. forcibly broke the connection between the main pipe and D.'s house and cut off his supply of water, because, although D.'s family had increased in numbers, he refused to pay $9 per annum for the water:—Held, that R. had no right to refuse the supply of water so long as he retained the servitude of D.'s property. 2. If a party to a contract dissolves it by reason of infractions, by the other party, of some of its stipulated conditions, he must dissolve it in toto. *Doyon* v. *Roy*, Q. R. 24 S. C. 191.

Water Supply—*Servitude—Enforcement—Interlocutory Injunction.*]—If a right to a supply of water is granted in exchange for other advantages, it should be considered rather as a right of servitude attaching to the realty than as a personal right; and an interlocutory injunction will be granted to compel its enforcement, especially when the respondent cannot terminate it without trespassing on the land of the applicant. *Christin* v. *Pelouquin*, 7 Q. P. R. 13.

ECCLESIASTICAL LAWS.

See CHURCH—MARRIAGE.

EJECTMENT.

Action Brought under Order of Equity Court—*Proof of Title—Presumption of Possession—Nonsuit.*]—R. filed a bill in equity praying that M. might be restrained from asserting title to a lot of land, and that R. might be declared to be entitled to the lot in fee simple. The Judge in Equity directed that R. bring an action of ejectment against M. to try the title. Both parties failed to prove a documentary title, and relied upon, and gave evidence of, title by possession. On questions submitted the jury found that R. and his predecessors in title had been in possession of the lot since 1876. On this finding the trial Judge ordered a verdict to be entered for R.:—Held, that the direction was right, and the Court was not obliged to treat the action under the order of the Equity Court as an ordinary action of ejectment, and assume the defendant to be in possession, and nonsuit the plaintiff on failure to prove title. *Robertson* v. *Miller*, 35 N. B. Reps. 686. The decree in equity founded upon the verdict in this case was reversed by the Supreme Court of Canada.

Improvements — *Tender — Condition—Description of Land.*]—In a petitory suit by the owner of land against a possessor, the plaintiff is not obliged to tender with his action an amount for the improvements; he is not in default to pay the amount until it has been fixed by the Court. A tender expressed to be made without prejudice, and pour acheter sa paix, and under the condition that the party to whom it is made can take it only as a complete settlement of his claim in principal, interest, and costs, is not illegal and will not be struck from the record on demurrer; it is not equivalent to a payment of the amount, but is a mere proposal. A tender is not necessarily illegal by reason only that there is a condition attached to it. Where land claimed by a petitory suit was situated in a locality of which there was no cadastral plan, and no fences or other boundaries, the judgment was held to be executable and the land to be sufficiently described as the lot of land situate at Fox Bay, Anticosti, on which the defendant had built a dwelling house which he occupied. *Menier* v. *Whiting*, Q. R. 18 S. C. 113.

Proof of Title—*Heir-at-law—Unrecorded Deed—Sale by Administratrix—Presumption—Paper Title—Adverse Possession—Acts of Possession—Limitation of Actions.*]—An unrecorded deed from the heir-at-law of the owner of the fee to his widow in occupation at the time of his death, which occupation was continued by the widow and her successors in title to the time the deed was given and for more than twenty years after, is not a deed by one disseised (the possession not being adverse), but operates as a conveyance of the heir's title, or, at all events, is good as a release against the heir or one claiming through him under a recorded deed. After a lapse of thirty years a deed by an administratrix, under a license from the Probate Court to sell, will be presumed to be good, though there is no affidavit of the administratrix indorsed thereon, as required by the Probate Act of 1840, and no proof that the provisions of the Act as to notice of sale, etc., were complied with. Adverse possession to cut down a documentary title of a defined lot must be made out clearly and satisfactorily, and must be open and exclusive, of some definite part or of the whole; and evidence of acts of cutting hay and planting crops on parts of the lot, the location of which are

not so defined as to make it possible to adjudge their position or boundaries, amount only to acts of trespass. *Cairns* v. *Horsman*, 35 N. B. Reps. 436.

Proof of Title — Heirship—Marriage — Reputation—Improvements under mistake of title—Lien—Option of taking land. *Derrickson* v. *Ellis*, 3 O. W. R. 828.

Right of Action by Owner of Reversion—Rights of lessee—Entry by lessee—Exclusive right—Oral lease—Agreement as to crops. *Penner* v. *Winkler* (Man.), 1 W. L. R. 403.

Title — *Adverse Possession — Evidence—New Trial.*]—On the trial of an action of ejectment, where the defendant claimed title by adverse possession, the Judge, in charging the jury, told them that if what the plaintiff stated was true, it would be difficult for them to find the defendant's holding to be open and adverse to the plaintiff. The jury, however, found that the defendant had title by adverse possession:—Held, that the verdict was not perverse, but there should be a new trial, as it was against evidence. *Porter* v. *Brown*, 36 N. B. Reps. 585.

Title—*Certificate under Land Registry Act—Tax Sale—Regularity—Onus.*]—In an action for the recovery of land, a plaintiff who relies on a certificate of title based on a tax deed, is not called upon to prove the regularity of the tax sale proceedings until the defendant shews some title to the land in question. *Carroll* v. *City of Vancouver*, 10 B. C. R. 179.

Trust—Statute of Frauds—Title by possession—Costs. *Sinclair* v. *McNeil*, 2 O. W. R. 915.

Verdict for Defendant—*New Trial.*]—In an action of ejectment, where the verdict is for the defendant, the Court will not ordinarily grant a new trial, unless special circumstances exist which prevent the plaintiff from bringing another action. *Tobique Salmon Club* v. *McDonald*, 36 N. B. Reps. 589.

ELECTION.

See CRIMINAL LAW — INSURANCE — OPPOSITION—PLEADING — VENDOR AND PURCHASER.

ELECTIONS.

See MUNICIPAL ELECTIONS—PARLIAMENTARY ELECTIONS.

ELECTRIC COMPANIES.

See ASSESSMENT AND TAXES—COMPANY — CONTRACT.

EMBEZZLEMENT.

See EXTRADITION.

EMBLEMENTS.

See LANDLORD AND TENANT.

EMMENAGOGUE.

See CRIMINAL LAW.

EMPHYTEUSIS.

See RAILWAY.

EMPLOYERS' LIABILITY ACT.

See MASTER AND SERVANT.

ENGINEER.

See MUNICIPAL CORPORATIONS.

EQUALIZATION OF ASSESSMENTS.

See ASSESSMENT AND TAXES.

EQUITABLE ASSIGNMENT.

Trust—*Bill of Exchange.*] — McE., who had mortgaged certain land to P. to secure a sum of $5,000, conveyed it to McK. and M. in trust for McK., subject to a life estate to McE., McK. assuming and covenanting to pay off $1,500 of the mortgage debt, and McE. covenanting to pay off the balance. Subsequently, on the 4th January, 1900, McE., who had a deposit account with M., who was a private banker, authorized M. to pay $650 to P. on the mortgage, and for such purpose signed the following document: "B. M. & Co., Bankers. Pay to P. (on mortgage McE.'s share) or bearer $650:" which he delivered to M., who a day or two afterwards informed P. of his having the money, though he did not tell him of the execution of the document, and he also notified McK. P. said he did not want the money before the beginning of next month, and M. did not pay over the money until the 29th January, and after the death of McE., who had died in the meantime, of which all the parties had notice:—Held, by Falconbridge, C.J., K.B., that under s. 72, s.-s. 2, and s. 74, of the Bills of Exchange Act, 53 V. c. 33 (D.), the document was not a cheque, being drawn on a private bank, but a bill of exchange, and that it was not revoked by McE.'s death. On appeal to a Divisional Court, the judgment was affirmed, but on the ground that the transaction amounted, either to an equitable assignment of the $650, or a trust to pay over same to P., which became irrevocable on its being communicated to the parties and assented to by them. *Trunkfield* v. *Proctor*, 21 Occ. N. 519, 2 O. L. R. 326.

See ATTACHMENT OF DEBTS—CHOSE IN ACTION—ASSIGNMENT OF.

EQUITABLE CHARGE.

See DOWER.

EQUITABLE ESTATE.

See DOWER.

EQUITABLE EXECUTION.

Declaratory Judgment—Foreign judgments—Appearance—Attornment to jurisdiction—Statute of Limitations—Absence from Province. *Stewart* v. *Guibord*, 2 O. W. R. 168, 554, 6 O. L. R. 262.

Interest in Land—*Rule 743—Sale under Judgment — Cancellation — Consideration—Crop-payments.*] — In 1899 the plaintiff recovered judgment against W., and registered and kept in force a certificate thereof. On the 2nd July, 1901, the defendant H. entered into an agreement to buy land, paying for it in instalments. A few days later H. agreed to sell this land to W. for a higher price, to be paid by the delivery of half the grain raised each year, without any provision to pay in cash. The plaintiff took proceedings under Rule 743 to have W.'s interest in the land sold, and an order for sale was made. The plaintiff then offered to redeem H. Before the order for sale H. had served on W. a notice purporting to cancel the agreement for default, and later notified the plaintiff of the cancellation:—Held, that H. would have had no right to cut out, in the manner he did and without notice to the plaintiff, the plaintiff's claim against W.'s interest, if that claim were one which could be enforced. But the nature of the agreement between H. and W. was such that W. could not have assigned his interest to anyone without H.'s consent. In the case of a crop-payment agreement, such as the present one, an assignee of W., while keeping within the purchaser's covenants, would perhaps not raise half of the crops that W. would, and might drag out interminably the final payment for the land. If, therefore, W. could not assign his interest, the plaintiff had no rights against it under his registered certificate of judgment, as he could not claim upon land which W. could not charge under his hand and seal in his (the plaintiff's) favour. There being no provision for payment of the land, other than by the crop-payments, W. could not, either before or after receiving the notice of cancellation, have forced H. to take payment in cash. As H. could not be compelled to take payment from W., the plaintiff could not force him to accept his (the plaintiff's) offer to pay off. *McGregor* v. *Withers*, 24 Occ. N. 252, 1 W. L. R. 429.

Share in Estate—Indebtedness to estate—Formation of company — Assignment of debtor's interest — Priority over creditors' claims. *Union Bank of Canada* v. *Brigham*, 2 O. W. R. 699.

See RECEIVER.

EQUITABLE INTEREST.

See LANDLORD AND TENANT.

EQUITABLE LIEN.

See SALE OF GOODS.

EQUITABLE MORTGAGE.

See BANKRUPTCY AND INSOLVENCY.

EQUITABLE RELIEF.

See COURTS—FRAUDULENT CONVEYANCE—INJUNCTION—JUDGMENT—RECEIVER.

EQUITY OF REDEMPTION.

See DOWER—EXECUTION.

EROSION.

See CROWN.

ERROR.

See APPEAL — CRIMINAL LAW—DIVISION COURTS.

ESCAPE.

See CRIMINAL LAW.

ESCHEAT.

See CONSTITUTIONAL LAW.

ESCROW.

See—DEED—SPECIFIC PERFORMANCE.

ESTATE.

Tenants in Common—*Joint Tenants—Title by Prescription — Statute of Limitations.*]—Where of five tenants in common of a farm, three acquired a title against the other two by virtue of the Statute of Limitations:—Held, that the title so acquired by the three tenants in common was a joint tenancy of the two-fifths, and they were then tenants in common of their original three-

fifths, and joint tenants of the two-fifths so acquired. *In re Livingstone*, 21 Occ. N. 521, 2 O. L. R. 381.

See MORTGAGE—WILL.

ESTOPPEL.

Charge on Land—Lien memorandum—Representation as to ownership—Subsequent conduct—Extension of time for payment—Conditional sale of goods—Lien—Acceptance. *John Abell Co.* v. *Hornby* (Man.), 1 W. L. R. 3.

Deed—*Privies in Estate — Reservation—Mines and Minerals—Action.*] — A person who had acquired title by possession to certain lands, nevertheless, afterwards took a conveyance from the owner by paper title, for an expressed consideration of $900, reserving to the grantor the mines and minerals, and gave a mortgage back for $300, "saving and excepting the mines, which said mortgagor has no claim to:"—Held, that this did not revest the mines in the grantor, nor was a subsequent owner estopped, by the exception in the mortgage, from claiming the mines as against one deriving title from the grantor, the action not being based on the mortgage, but being wholly collateral to it. *Dodge* v. *Smith*, 22 Occ. N. 52, 3 O. L. R. 305, 1 O. W. R. 46, 803, 2 O. W. R. 561.

Fraud—Patent for mining land—Registration—Mortgage—Notice. *Barr* v. *Bird*, 1 O. W. R. 30.

Rent—Claim for, by president of company—Annual statement. *Lindsay* v. *Strathroy Petroleum Co.*, 1 O. W. R. 355.

ESTREAT.

See CRIMINAL LAW.

EVICTION.

See LANDLORD AND TENANT — VENDOR AND PURCHASER.

EVIDENCE.

I. ADMISSIBILITY, 612.
II. AFFIDAVITS, 619.
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I. ADMISSIBILITY.

Admissions — *Devisibility—Commencement of Proof in Writing.*]—Where a contract is admitted to have been entered into by the party against whom it is set up, no commencement of proof in writing is necessary in order to permit of the reducing of evidence by parol as to the amount of the consideration or as to the conditions of the contract. In such a case, the rule that admissions cannot be divided against the party making them does not apply. *Campbell* v. *Young*, 23 Occ. N. 38, 32 S. C. R. 547.

Admissions — *Divisibility — Commencement of Proof in Writing — Architect—Plans—Agreement.*] — In an action brought by architects, claiming fees for the preparation of sketches or designs for the defendant, the latter, when examined as witness, admitted that the sketches had been prepared for him by the plaintiffs, but stated that there was an understanding that they were not to be paid for unless used by him, and that they had not been used. It appeared that the defendant, at the time the plans were invited, had not yet purchased the land for the proposed buildings, and that he had asked for plans from several architects:—Held, that the admission of the defendant could not be divided, for the purpose of obtaining a commencement of proof, there being no improbability in his statement, or indication of bad faith, or other circumstance, to bring the case within the exceptions of 60 V. c. 50, s. 20 (Q.), amending Art. 1243 of the Civil Code. *Cox* v. *Pacaud*, Q. R. 23 S. C. 9.

Admissions—*Withdrawal—Leave—Motion for Judgment.*]—After all parties had agreed upon a statement of facts, and the plaintiff had served notice of motion for judgment thereon, he delivered a statement of claim and served on the defendants a notice withdrawing the statement of facts and countermanding the notice of motion. One of the defendants then moved for judgment on the statement of facts, which had not been filed:—Held, that it was not necessary for the plaintiff to make an independent motion to be relieved from his admissions contained in the statement of facts, which had not been acted upon or brought before the Court; after the filing of the statement of claim and the notice of withdrawal, it was not competent for the plaintiff to get judgment on the statement of facts; and if the sanction of the Court were needed for the course taken by the plaintiff, it might be given upon the defendant's motion. *East* v. *O'Connor*, 21 Occ. N. 28, 19 P. R. 301.

Appeal — *Acquittal for Perjury at Trial of Action.*]—For perjury alleged to have been committed by the defendant at the trial of this action, he was tried and acquitted before the hearing of an appeal in the action, and, on the appeal, his counsel moved the full Court to be allowed to read the verdict of the jury in the criminal trial. The motion was refused. *Borland* v. *Coote*, 24 Occ. N. 383, 10 B. C. R. 493.

Books of Account—*Improper Reception—New Trial — Goods Sold—Admissions of Defendant.*]—In an action for the price of goods sold and delivered, to which the defence set up was that the goods in question were only delivered to the defendant as manager

of the plaintiffs' business and not otherwise, books of account kept by the plaintiffs were received in evidence against the defendant:—Held, that the evidence in question was improperly received; and the Court, being unable to say with certainty that the evidence did not enter into the materials that produced upon the mind of the trial Judge the conviction expressed in his judgment in favour of the plaintiffs, and being unable to say with certainty what the judgment of the trial Judge excluding the evidence improperly received would have been, directed a new trial. It was argued that the reception of the books of account was "harmless error," inasmuch as they could only have been received to fix the value of the goods sold and delivered, and such value was fixed independently of the books by the admission of the defendant. The whole question in dispute being whether the defendant was a purchaser or not, and there being evidence that he was not aware that the plaintiffs were making a claim against him until shortly before the action was brought, the admission relied upon being vague in its character, and the amount of goods sold being only capable of being ascertained from the plaintiffs' books:—Held, that the admission was not of the nature or effect which such an argument required. Semble, if it were conceded that the defendant was a purchaser of the goods sent, the evidence as to his admissions on this point would probably suffice to fix the amount. *Carstens* v. *Muggah*, 37 N. S. Reps. 361.

Cause of Death — *Way—Non-repair — Negligence—Statements of Person Injured—Res Gestæ—Other Evidence.*]—In an action brought by the father and mother of a young girl to recover damages in respect of her death, which resulted, as was alleged, from a fall on a stone in a highway under the control of the defendants, it was proved that the stone in question had been allowed to remain for a long time in a part of the highway used by foot passengers; that several persons had tripped over it; that the deceased had left her house on a certain evening to go to another house, the direct route to which would be by the highway in question; that she came to the other house apparently suffering great pain, and stated that she had tripped on the stone and hurt herself; that, about the time she would in the ordinary course have been passing the place in question, a witness saw a young girl, whose description answered to that of the deceased, lying beside the stone, who stated to him that she had fallen on the stone and hurt herself; and that the girl died from peritonitis resulting, in the opinion of the doctor who attended her, from an injury such as would have been the result of a fall on a stone:—Held, that the statement of the deceased to her friends at the house to which she came, and, assuming that the identity had been proved, her statements while lying near the stone, were not admissible in evidence as part of the res gestæ, these being at most statements made in reference to the accident after it had happened, and after the deceased had had time for consideration, distinguishable therefore from those involuntary and contemporaneous exclamations made without time for reflection, which alone are properly admissible as part of the res gestæ. Regina v. McMahon, 18 O. R. 502, applied. But the identity of the deceased with the person seen by the witness lying near the stone was established; and, excluding her statements, there was ample evidence to justify the conclusion that the deceased had received injuries by falling on the stone; and, as the highway was by reason of the presence of the stone in a dangerous condition and out of repair, the defendants were liable. *Garner* v. *Township of Stamford*, 24 Occ. N. 52, 7 O. L. R. 50, 2 O. W. R. 1167.

Confession of Judgment—*Pleading—Estoppel by Record.*]—A confession of judgment, for a portion of plaintiff's claim, is a judicial admission of the plaintiff's right of action, and constitutes complete proof, against the party making it. Judgment appealed from reversed and judgment at the trial, Q. R. 21 S. C. 241, restored. Hudon Cotton Co. v. Canada Shipping Co., 13 S. C. R. 401, followed. Great North West Central R. W. Co. v. Charlebois, [1899] A. C. 114, 26 S. C. R. 221, distinguished. *Citizens' Light and Power Co.* v. *Town of St. Louis*, 24 Occ. N. 165, 34 S. C. R. 495.

Copy of Plan—*Crown Lands—Description in Grant — Plan of Survey — Certified Copy.*]—The provisions of s. 20 of the Evidence Act, R. S. N. S. 1900 c. 160, do not permit the reception of a certified copy of a copy of a plan of survey deposited in the Crown lands office, to make proof of the original annexed to the grant of lands from the Crown. *Nova Scotia Steel Co.* v. *Bartlett*, 55 S. C. R. 527.

Cross-examination of Party on Affidavit.]—Where a party has been cross-examined on an affidavit made by him, the opposite party can use such examination at the trial as evidence in rebuttal of the evidence of the same party. *Livingstone* v. *Colpitts*, 21 Occ. N. 102, 4 Terr. L. R. 441.

Custom of Commerce — *Proof of.*] — Evidence may be given of the usage of commerce not only when the terms of the contract are ambiguous, but even when the intention of the parties is not clearly shewn according to the circumstances of the transaction. *Prior* v. *Atkinson*, Q. R. 19 S. C. 210.

Depositions—*Special Examiner — Wrong Person—Suppression.*] — An order appointed "E. K. A. of Neihart, Montana, U.S.A., a justice of the peace," a special examiner to take the depositions of certain witnesses; the depositions were in fact taken by one G. P. M., a justice of the peace, it appearing that E. K. A. had ceased to hold office, and that G. P. M. was his successor in office. An agent for each party appeared on the taking of the depositions, and it did not appear that any objection was made to G. P. M. taking the depositions:—Held, that the depositions were taken by G. P. M. without authority and, therefore, could not be used in evidence. Held, also, that the depositions being taken without authority and being not merely irregular, a substantive motion to suppress was not necessary, and that the objection could be taken upon their being tendered in evidence. *Claverie* v. *Gory*, *Pagnac* v. *Claverie*, 4 Terr. L. R. 470.

Depositions at Former Trial — *Divorce.*] — In divorce proceedings the evidence of a witness who cannot be found, given

at a former trial proving misconduct, may be read over to the petitioner at the trial and verified by her as a correct note of the evidence as given by the witness and used as proof of misconduct. *Cunliffe* v. *Cunliffe*, 8 B. C. R. 18.

Depositions in Another Action.] — The provision of art. 292, C. P., "A Judge may order that the evidence taken in one action may serve in another," must be interpreted as applying to evidence not already taken, but which is to be taken, the parties being aware at the time that it will be useful in another cause. *Boutin* v. *Traders' Advertising Co.*, 5 Q. P. R. 359.

Depositions in Former Action — Admissibility — Lack of opportunity for cross-examination. *Graham* v. *Frank* (Y.T.), 1 W. L. R. 510.

Depositions of Party in Former Action.]—*Ray* v. *Port Arthur, Duluth, and Western R. W. Co., Ray* v. *Middleton*, 2 O. W. R. 345, 3 O. W. R. 160.

Depositions of Witnesses—*Use on Motion for New Trial—Contradicting Evidence Given at Trial.*]—The plaintiff, having given notice of motion for a new trial on the ground of surprise, in that certain witnesses, called for the plaintiff, had withheld evidence which they could have given in his support at the trial, and were willing to give such evidence if a new trial were granted, subpœnaed three of these witnesses under Rule 491, for examination before a local registrar upon the motion for a new trial:—Held, that Rule 491 applies to motions for a new trial pending before a Divisional Court. Held, however, that evidence of persons who had been witnesses at the trial, that the evidence they then gave was not in fact true, and that certain statements made by them before trial to the plaintiff's solicitor (which was avowedly the evidence sought to be obtained here by the examination in question) were true, would not be receivable. *Rushton* v. *Grand Trunk R. W. Co.*, 23 Occ. N. 295, 6 O. L. R. 425, 2 O. W. R. 654.

Depositions of Witness at Former Trial—Rejection — No substantial miscarriage. *Glasgow* v. *Toronto Paper Manufacturing Co.*, 5 O. W. R. 104.

Deposition of Witness before Coroner's Inquest — Action under Fatal Accidents Act — Admissibility. *Fleming* v. *Canadian Pacific R. W. Co.*, 5 O. W. R. 588, 589, 805.

Depositions on Discovery—*Ex-officer of Corporation.*] — If an appointment is taken out for the examination for discovery of an ex-officer of a corporation, and the corporation's solicitor does not attend, and gives notice that he will object to the deposition being received at the trial:—Held, following Osler, J.A., in Leitch v. Grand Trunk R. W. Co., 13 P. R. 369, that it should not be received. *Bank of British Columbia* v. *Oppenheimer*, 7 B. C. R. 448.

Depositions on Discovery—*Ex-officer of Corporation.*]—On an examination for discovery of an ex-officer of a corporation the corporation's counsel attended and objected to certain questions being put:—Held, that the deposition was admissible at the trial. *Walkley* v. *City of Victoria*, 7 B. C. R. 481.

Depositions on Discovery—*Ex-officer of Corporation.*]—An examination for discovery of an ex-officer of a corporation is not inadmissible at the trial merely because the person examined was not such officer at the time of examination. *British Columbia Electric R. W. Co.* v. *Manufacturers Guarantee and Accident Ins. Co.*, 7 B. C. R. 512.

Depositions on Discovery — *Officer of Company.*]—On an examination for discovery of the plaintiffs' manager the plaintiffs took no part:—Held, that the deposition was admissible at the trial. *Royal Bank of Canada* v. *Harris*, 8 B. C. R. 368.

Depositions on Discovery—*Parties.*]—The depositions of the defendant B., taken at the instance of the plaintiff for the purposes of discovery before the trial, under Rule 201 of the Judicature Ordinance, N. W. T., and offered and received in evidence at the trial under Rule 224, were held admissible as evidence, not only as against the defendant B., but also as against his co-defendants, all the defendants being members of the committee of management of an unincorporated association, and all being represented on the examination of the defendant B. by the same counsel, who had the opportunity of cross-examining B. if he wished to do so, and did in fact cross-examine him. Allen v. Allen, [1894] P. 248, followed. Saltmarsh v. Hardy, 42 L. J. Ch. 422, distinguished. *Carte* v. *Dennis*, 21 Occ. N. 267, 5 Terr. L. R. 30.

Entries in Merchant's Books — *Oral Testimony—Admissions.*]—The entries made by a merchant in his books must be accepted as presumably representing, faithfully and correctly, the facts; and, unless an error is established by legal proof, they are evidence against him: arts. 1226, 1227, C.C. 2. The oral testimony of the merchant himself cannot destroy such proof, and as against him does not constitute legal proof to the contrary. 3. An authentic act may be contradicted and its terms may be changed by a judicial admission of the party against whom such admission is invoked. *Resther* v. *Matte*, Q. R. 13 K. B. 198.

Evidence Taken in Another Cause — *Adjudication.*]—Articles 291 and 292, C. P., relate only to the trial of causes pending and tried at the same time; therefore, evidence taken in a cause already adjudicated upon cannot serve as evidence in a pending cause. *Quebec Central R. W. Co.* v. *Dionne*, 4 Q. P. R. 424.

General Reputation of House — *Affidavits.*]—Held, that evidence of the general reputation of a house in which a Chinese immigrant has lived is admissible in habeas corpus proceedings directed against the Collector of Customs who is detaining such immigrant for deportation to China on the ground that she is a prostitute. An affidavit drawn up in a language not understood by the deponent, may be read in Court if it appears from the jurat that it was first read over and interpreted to deponent. *In re Ah Gway*, 2 B. C. R. 343, not followed. *In re Fong Yuk*, 21 Occ. N. 490, 8 B. C. R. 118.

Improper Admission — *Hearsay — Declarations of Deceased Persons—Plan Filed in Crown Land Office—Certified Copy—Witnesses and Evidence Act.*]—On the trial of an action for damages for trespass to land, witnesses were permitted, notwithstanding the objection of the plaintiff's counsel, to give evidence of what they had been told or understood, and of declarations of deceased persons, in relation to lines and boundaries in dispute. Also a certified copy of a plan found in the Crown land office, and supposed to relate to the property in dispute, was received in evidence: — Held, that the evidence was wrongly received, and that the verdict for the defendant, entered upon the findings of the jury, must be set aside with costs; and that the statute (Witnesses and Evidence Act, R. S. N. S. 1900, c. 160, s. 20), making admissible in evidence plans on file in the Crown land office, was one that must be strictly construed. *Bartlett* v. *Nova Scotia Steel Co.*, 37 N. S. Reps. 259.

Indecent Assault—*Complaints to Husband.*]—In an action for damages by a husband and wife for assaults alleged to have been committed on the wife, under circumstances which made them the criminal offence of an attempt to commit rape or an indecent assault:—Held, that evidence of statement and complaints made by the wife to the husband after the alleged assaults took place was properly received. *Hopkinson* v. *Perdue*, 24 Occ. N. 339, 8 O. L. R. 228, 3 O. W. R. 934.

Knowledge of Trial Judge of Facts in Another Action.] — Where it was evident from the conduct of counsel on both sides that they took it for granted that the trial Judge had knowledge of certain facts established in another action which had been tried before him with a jury, and out of which this action arose, and that for that reason no evidence was given of such facts: Held, that the trial Judge might properly make use of his knowledge. *Pease* v. *Town of Moosomin*, 5 Terr. L. R. 207.

Parol Evidence—*Cheque—Deposit of, as Security—Commercial Matters.*]—Bills of exchange, promissory notes, and cheques are commercial terms by themselves, and with respect to all persons and all contracts or transactions relating thereto are commercial matters. Therefore, one who alleges that he has given a cheque to another as security for an obligation which he has assumed to the holder of the cheque to attempt to collect the amount of the latter's deposit in a bank in liquidation, may prove his allegation by oral testimony. *Town of Maisonneuve* v. *Chartier*, Q. R. 20 S. C. 518.

Parol Evidence—*Trust.*]—Among other claims in this action, the plaintiff asked to have it declared that the purchase made by the defendant of a lot of land was made to him as trustee and agent for the plaintiff, and that the plaintiff was entitled to the profits and an account. There was no writing evidencing the alleged trust:—Held, that the plaintiff was at liberty to prove by parol evidence (if he could do so) the existence of the alleged trust. The authorities are conflicting. Bartlett v. Pickersgill, 1 Cox 15, 1 Eden. 515, 4 East 577, Heard v. Pilley, L. R. 4 Ch. 548, James v. Smith, [1891] 1 Ch. at p. 387, and Rochefoucauld v. Bousfead, [1897] 1 Ch. 196, discussed. Held, however, that the evidence in this case failed to prove the trust. *Hull* v. *Allen*, 22 Occ. N. 138, 1 O. W. R. 151, 782.

Parol Evidence — *Contradicting Valid Writing—Commencement of Proof by Writing—Documents — Inscription de Faux.*] — Oral evidence will not be admitted to contradict the terms of a writing validly made whether as a commencement of proof by writing or any other kind of oral testimony. 2. An inscription de faux is only required when it is desired to prove the falsity of what a public officer declares that he saw or heard himself. *O'Malley* v. *Ryan*, Q. R. 21 S. C. 566.

Parol Evidence—*Work Done—Request.*] —On a claim for repairs done by the lessee at the request of the lessor, and board of men, exceeding $50, the request cannot be proved by parol evidence. *Caron* v. *Gaudet*, 6 Q. P. R. 23.

Parol Evidence to Explain Contract —*Collateral Security.*]—The plaintiff sued on a promissory note, and tendered with his action a certificate of shares which he said the defendant had transferred to him as collateral security for the loan represented by the note. The defendant pleaded that the note was made in connection with a contract by which the defendant sold to the plaintiff eleven shares of Kensington Land Company stock subject to the right of redemption within six months on certain conditions, and that the note was only collateral to the contract, and made at plaintiff's request to enable him to obtain the money by discount. The note and contract were produced:—Held, that taking the note and contract together, and also seeing the admission in the declaration that the two documents were connected with the same transaction, parol evidence was admissible in explanation of the contract as between the parties thereto. *Walker* v. *Brown*, Q. R. 19 S. C. 23.

Presentation of Evidence Rejected— *New Trial.*]—Where a party seeks a new trial on the ground of wrongful rejection of evidence, he should shew that the evidence sought to be adduced was put squarely before the Judge, so that his mind was applied to the point. *Hopkins* v. *Gooderham*, 24 Occ. N. 104, 10 B. C. R. 250.

Production of Book—Refusal of trial Judge to allow — Substantial wrong — New trial—Costs. *Matthews* v. *Moody*, 1 O. W. R. 47.

Relevancy — *Fraud — Similar Transactions.*]—In an action to set aside a bill of sale of a mineral claim, on the ground that it was forgery by one of the defendants, evidence was given by the plaintiff and his witnesses as to matters which, whether material or not, were intended to make the Judge give a readier credit to the plaintiff's case. For the defence witnesses were allowed to give evidence shewing that the plaintiff and his witnesses, in respect of the same mineral claim, had been parties or privy to a fraudulent transaction involving perjury and conspiracy, and tending to shew that a like fraudulent scheme was being attempted in this case, and the result was that the Judge

was so influenced by this evidence that he gave judgment for the defendants:—Held, that the evidence on behalf of the defendants was properly admitted. *D'Avignon* v. *Jones*, 23 Occ. N. 71, 9 B. C. R. 359; affirmed, 32 S. C. R. 650.

II. Affidavits.

Marksman—*Jurat.*]—In the jurat of the affidavit of a marksman, upon which a rule had been obtained, instead of the words "he (or who) seemed perfectly to understand the same," were the words "seemed fully to understand the same:"—Held, a sufficient compliance with Rule 1 of Hilary Term, 1848. *Ex p. Allain*, 20 Occ. N. 87, 35 N. B. Reps. 107.

Practice—Swearing before solicitor for affiant — Necessity for independent commissioner — Determination of question whether commissioner acting as solicitor—Authority of commissioner. *Gougeon* v. *Thompkins* (N.W.T.), 1 W. L. R. 114.

Statute — *Form Prescribed — Officer to Take—Justice of the Peace—Commissioner—Exception to Form.*] — The provisions of a special statute, enacting that an affidavit shall be made according to the form contained in the Act, which indicates that it is to be made before a justice of the peace, have not the effect of restricting the power conferred on a commissioner of the Superior Court by art, 23, C. P. C.; but these provisions indicate only that a justice of the peace can also take such affidavit. The fact that an affidavit does not read in the first person, is not a ground for taking exception to its form, if it is not shewn that the other party has been prejudiced thereby. *Lapointe* v. *Berthiaume*, Q. R. 26 S. C. 35.

Swearing—*Foreign Notary.*] — A notary public for the State of New York has authority, under art. 30, C. P., to receive affidavits, within his State, for use in the Courts of the Province of Quebec. *Schwob* v. *Baker*, 5 Q. P. R. 441.

III. Corroboration.

Action against Executor—*Contract.*]—The corroboration required by s. 50 of the Evidence Act (B. C. stat. 1900, c. 9, s. 4), must refer specifically to the contract on which action is based, and not to some part of it, so as to leave the effect of the whole unascertained. *Blacquiere* v. *Corr*, 10 B. C. R. 448.

Action against Representative of Deceased—*Cestui que Trust.*] — The material corroborative evidence required by R. S. O. 1897 c. 73, s. 10, in a proceeding by or against the executor of the will, or the administrator of the estate, of a deceased person, may be given by one who is interested as cestui que trust in the matter of the claim in question in the action. The interest of such a witness in the result may well be considered by the jury in considering the weight to be attached to it, but the evidence could not be withdrawn from their consideration. *Batzold* v. *Upper*, 22 Occ. N. 257, 4 O. L. R. 116, 1 O. W. R. 381.

Action against Representative of Deceased—*Promissory Note—Comparison of Handwriting.*]—In an action on a promissory note against the personal representatives of the maker, tried by a Judge without a jury, a duplicate registered mortgage purporting to be executed by the maker of the note, with the registrar's certificate of registration upon it, was produced in evidence to prove by comparison the signature of the note:—Held, that the Judge was entitled to compare the signatures, and act on his own conclusion as to their identity, and having found them identical, the corroboration was sufficient to satisfy R. S. O. 1897 c. 73, s. 10. *Thompson* v. *Thompson*, 4 O. L. R. 442, 1 O. W. R. 431.

Action by Executors for Money Demand — *Defence — Payment to Testator — Testimony of Defendant—Corroborating Circumstances.*]—In an action by executors to recover money due from C. to the testator, it was proved that the latter when ill in a hospital had sold a farm to C., and that $1,000 of the purchase money was deposited in a bank to the testator's credit; that subsequently C. withdrew this money on an order from the testator, who died some weeks afterwards, when none was found on his person, nor any record of its having been received by him. C. admitted having drawn out the money, but swore that he had paid it over to the testator; no other evidence of any kind was given of such payment:—Held, reversing the judgment of the Court of Appeal, 2 O. W. R. 356, and restoring the judgment of a Divisional Court, 1 O. W. R. 205, that a prima facie case having been made out against C., and his evidence not having been corroborated as required by R. S. O. 1897 c. 73, s. 10, the executors were entitled to judgment. *Thompson* v. *Coulter*, 24 Occ. N. 48, 34 S. C. R. 261, 3 O. W. R. 82.

Breach of Promise of Marriage — *Imperial Statute.*] — The Imperial statute 32 & 33 V. c. 68, s. 2, requiring the plaintiff's evidence in an action for breach of promise of marriage to be corroborated by some other material evidence in support of such promise, is in force in Manitoba, not being either expressly or by implication repealed by the Manitoba Evidence Act, 57 V. c. 11, now c. 57 of R. S. M. 1902. *Cockreill* v. *Harrison*, 23 Occ. N. 123, 14 Man. L. R. 366.

Claim against Estate of Deceased Person—Statute of Limitations. *Wilson* v. *Howe*, 1 O. W. R. 272.

Partition of Land—Proof of Identity. *Fuller* v. *Grant*, 1 O. W. R. 452.

IV. Credibility of Witnesses.

Conflicting Evidence—*Duty of Court.*]—When several witnesses equally intelligent and credible, who appear to give their testimony in good faith, do not agree upon the existence of a fact, the Court should adopt the version of the majority, rather than that of the minority. 2. As between witnesses equally honest, the Court ought rather to believe those who would not be likely to be mistaken than those who are likely to misconceive the facts in question. *Guay* v. *Village of Malbaie*, Q. R. 25 S. C. 263.

Finding Based on Positive Evidence —*Appeal.*]—In an action for injury to land by flooding, the trial Judge found, with some doubt, that the water had been delivered by means of a culvert constructed by the defendants, in spite of a mass of testimony going to shew that this was impossible:—Held, that the Court (Supreme Court en banc) would not interfere with the Judge's finding, there being positive evidence to sustain it, which he had chosen to believe, and it could not be said that he was clearly wrong. *Milton* v. *District of Surrey*, 10 B. C. R. 296.

Trial Judge—*Appellate Court.*] — When the credibility of a witness who has given his evidence before the trial Judge is questioned before an appellate Court, the Court should reverse the finding of the trial Judge as to the witness's evidence only if the evidence itself furnishes very strong grounds for doing so, and if the matter is in doubt the finding should be accepted. *Laflamme* v. *Fortier*, Q. R. 27 S. C. 96.

V. Documentary Evidence.

Commencement of Proof—*Admission of Oral Testimony—Promissory Note.*]—An affidavit to the effect that the payee of a promissory note has transferred it to the person making the affidavit, joined with the admission of the latter that the holder of the note did not receive from him any consideration for transferring it to him, constitutes a "commencement de preuve" in writing of a promise by the transferee of such note to pay the amount thereof to the transferor, sufficient to admit oral testimony of such promise. *Jewell* v. *Latimore*, Q. R. 26 S. C. 450.

Commencement of Proof in Writing —*Authentic and Private Writings.*]—A writing which is not authentic by reason of defects which deprive it of its authenticity, will avail as a private writing if it have been signed by all the parties whose signatures thereto were necessary if made as a private writing. 2. Verbal evidence is not admissible to establish the amount payable under a private writing (not referring to any specific transaction), signed with the amount in blank, unless there be a commencement of proof in writing as to the amount; and the signature of the person obliging himself would not constitute such commencement of proof. Judgment in Q. R. 19 S. C. 82 affirmed. *Gauthier* v. *Rioux*, Q. R. 19 S. C. 473.

Entries in Books—*Onus.*]—An entry in a merchant's books, shewing that the defendant is indebted in a certain amount, with proof that the plaintiffs did sell goods to him and that the books were regularly kept, is not sufficient, per se, to put the defendant, who, by his plea, denied his indebtedness, upon proof of the incorrectness of such entry. *Garth* v. *Montreal Park and Island R. W. Co.*, Q. R. 18 S. C. 463.

Instrument in Duplicate—*Variation—Loss—Secondary Evidence — Demand of Performance of Obligation—Default.*]—When a written instrument is made in duplicate, all that one contains more than the other is non-existent so far as the holder of the latter is concerned. In order that secondary evidence may be admitted of a document, it is not necessary to shew that it was lost by no fault of the party or unforeseen accident; it is sufficient to shew to the satisfaction of the Court that it is impossible to find it, and that it has not been purposely destroyed. Damages cannot be recovered for non-performance of an obligation unless the party seeking to recover has demanded performance so as to place the other in default. *Lafrance* v. *Larochelle*, Q. R. 27 S. C. 153.

Notice to Produce — *Object of.*] — The only object of a notice to produce is to enable the party giving it to put in secondary evidence the contents of a writing, if the original, being in the possession of the party to whom the notice is given, is not produced by him. If the party chooses to produce the original without notice, or if the party desiring to put in the original gets possession of it and puts it in, it is no objection that a notice to produce was not given. *Carte* v. *Dennis*, 21 Occ. N. 267.

Oral Contract — *Petition to Open up Judgment—Discovery of Fresh Evidence.*]—A party who has declared, in compliance with a judgment ordering him to file particulars, that he was suing upon an oral contract, may, without fraud, file documentary evidence at the trial, in support of such so-called oral contract. 2. At any rate, it is the duty of the adverse party, when such documents are filed, to object to their production and take proceedings to have the case reopened while it is under advisement, and a requête civile will not be received when the party might have had the case reopened before judgment. 3. A judgment will not be revoked by reason of the discovery of new evidence, unless it is shewn that the party made reasonable efforts to discover it before the trial, or could have discovered it by reasonable diligence. *Union Home and Real Estate Co.* v. *Estates Limited*, 6 Q. P. R. 383.

Revival of Action—*Petition by Child of Deceased Plaintiff—Proof of Status—Certificate of Baptism—Marriage Contract.*]—Upon a petition for leave to continue an action in the name of the petitioner as the daughter of the deceased plaintiff:—Held, that the certificate of the petitioner's baptism attested only her filiation, but not that her parents were man and wife, which fact could only be proved by the marriage settlement or other similar documents. *Connolly* v. *Consumers' Cordage Co.*, 6 Q. P. R. 150.

Will—*Validity—Letters Probate.*] — Probate of a will devising real estate is not conclusive evidence of the validity of the will in a Court of equity. *Turner* v. *Turner*, 24 Occ. N. 243, 2 N. B. Eq. Reps. 535.

VI. Foreign Commission.

Application for—Affidavit in support—Purpose of evidence sought. *Spencer* v. *Drysdale* (B.C.), 1 W. L. R. 6 & 7.

Application for—*Evidence on.*]—Application was made for a commission to examine a witness resident in the United States, the

application being based on an affidavit of the partner of the defendant's solicitor, on information obtained by him from M., the defendant's agent. There was no affidavit from M., personally, and nothing to shew that the evidence of the witness could not have been obtained before he left the jurisdiction, or that the facts said to be in the knowledge of the witness could not be supplied by other persons: — Held, that the application was properly dismissed. *McPherson* v. *Ritter-Conley Mfg. Co.*, 35 N. S. Reps. 429.

Application for, during Trial — *Refusal—Adjournment by Consent — Appeal — Estoppel.*]—During the progress of the trial, and after a number of witnesses on behalf of the plaintiffs had been examined, the defendants' counsel applied for a commission for the examination of a witness who was absent in British Columbia, and for a postponement of the trial. The witness in question was a son of one of the defendants, who was aware of his absence, but the fact was not brought to the attention of the defendants' counsel until the day on which the trial was commenced. The trial Judge having refused both the commission and the postponement:— Held, that there was no reason for interfering with his discretion on these points. After the commission applied for had been refused, the plaintiffs' counsel offered to agree to an adjournment for a reasonable time, to be fixed by the Court, to enable the defendants to produce the witness, should they desire to do so, and the case was adjourned from the 8th January to the 17th February. On the latter day, the case being called, the defendants' counsel stated that he had no further evidence to offer, and judgment was given for the plaintiffs: — Held, that the defendants, having accepted the offer made on behalf of plaintiffs, and obtained an adjournment of the case, were not in a position to revert back to their original rights, and claim a review of the judgment. *Stephen* v. *Thompson*, 35 N. S. Reps. 390.

County Court—*Examination of Plaintiffs —Expense.*]—In an action in a County Court on a promissory note for $65.40, the defendant pleaded that the note was obtained from him under duress and the plaintiffs, who lived in Ontario, applied for a commission to take their evidence there: — Held, that, as the probable expenses of the commission would not exceed a quarter of the expenses of the plaintiffs attending the trial, and the application was made bona fide, it should be granted. *Thompson* v. *Henderson*, 9 B. C. R. 540.

Examination of Absent Plaintiff.]—Action of replevin. After the commencement of the action one of the plaintiffs left the jurisdiction. Application was made on behalf of the plaintiffs to examine the absent plaintiff under a commission, the plaintiffs' solicitor stating that the absent plaintiff was joined by mistake:—Held, that the plaintiffs ought to have leave to issue a commission. The delay was satisfactorily accounted for, and, even if the absentee was a real plaintiff, the law permits a commission to be issued to take the evidence of a party. The fact that it is on the part of the plaintiff makes no difference. *Willis* v. *Behie*, 22 Occ. N. 430.

Examination of Defendant and Witness Abroad — Failure to make case on application. *Stearns* v. *Kimmell* (Y.T.), 1 W. L. R. 390.

Examination of Defendants Abroad —Discretion—Appeal—Terms—Costs. *Ferguson* v. *Millican*, 6 O. W. R. 661, 11 O. L. R. 35.

Examination of Party.]—Under a general commission to examine witnesses abroad on behalf of both parties, the witnesses intended to be examined not being named in the order or the commission, it is not permissible for the plaintiff to give his evidence before the commissioner, and, where the commission is opened at the trial, the plaintiff's depositions on being tendered in evidence will be rejected. *Wright* v. *Shattuck*, 4 Terr. L. R. 317.

Examination of Party—*Default as to Interrogatories.*]—A defendant against whom interrogatories upon articulated facts have been declared pro confessis, and who has left the country, cannot obtain a rogatory commission for his examination abroad. *Bernard* v. *Carbonneau*, 6 Q. P. R. 350.

Examination of Party — *Interrogatories.*]—A party to an action in default for answers to interrogatories sur faits et articles may, by motion, and on paying the costs incurred by his default, ask to be examined upon commission at his new domicil out of the Province. *Burelle* v. *Palardy*, 4 Q. P. R. 73.

Examination of Party—Place for—Expenses—Costs. *Smith* v. *McDearmott*, 2 O. W. R. 316, 475.

Examination of Plaintiff Abroad — Exceptional circumstances. *Lewin* v. *Cheesewerth*, 6 O. W. R. 481.

Examination of Plaintiff Abroad — Terms—Costs. *Watt* v. *Mackay*, 5 O. W. R. 93, 170.

Examination of Plaintiff as Defendant to Counterclaim—Discovery. *Levi* v. *Edwards*, 5 O. W. R. 83.

Examination of Witnesses in Foreign State — Letters rogatory — Necessity for — Jurisdiction of local Master. *Keogh* v. *Brady*, 6 O. W. R. 552, 846.

Grounds for Ordering — Terms—Security for costs. *McGregor* v. *Johnson*, 2 O. W. R. 531.

Interrogatories — *Foreign Commission —Evidence—Motion to Strike out—Jurisdiction.*]—Motion by defendant to strike out interrogatories served by plaintiffs upon defendant as proposed to be used upon a commission to take evidence in Scotland. No authority was cited in support of the motion; against it was the authority of Hume-Williams and Macklin on Evidence on Commission (1903), p. 101, where it said that great care should be taken in framing interrogatories, for, "if the interrogatories contain leading questions or are immaterial, irrelevant, or otherwise objectionable, the opposite party may object to the answers being received at the trial. It is not the present practice for the Master to consider interrogatories proposed to be administered to witnesses on commission, because the rules which

so provide apply only to interrogatories inter partes; but the practice seems at one time to have been different." The only rule dealing with the subject is 503:—Held, in the absence of express authority, there was no power to deal with these interrogatories. A party examining on interrogatories cannot be interfered with as is sought to be done in this case. If the other side objects to his interrogatories, it may be wise to alter them. But a party is not obliged to do so. If he chooses he is free to take his risk of the commission evidence being rejected either in whole or in part by the Judge at the trial. Motion dismissed with costs to plaintiffs in the cause. *Toronto Industrial Exhibition Assn.* v. *Houston*, 5 O. W. R. 493, 9 O. L. R. 527.

Interrogatories—*Names of Witnesses.*]—When a commission in the nature of a commission rogatoire is issued to examine witnesses, the interrogatories will be allowed and settled notwithstanding the fact that the party at whose instance the commission issued, declares he is unable to disclose the names of all the witnesses he intends examining. *Milliken* v. *Laurentide Pulp Co.*, 6 Q. P. R. 134.

Irregularity — *Waiver — New Trial—Defect in Evidence.*]—Where a commission to take evidence was issued without a formal order therefor, but merely on an informal memorandum of a Judge, containing no direction as to the commissioners' name, or the time, place, or manner of taking the evidence, but the commission, before being sent out, had been shewn to the advocate for the opposite party, and due notice of the time and place of taking the evidence under the commission had been served on him, and on the return of the commission it had been opened at his instance:—Held, that the irregularities in connection with the issue of the commission, which might at an earlier stage have been taken advantage of by motion to suppress, were waived by the advocate for the opposite party, with knowledge of the irregularities, causing the commission to be opened; that being a fresh step within the meaning of s. 541 of the Judicature Ordinance. 2. That in any case, the trial Judge having received the evidence, and s. 501 of the Judicature Ordinance providing that a new trial shall not be granted on the ground of the improper admission or rejection of evidence, unless, in the opinion of the Court to which application is made, some substantial wrong or miscarriage has been thereby occasioned in the trial, and the Court being of the contrary opinion, no effect should be given to the objection. Trial of an action adjourned to enable plaintiff to supply defect in the evidence in support of his case under s. 236 of the Judicature Ordinance. *Hamilton* v. *McNeill*, 2 Terr. L. R. 31.

Irrelevant Testimony — Terms—Costs and expenses. *Toronto Industrial Exhibition Assn.* v. *Houston*, 5 O. W. R. 303, 349, 493.

Postponement of Trial — Delay — Terms—Security for costs. *Lemoine* v. *MacKay*, 2 O. W. R. 390, 400.

Return — *Delay — Nullity — Omission to Put Questions.*]—The execution of a foreign commission and the return of the commissioner after the time fixed, by the consent of the parties, are not necessarily causes of nullity, especially when no prejudice has been occasioned. 2. If the commissioner has omitted to put to a witness certain questions, his return will not be received, his proceedings being incomplete, but such omission does not render the proceedings void, and the Court, in that case, will order the record to be sent back to the commissioner with instructions to put the questions and so complete his proceedings. *Thibault* v. *Poulin*, Q. R. 22 S. C. 371, 5 Q. P. R. 189.

Time — *Extension — Issue — Return.*]—Where a commission rogatoire has not been issued within the time allowed for its return, the order allowing it to be issued lapses, and the Court cannot extend the time for taking testimony under such commission or for its return. *Girard* v. *City of Montreal*, Q. R. 18 S. C. 315.

Trial Judge — *Postponement of Trial.*]—The Judge to whom an application is made for a commission rogatoire may refer the same to the trial Judge, who will, in his discretion, after having heard the evidence, grant or refuse the motion, and, in the former case, postpone the trial in order to permit the execution of the commission. *Armstrong* v. *Gillies*, 5 Q. P. R. 423.

Witnesses out of Province — *Examination of—Procedure.*] — Under art. 373, C. P., the commissaire-enquêteur to be appointed must reside in the Province of Quebec, and the witness to be examined must also reside therein. If the witnesses reside out of the province, the party who finds it necessary to examine them must proceed under arts. 380 et seq. *Patterson* v. *Crépeau*, Q. R. 19 S. C. 147, 3 Q. P. R. 404.

VII. Secondary Evidence.

Books and Documents — *Objections—Resemblance or Identity of Performances—Copyright.*] — Objections to secondary evidence of the contents of a written document must be distinctly stated when it is offered; and if not objected to it is received, and is entitled to its proper weight, and the weight to be attached to it will depend upon the circumstances of each case. Each programme of an entertainment is an original document, not a mere copy. The rule excluding oral testimony of a witness of the contents of a written document which he had read was not applicable to the present case (an action for infringement of a copyright by the performance of an opera). What was sought to be proved was not the contents of any book or document, but the resemblance or identity of two performances, partly verbal, partly musical, and partly made up of dramatic action, gesture, and facial expression. Sufficiency and admissibility of evidence of resemblance or identity of the performance or of copy with original discussed. *Carte* v. *Dennis*, 5 Terr. L. R. 30.

Notice to Produce — *Object of.*]—The only object of a notice to produce is to enable the party giving it to put in secondary evidence of the contents of a writing, if the original, being in the possession of the party to whom the notice is given, is not produced by him. If the party chooses to produce the

original without notice, or if the party desiring to put in the original gets possession of it and puts it in, it is no objection that a notice to produce was not given. *Carte* v. *Dennis*, 21 Occ. N. 267, 5 Terr. L. R. 30.

Proof in Writing — *Necessity for — Loss by Unforeseen Accident — Oral Testimony.*] — Where the original of a notarial minute has disappeared without the fault of the parties, by some inexplicable circumstance, the case comes within art. 1233, para. 6 C. C., which provides that proof may be made by testimony "in cases in which the proof in writing has been lost by unforeseen accident." *Filiatrault* v. *Feeny*, Q. R. 20 S. C. 11.

Voluntary Destruction of Document.] —A plaintiff who has voluntarily destroyed an instrument under seal evidencing an agreement with the defendant cannot be allowed to prove orally the contents of such document. *Coté* v. *Cantin*, Q. R. 21 S. C. 432.

VIII. WITNESSES.

Competency — *Religious Belief.*] — A person offered as a witness, upon being examined on the voir dire, stated that he believed in God but did not believe in a future state of rewards and punishments dependent upon his conduct while on earth, whereupon he was rejected as incompetent:—Held, that he was properly so rejected. *Bell* v. *Bell*, 34 N. B. Reps. 615.

Cross-examination on Affidavit—Interlocutory motion — Original document — Production by witness. *Wilson* v. *Rannie* (Y.T.), 1 W. L. R. 397.

Cross-examination to Credit — *Contradiction — Defamation.*]—The defendant in an action of defamation, to which he pleaded privilege, after himself stating in the witness box that one H. had informed him that the plaintiff was keeping the strippings from his cows, and making butter from them, contrary to his agreement with a cheese-making association, which was the alleged slander, called H. as a witness, and proved that H. had told him (the defendant) what he had stated. The plaintiff's counsel then in cross-examination asked H. his grounds for making the statement, and H. said that he had seen the plaintiff's wife taking the strippings, and that she had not mixed them with the milk sent to the factory; that she told him that she always took the strippings from the cows and used them in the house. The plaintiff proposed to call, in reply, a witness to contradict H.:—Held, that this evidence, if sufficiently tendered, was properly rejected, there being no plea of justification, and the defendant not seeking to go into the truth of the charge. It was not competent for the plaintiff to make the evidence relevant by himself asking H., in effect, whether the charge were true or not, and then seeking to contradict him. The cross-examination of H. upon this point was proper, but only as a matter of credit, to rebut evidence brought out by himself upon a matter going only to credit. *Preston* v. *Thompson*, 21 Occ. N. 464.

Expert Witnesses — Opinion evidence — Witness fees — Additional payment for opinion. *Butler* v. *Toronto Mutoscope Co.*, 6 O. W. R. 527, 11 O. L. R. 12.

Expert Witness — *Opinion — Witness Fees.* —A medical man who has attended the victim of an accident, and who is afterwards called as a witness, must disclose all the facts of which he has knowledge; but is not obliged to express an opinion in his capacity of physician until his fees as such have been paid or guaranteed. *Marquis* v. *Robidoux*, 3 Q. P. R. 433.

Motion—Cross-examination of officers of company on affidavit—Injunction—Production of documents — Undertaking to produce — Questions — Relevancy — Sufficiency — Trade union—Details as to employer's business. *Gurney Foundry Co.* v. *Emmett*, 2 O. W. R. 938, 959, 1038, 3 O. W. R. 382, 554.

Motion — *Examination of Witness on Pending Motion—Ex Parte Motion—Substituted Service of Process—Status of Witness to Move to Set aside Appointment and Subpœna.*]—Motion by a person, not a party to the suit, who was served by plaintiff with a subpœna and appointment for examination as a witness upon a pending motion, to set aside the subpœna and appointment. Several grounds were taken in the notice of motion. Those mainly relied on were: (1) that there is no motion pending before the Court, and so Rule 491 does not apply; (2) that an order for substituted service has already been made and acted on, and the witness, on whom service was made, has disclaimed any knowledge of defendant's residence, and (3) that the Rules do not provide for or permit the examination of witnesses upon an ex parte motion. It was argued that the witness has no status to move yet. This point was met by Steele v. Savory, 8 Times L. R. 94, which seems to overrule the objection. The substantial question was whether an ex parte motion is a "motion before the Court" within the meaning of Rule 491. The notes to this Rule in Holmested & Langton's Jud. Act, p. 673, and the cases cited, seem to shew that an ex parte motion is a motion in support of which evidence can be obtained:—Held, plaintiff was right in trying to obtain such information as would enable such an order to be made as would prima facie bind defendant on the question of service. When an order has been made, as here, which was plainly abortive, it does not seem reasonable to hold, in the absence of authority, that plaintiff's whole remedy is exhausted. The motion dismissed. *Dunlop* v. *Dunlop*, 5 O. W. R. 258, 305, 9 O. L. R. 372.

Party as Witness — *Discrediting — Reputation — Opinion — Rejection of Evidence—New Trial.*]—At the trial of an action for negligence in non-repair of a way, the plaintiff testified in his own behalf. For the defence a neighbour of the plaintiff's was called who swore that the plaintiff's general reputation among his neighbours in the community was not good; the witness would not believe the plaintiff on his oath. He said he knew the individual opinions of the plaintiff's neighbours as to his character, and he was then asked by counsel for the plaintiff: "Whose opinion do you know?" This was not allowed:—Held, that this evidence should

not have been rejected; but, as, even assuming the plaintiff's testimony to be true, the action was properly dismissed by the trial Judge, there was no substantial wrong or miscarriage within Order 37, Rule 6, and there should not be a new trial. *Messenger* v. *Town of Bridgetown*, 33 N. S. Reps. 291.

Party as Witness—*Refusal to Incriminate Himself — Municipal Councillor — Quo Warranto.*] — The defendant was elected a member of the council of a village, the charter of which required that no one should occupy such office unless he could read and write. The plaintiff proceeded against the defendant by quo warranto upon the ground that he could neither read nor write. Being examined by the plaintiff as a witness, the defendant refused to say whether he could read or write, and refused to read a paper presented to him:—Held, that he was not bound to incriminate himself, and his refusal was proper. *St. Arnaud* v. *Barrette*, 4 Q. P. R. 102.

Petition to Correct Deposition.]—A witness has the right to apply directly to the Court, by petition, to have his deposition corrected, when he states that it is not correct. *Nadon* v. *Richmond, Drummond, and Yamaska Ins. Co.*, 3 Q. P. R. 439.

Right to Contradict Witness—*Judge's Leave—Refusal of.*]—Where a witness, whether a party to the action or not, is called by the plaintiff to prove a case, and his evidence disproves the case, the plaintiff may yet establish his case by other witnesses called, not to discredit the first, but to contradict him on facts material to the issue; and the right to contradict by other evidence exists, though the trial Judge may not grant his permission. *Stanley Piano Co. of Toronto* v. *Thomson*, 21 Occ. N. 73, 32 O. R. 341.

IX. Other Cases.

Action to Perpetuate Testimony — Procedure — Order for examination of witnesses. *Atlas Loan Co.* v. *Honsinger*, 3 O. W. R. 917.

Admission of Liability — *Burden of Proof—Positive and Negative Evidence.*]—Where in an action against the indorser of a promissory note, a defence of failure to present for payment and to give notice of dishonour is admitted, but the plaintiff relies on an alleged admission of liability by the defendant, the burden of proof is on the plaintiff; and the case is not one where the rule as to the adoption of the positive evidence of one witness against the negative evidence of another can be properly applied. *Hart* v. *Taylor*, 37 N. S. Reps. 155.

Affidavit — *Jurat — Illiterate Person.*]—The jurat to an affidavit for an order for replevin, made by an illiterate person, after the words "sworn, etc.," containing the words, "And I certify that this affidavit was read in the presence of the deponent, and that the said deponent seemed perfectly to understand the same:"—Held, that the affidavit was bad, being apparently signed by an illiterate person, and there being no certificate that it was subscribed in the presence of the commissioner. *Kassop* v. *Day*, 36 N. S. Reps. 430.

Affidavits — *Interlocutory Application—Information and Belief—Grounds for.*]—An affidavit leading to an order for an ex juris writ containing allegations of the fact which must necessarily have been founded on information and belief only, must state the source of the information. *Tate* v. *Hennessey*, 8 B. C. R. 220.

Application to Let in Fresh Evidence—*Knowledge of Party.*]—A petition to open up judgment in order to prove an allegation in the declaration (which the plaintiff forgot at the hearing) will not be granted unless it appears that the facts which it is desired to prove did not come to the knowledge of the plaintiff until after the close of the examination of witnesses. *Canadian Breweries (Limited)* v. *Allard*, 4 Q. P. R. 365.

Bornage — *Right of Defendant to Call Witnesses—Absence of Plea.*]—In an action en bornage, a defendant, who has not filed a plea, has nevertheless a right to examine witnesses. *Johnsons Co.* v. *Wilson*, Q. R. 24 S. C. 131.

Court of Appeal—Leave to adduce further evidence on appeal. *Klees* v. *Dominion Coat and Apron Co.*, 3 O. W. R. 841, 937, 6 O. W. R. 200.

Default of Answer to Interrogatories—*Promissory Note — Prescription — Interruption — Part Payment.*]—The default of the defendant to answer interrogatories sur faits et articles is sufficient proof to establish part payments made by him upon a promissory note for more than $50, and therefore to prove the interruption of prescription. *Charrier* v. *St. Pierre*, Q. R. 19 S. C. 103.

Deposition of Witness — *Forum.*]—A deposition necessary to obtain judgment in an action by default should be taken before the Judge or the prothonotary and not before a commissioner of the Superior Court. *Morris* v. *Everett*, 3 Q. P. R. 466.

Discovery of Fresh Evidence—*Opening up—Judgment.*]—Where the plaintiff, whose action had been dismissed, presented a petition supported by an affidavit shewing that since the judgment he had discovered two new witnesses who would prove facts essential to the success of his action, an order was made remitting the parties to the same position as they were in before judgment in order that the plaintiff might produce the two witnesses, with leave to the defendant to give evidence to contradict them, and reserving costs. *Brousseau* v. *Déchêne*, 3 Q. P. R. 397.

Entries—*Proof of Debt — Sufficiency.*]—Where regular entries of sales of goods were made, and invoices were rendered and demands for payment frequently made, and the debtor only questioned one small item of 50 cents, and, promising to pay, asked for delay:—Held, that the indebtedness was sufficiently established. *Laporte* v. *Duplessis*, Q. R. 20 S. C. 244.

Examination of Witness de Bene Esse—*Rule 638.*] — Summons to examine a witness de bene esse. The witness lived at

Telegraph Creek, in Cassiar district, but at the time of the hearing of the summons he was in Victoria temporarily, and the application was for the purpose of getting his evidence before he went back to Telegraph Creek:—Held, that Rule 368 was applicable, and order made as asked. *Hyland* v. *Canadian Development Co.*, 22 Occ. N. 170, 9 B. C. R. 32.

Examination of Witness de Bene Esse.]—*Haskins* v. *May*, 2 O. W. R. 500.

Exchequer Court of Canada—*Statutes—Conflict.*]—In a proceeding in the Exchequer Court of Canada, if a conflict arises between the rules of evidence established by a provincial statute and those subsisting by virtue of a Dominion statute, the latter will prevail. *Regina* v. *O'Bryan*, 7 Ex. C. R. 19.

Injunction Motion — Cross-examination on affidavits—Refusal to produce books—Proper custodian—Order for production—Forum—Alternative motion to commit. *Canada Foundry Co.* v. *Emmett*, 2 O. W. R. 1032, 1102, 3 O. W. R. 53, 630.

Letter Written "Without Prejudice"—Objection on appeal. *McLennan* v. *Gordon*, 5 O. W. R. 98.

Notes of, Taken at Trial.]—The notes of evidence taken at the trial are conclusive as to what took place thereat. *McDougall* v. *McLean*, 1 Terr. L. R. 450.

Opinion Evidence.] — See *Wright* v. *Shattuck*, 5 Terr. L. R. 264.

Reference — New Master—Adoption of evidence taken before former Master—Order requiring—Jurisdiction of Master in Chambers. *Evans* v. *Jaffray*, 1 O. W. R. 29, 158, 2 O. W. R. 678, 3 O. W. R. 877, 6 O. W. R. 733.

Reference to Master for Trial—Rulings on evidence — Interlocutory appeals—Admission and rejection of evidence—Interpretation of contract — Form of questions. *Askwith* v. *Capital Power Co.*, 4 O. W. R. 235.

Way — Non-repair — Negligence—Fatal Accidents Act—Cause of death—Statement of deceased—Narrative of event — Municipal corporations—Joint liability. *Garner* v. *Township of Stamford*, 2 O. W. R. 1167.

Witness — *Alien — Form of Oath.*]—Upon a trial for murder, a Chinese witness, who was not a Christian, was interrogated as to the form of oath most binding, and was sworn by "the King's oath," or "chicken oath," a form deemed of greater solemnity than those ordinarily administered, the "paper" and "saucer" oaths. *Rex* v. *Ah Wooey*, 9 B. C. R. 569.

EVOCATION.

See COURTS.

EXAMINATION.

See BANKRUPTCY AND INSOLVENCY—DISCOVERY—EXECUTION—JUDGMENT DEBTOR—MUNICIPAL ELECTIONS.

EXCEPTIONS.

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EXECUTION.

I. EXEMPTIONS, 632.
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I. EXEMPTIONS.

Clothing — *Retention for Value of Repairs — Clothing Supplied by Husband to Wife.*]—A fur overcoat for a man of a certain age and of a certain social position is an ordinary garment necessary and indispensable during the winter season, and therefore is exempt from seizure under art. 580, C. P. C. 2. A right of retention claimed by one who has repaired such an overcoat does not authorize a creditor to seize it under execution. 3. A husband being obliged to clothe his wife, necessary articles of personal clothing given to a wife by her husband during marriage do not fall under the prohibition against gifts from husband to wife inter vivos, and such garments once given to the wife become her individual property, and therefore are not exigible for the debts of her husband. *Robertson* v. *Honan*, Q. R. 24 S. C. 510.

Contractor—*Animals Used in Business—Several Callings.*]—A contractor who uses a horse in his business is not a carter, and cannot as such oppose the seizure of the horse in execution. 2. A debtor who follows several callings cannot claim exemption from seizure of tools used in his business, unless they are used in his principal calling. 3. The law does not allow the privilege of protection from seizure of two horses or two oxen except to a farmer, the cultivation of whose farm is his principal occupation. *McManamy* v. *Pelletier*, Q. R. 24 S. C. 127.

Homestead — Conveyance of homestead by husband to wife—Action to set aside—13 Eliz. c. 5—Consideration. *Meunier* v. *Doray*, (N. W. T.), 2 W. L. R. 231.

Homestead — *Judgments Act.*] — The plaintiff claimed a right to have two village lots owned by the defendant sold to satisfy a judgment of which he had registered a certificate. The defendant occupied as his dwelling the upper floor of a two-storey building on one of the lots, the ground floor having been built for use as a store. There was a stairway inside the building connecting the two floors, also a stairway from the outside to the dwelling. The two lots were occupied as one property and some use was made of the vacant store for storage of articles used in connection with the dwelling. The Judge at the trial found that the value of the property was $3,000, and that there was a mortgage upon it for an amount exceeding $2,000: —Held, that the defendant was bona fide using the whole premises as his residence and that, under s. 12 of the Judgments Act, R. S. M. c. 80, the property as a whole was free from sale under the judgment. *Codville* v. *Pearce*, 21 Occ. N. 318, 446, 13 Man. L. R. 468.

Homestead — Mortgage—Sale—Lien on proceeds—Land Titles Act, N.W.T.—Incumbrances — Originating summons. *Bocz* v. *Spiller* (N.W.T.), 1 W. L. R. 366, 2 W. L. R. 280.

Homestead — *Sale of—Mortgage Taken in Part Payment — Receiving Order.*]—The Exemptions Ordinance, C. O. 1898 c. 27, s. 2, s-s. 9, declares the following real property of an execution debtor and his family free from seizure by virtue of all writs of execution, namely:—(9) "The homestead, provided the same is not more than one hundred and sixty acres; in case it be more the surplus may be sold subject to any lien or incumbrance thereon;"—Held, that mortgage moneys, forming part of the proceeds of the sale of the defendant's homestead, do not come within this provision. This provision exempts the homestead only so long as it remains a homestead, and where the debtor has voluntarily disposed of it, the language of the Ordinance is not wide enough to extend the exemption to the proceeds, unless they are re-invested in other exempt property before a creditor has acquired a charge or lien upon them. Receiving order, as equitable execution, discharged. *Massey-Harris Co.* v. *Schram*, 5 Terr. L. R. 338.

Homestead — *Value — Notice.*]—Held, that the execution debtor was entitled, as an exemption under the Homestead Act, to $500 out of $1,000 realized by the sheriff on the sale of a steamship, the only exigible personalty of the debtor. Vye v. McNeill, 3 B. C. R. 4, approved:—Semble, that notice of a claim of exemption is necessary. *Yorkshire Guarantee and Securities Corporation* v. *Cooper*, 23 Occ. N. 302, 10 B. C. R. 65.

Tools and Implements — *Selection — Right of Creditor to Make.*]—The privilege granted the debtor by art. 598, C. C. P., paragraph 10, of selecting and withdrawing from seizure "tools and implements and other chattels ordinarily used in his profession, art, or trade, to the value of $200," only exists while the debtor is carrying on his profession, art, or trade. When he has ceased to do so, his right to make a selection is at an end, and, therefore, his creditor can have no right, under art. 1031, C. C., to make such selection. In any case the right of the creditor, under the last mentioned article, is merely to bring back certain effects to the patrimony of the debtor, for the benefit of his creditors generally, and cannot be exercised for the exclusive benefit of the creditor seeking to avail himself of the provisions of the article. *Stephens* v. *Toback*, Q. R. 26 S. C. 41.

Tools of Trade — *Costs of Opposition.*] —A workman who demands the withdrawal from a seizure of his necessary tools, cannot claim costs against the execution creditor, because the bailiff making the seizure cannot make the distinction between tools which the debtor may claim as exempt and his other tools. *Cunningham* v. *Guilbault*, 6 Q. P. R. 75.

II. For Costs.

Judge's Order—*Direction for Set-off—Service of Allocatur—Issue of Execution—Production of Order.*]—Where a Judge's order requires the defendant to pay interlocutory costs to the plaintiffs, and the Judge makes an oral direction that costs previously awarded to the defendant should be set off pro tanto, the deduction should be made before execution issues on the Judge's order. It is not necessary to serve the certificate of taxation of the costs awarded by an order, where the party to pay has been represented upon the taxation and has notice of the amount payable. When execution is issued upon a Judge's order, the order itself or an office copy should be produced to the officer issuing it; a mere copy is not sufficient, unless such officer is the one who has official custody of the book in which the order is entered. *People's Building and Loan Assn.* v. *Stanley*, 22 Occ. N. 410, 4 O. L. R. 644, 1 O. W. R. 399, 469, 572, 592, 2 O. W. R. 122.

Motion for Leave to Appeal—*Court of Appeal—High Court.*]—An application to a Judge of the Court of Appeal for leave to appeal from an order of a Divisional Court having been dismissed with costs, the same were taxed and a certificate thereof issued, which, with the order of dismissal, was filed in the High Court, and a fi. fa. to levy the amount of such costs placed in the sheriff's hands for execution:—Held, that the order directing payment of costs was properly made under ss. 77 and 119 of the O. J. Act; and that execution was properly issued out of the High Court, under Rule 3, by analogy to the procedure under Rule 818. *People's Building and Loan Association* v. *Stanley*, 22 Occ. N. 300, 371, 4 O. L. R. 247, 377, 1 O. W. R. 399, 469, 572, 592, 2 O. W. R. 122.

Pending Appeal to Privy Council—*Security.*]—In a case in which, by special leave, an appeal has been allowed to the Judicial Committee of the Privy Council, execution may issue, pending such appeal, for the costs incurred in the Courts appealed from, without, for that purpose, sending the record back to the Court of first instance, when no security for the costs incurred in the Courts below has been given with the

appeal to the Judicial Committee. *Consolidated Car Heating Co.* v. *Came*, 5 Q. P. R. 48.

III. PROCEDURE.

Creditor Collocated on Moneys Levied — *Insolvency — Sub-opposition—Subcollocation.*]—Held, in review, affirming the disposition of the judgment in Q. R. 23 S. C. 45, but modifying the considérants, that art. 824 of the Code of Procedure, which authorizes a creditor of a person who is entitled to be collocated, or who is collocated, upon moneys levied, to file a sub-opposition, does not confer any privilege on such creditor. If the person primarily entitled to be collocated is insolvent, the amount of the collocation must be distributed among his creditors, according to law. The service of a writ of attachment, attaching such moneys in the hands of the sheriff, does not give the sub-opposant any special right thereto. Art. 1981, C. C. *Marion* v. *Brien dit Desrochers*, Q. R. 23 S. C. 52.

Guardian of Property Seized — *Discharge — Lapse of Time — Destruction of Property Seized.*] — A judicial guardian is not discharged from his guardianship by the expiration of a year from the day of the seizure, and a rule will issue against him to make him produce the goods intrusted to him if he does not prove that they have been destroyed without fault on his part. *Millar* v. *Gillespie*, 5 Q. P. R. 376.

Opposition to Seizure — *Dismissal — Execution of Judgment of Court of Review —Time for.*]—A motion for the dismissal of an opposition cannot be made before the original thereof is returned. 2. An opposition which raises the question whether a judgment of the Court of Review, in a summary matter, can be executed within eight days from the rendering thereof, is not frivolous, and will not be dismissed on motion. *Kavanagh* 1. *Quinn*, 5 Q. P. R. 166.

Opposition to Seizure—*Insaisissabilité —Investment of Moneys Bequeathed—Declaration—Registration.*] — A declaration of investment, stating that a purchase of property has been made with moneys bequeathed to the purchaser on condition of insaisissabilité, may be set up in opposition to a seizure of such property by a creditor of the purchaser, although the declaration was not registered until after the creditor's claim had accrued. *Baird* v. *Morphy*, Q. R. 23 S. C. 497.

Opposition to Seizure—*Security—Time for—Hypothecary Creditor—Tenant.*] — An hypothecary creditor, whose claim has been registered before the registration of a lease of the immovable hypothecated, may require from the tenant, who files an opposition to a seizure by such creditor, asking that the immovable may be sold subject to his lease, security that the immovable will be sold for a price sufficient to assure him the amount which is due to him (art. 726, C. P. C.), 2. He may require such security as soon as the opposition is filed and without admitting the ground of the opposition. *Desaulniers* v. *Peyette*, Q. R. 12 K. B. 445.

Reduction of Amount of Judgment after Seizure — *Opposition — Sheriff — Return.*]—A seizure made under a writ issued in execution of a judgment obtained ex parte for $500 damages ceased to be valid and binding as soon as this judgment is reformed upon opposition to judgment by a second judgment maintaining the opposition; and the defendant-opposant is only bound under the seizure to the sum to which the judgment is reduced, in this case, $50. Such a seizure having become effete cannot be continued upon the same writ for the latter sum; and the defendant may dispose of the immovable so seized notwithstanding the seizure after the judgment maintaining the opposition. 2. A writ of execution which has been returned by the sheriff to the Court upon service of certificate of the filing of an opposition to the judgment cannot be withdrawn from the record of which it forms part in order to be sent to the sheriff with instructions to continue proceedings, without the authorization of the Court or a Judge. *Demers* v. *Dufresne*, 5 Q. P. R. 465.

Seizure and Sale—*Opposition for Payment—Bailiff's Return — Default — Rule Nisi.*]—A bailiff who has seized and sold a debtor's property both at his domicil and place of business, and has received an opposition for payment on the moneys levied at either of these places, must return into Court all the moneys levied at that place, and make a separate return of his proceedings at both places, in order that the Court may adjudicate; in default of his so doing, a rule may be issued against him. *Lacroix* v. *Proulx*, 5 Q. P. R. 309.

Seizure by Way of Security—*Service —Return — Declaration.*]—When a writ of saisie-gagerie is made returnable the second day after service, the declaration must be served at the same time as the writ. 2. When the service of the declaration is made at the office of the Court, there must be at least one clear day between the service and the return. *Dupuis* v. *Mathieu*, 5 Q. P. R. 414.

Seizure for Preservation of Property—*Declaration—Money in Bank—Garnishment—Exception to Form.*]—A writ of saisie-conservatoire must be accompanied by a declaration or contain a sufficient statement of the grounds of the demand. 2. If the articles to be seized are not in specie, but sums of money in the possession of a bank, the creditor must proceed by way of garnishment, and not by saisie-conservatoire. 3. A saisie-conservatoire with respect to sums of money, and not accompanied by a declaration, will be dismissed upon exception to the form. *Leith* v. *Hall*, 5 Q. P. R. 155.

Sheriff — *Return — Reissue to another Sheriff—Opposition—Sale of Railway.*]—If the sheriff to whom a writ of execution is addressed makes a return of nulla bona and nullæ terræ, the prothonotary has no right to address the same writ to the sheriff of another district, by making an addition in the margin. 2. An opposition to the sale of a portion of a railway seized under a writ of execution will not be dismissed upon defence in law upon the ground that it is not formally alleged that the portion of the railway so seized does not constitute a section; that must be shewn by evidence. *Atlantic and Lake Superior R. W. Co.* v. *Dillon*, 5 Q. P. R. 191.

IV. Seizure.

Account Book—*Assignment of Debts.*]—A ledger or account book containing a list of debts which have been assigned in writing, and which are described in the writing as "all the debts in a certain ledger marked A," is a mere incident to the debts, and is no longer a chattel as it was before the entries were made in it. It is, therefore, not seizable in execution against judgment debtor, the former owner of the debts, as against the person to whom they have been so assigned by him. *Corticelli Silk Co.* v. *Balfour*, 5 Terr. L. R. 385.

Amendment — *Affidavit — Provisions of Statute.*]—Article 647, C. P., does not prevent the amendment of an opposition to a seizure, but merely requires that such amendment shall be accompanied by a deposition on oath affirming that the facts alleged therein are true. 2. An affidavit is not required in support of an amendment which merely alleges a provision of a public statute, of which the courts are bound to take notice without its being pleaded—in this case, the charter of the city of Montreal. *Larocque* v. *City of Montreal*, 5 Q. P. R. 34.

Amendment — *Title — Costs.*]—On motion to reject an opposition, and on motion by the opposant to amend:—Held, that a delay will be granted to the opposant to amend her opposition by setting up her title and the date thereof, upon her paying costs of both motions au préalable, and that in default by her of so doing within such delay, the opposition will stand dismissed. *Senecal* v. *Chappell*, 5 Q. P. R. 72.

Bailiff's Return — *Exemptions—Controverting Return—Res Judicata.*] — A defendant can, without inscribing en faux against the report of a bailiff seizing the defendant's goods, declaring that he has left to such defendant all the goods which he had the right to keep, prove that the bailiff has not left them. 2. A judgment declaring a saisie-gagerie good and valid, and ordering the sale of the property seized, constitutes res judicata upon an opposition afin d'annuler founded upon defects or irregularities in the seizure. *Adams* v. *Mulligan*, Q. R. 20 S. C. 251.

Bank Notes — *Property Passing.*] — A superannuated civil servant had presented his superannuation certificate at the wicket of a bank, which paid superannuation allowances for the Dominion Government. The teller counted out the amount coming to him, and placed the money on the edge of the teller's wicket. Before the payee had touched it, the money was seized by a sheriff's bailiff under an execution against the payee:—Held, that that the property in the money had passed to the payee as soon as it had been placed upon the ledge, and that the execution creditor was entitled to it. *Hall* v. *Hatch, Bank of Montreal* v. *Hatch*, 22 Occ. N. 58, 3 O. L. R. 147.

Book Debts — Attachment of debts. *Jobin-Marrin Co.* v. *Betts* (N.W.T.), 1 W. L. R. 369.

Buildings on Land—*Erection by Purchaser à Réméré—Seizure and Sale.*]—Buildings placed upon land by a purchaser à réméré may be seized and sold separately from the soil. 2. A purchaser à réméré has no status to restrain the sale, as against him, of buildings placed upon the land of his vendor. Quære, whether such a seizure is of movables or immovables. *Lafontaine* v. *Bélanger*, 6 Q. P. R. 338.

Claim by Assignee of Chattel Mortgage and Lien Note Given by Vendors of Execution Debtors — Extinguishment of claim—Interpleader—Equitable interest—Subrogation—Renewal of chattel mortgage. *Green* v. *Cornell*, 3 O. W. R. 872.

Claim by Transferee — *Possession.*]—An opposition to a sale of movable effects, made by a third person, who has lent money to the debtor and has had transferred to him the effects seized as security for the loan, but has let them in possession of the debtor, will be dismissed upon motion as frivolous. *Pharand* v. *Emond*, 5 Q. P. R. 29.

Costs — *Taxation — Notice — Particulars—Several Defendants — Contestation by one only—Apportionment of Costs.*]—Pursuant to art. 554, C. P., costs incurred in the Circuit Court must be taxed upon notice to the opposite party before an execution issues. 2. Where, upon a bill of costs, taxed, but not on notice to the opposite party, execution issued for a larger amount than was really due, an opposition demanding the annulment of the seizure for the whole amount, without mentioning the items of the bill of costs objected to, will not be allowed; but the opposant will be permitted to prove his allegations or surcharge, notwithstanding that that is equivalent to a revision of the bill of costs; and if he succeeds in establishing that the amount of the writ of execution is larger than the amount due, the opposition will be allowed for the difference between these amounts, but without costs, seeing that both parties are in fault. 3. By virtue of item 37 of the Circuit Court tariff, or item 19 of the Superior Court tariff, when there are two defendants appearing by different attorneys, and one of the two files a plea, the attorney of the plaintiffs, if he succeeds in obtaining judgment upon every issue, will be entitled to the full amount of his costs against the defendant who contested the action, and to half the costs against the one who did not contest. *Descormiers* v. *Hyland*, 5 Q. P. R. 112.

County Courts Act — *Seizure by Creditor—Ratification by Bailiff—Abandonment—Interpleader — Onus — Estoppel—Sale of Goods Act.*]—Under ss. 82 and 83 of the County Courts Act, R. S. M. 1902 c. 38, before the amendment of 1904, a seizure under execution made by the execution creditor himself was not unlawful or invalid. Where wood piles were seized under execution, and notices of the seizure attached to the different piles, and a person living near asked by the bailiff to look after them, and a week or two later placed by the bailiff in charge, it was held that there was no abandonment. Per Dubuc, J.,— The property in the wood never passed to the claimant, notwithstanding contract to buy and part payment, because it had not been measured: Rule 3 of s. 20, Sale of Goods Act, R. S. M. 1902, c. 152. The plaintiff was not estopped from enforcing his execution by the fact that he had attached any

money that might be due from the claimant to the judgment debtor on a sale of the wood. Per Perdue, J.—Under s. 20 of the Act it was not open to the claimant, on the trial of the interpleader issue, to raise any objection to the validity of the seizure or as to its abandonment. The question was whether the goods seized were the property of the claimant as against the execution creditor, and the onus was on the claimant to prove his ownership. The claimant failed because the provisions of the Bills of Sale Act had not been complied with. Richards, J., dissented. *Huxtable* v. *Conn*, 24 Occ. N. 245, 14 Man. L. R. 713.

Crops on Land Transferred by Execution Debtor—Labour and means of transferee—Ownership of crops — Interpleader. *Massey-Harris Co.* v. *Moore* (N.W.T.), 1 W. L. R. 215.

Dismissal — *Examination of Opposant.*] —The Court may, upon a motion for the examination of the party opposing a seizure and for the dismissal of the opposition after such examination, order the examination of the opposant, saving the right to pronounce afterwards upon the part of the motion relating to the dismissal of the opposition. It is not necessary for the applicant to allege in his notice of motion that the opposition is untenable on its face. *Dupuis* v. *Beaudry*, 4 Q. P. R. 416.

Distribution — *Contestation.*] — The opposition of a third party cannot hinder a distribution of the moneys realized, and the rights and privileges of the parties will be determined by the scheme of distribution unless it is contested, contestation being the remedy of the third party. *Turgeon* v. *Shannon*, 4 Q. P. R. 156.

Filing Documents — *Deposition—Service—Stay of Sale.*] — The failure to file, with an opposition, the documents alleged in it, is not a ground for dismissing it upon a simple motion, in accordance with art. 651, C. P.; and Rule 62 of the Rules of Practice is not imperative. 2. The sheriff is bound to receive an opposition accompanied by a deposition such as is mentioned in arts. 647 and 727, C. P., and the service of such opposition stays the sale, pursuant to art. 729, C. P. *Morinville* v. *Basil*, Q. R. 18 S. C. 397.

Goods of Stranger—*Right of Revendication.*]—The owner of effects seized under a writ of saisie-arrêt before judgment, as belonging to a third person, has the right to recover them by means of a saisie-revendication in the hands of the first execution creditor or of the bailiff or guardian to the seizure. *Corriveau* v. *Boright*, 6 Q. P. R. 136.

Guardian — *Discharge — Sale.*] — A guardian appointed to a seizure under execution is discharged as soon as he has handed over the effects seized to the bailiff charged with the sale of them, and if the latter does not sell them all, the guardian is not responsible for those which are not sold. *Gingras* v. *Parent*, Q. R. 25 S. C. 271.

Guardian — *Several Execution Creditors —Different Guardians — Rights of.*]—The second execution creditor seizing is not obliged to name the same guardian as in the case where the debtor has been dispossessed of the goods seized. 2. The two guardians named at the time of different seizures, who have allowed the debtor to remain in possession of the goods seized, may each or either take them from him at any time before the sale. 3. If the two guardians wish to have possession of the goods seized, the Court, upon petition, will determine their respective rights, awarding, however, possession, in default of sufficient reasons against his demand, to the guardian named in the cause in which the sale of the goods seized should first take place. *Couture* v. *McManamy*, Q. R. 24 S. C. 356.

Inscription — *Filing of Contract.*]—A person who makes an opposition to a seizure based upon a marriage contract, cannot set the opposition down for judgment without filing the contract, and if he does so, the inscription will be set aside on motion. *Ward* v. *McGarry*, 3 O. P. R. 380.

Irregularities.]—A defendant cannot by opposition to a seizure after judgment invoke irregularities—in this case an erroneous description of his residence in the procès-verbal of seizure—which he could have set up by exception to the form before judgment. *Atkinson* v. *Ryan*, Q. R. 18 S. C. 427.

Joint Opposition.]—Two or more persons, each one of whom is sole owner of one of the articles seized, cannot, by a joint opposition, each claim the article which belongs to him, especially if their titles are not of the same nature. *Hill* v. *Howley*, Q. R. 20 S. C. 269, 4 Q. P. R. 176, 353.

Lessor of Goods Seized.] — A third party, the lessor of the goods seized, who has reserved to himself the right to re-take them if the lessee should not pay the instalments regularly, may exercise such right by way of opposition to the seizure of the goods by a creditor of the lessee. *Farand* v. *Emond*, 5 Q. P. R. 58.

License under Liquor License Act.] —See *Walsh* v. *Walper*, 22 Occ. N. 49, 3 O. L. R. 158.

Mining Lease — *Prospector's License—Machinery—Annexation to Freehold—Trade Fixtures—Fi. Fa. de Bonis—Sale.*] — The licensees of a mining area in Nova Scotia erected a stamp mill on wild lands of the Crown, for the purpose of testing ores. All the various parts of the mill were placed temporarily in position, either resting by their own weight on the soil or steadied by bolts, and the whole installation could be removed without injury to the freehold:—Held, that the mill was a chattel, or at any rate a trade fixture, removable by the licensees during the tenure of their lease or license, and, consequently, it was subject to seizure and sale under an execution against goods. Judgment in 36 N. S. Reps. 395 affirmed, but for different reasons. *Liscombe Falls Gold Mining Co.* v. *Bishop*, 25 Occ. N. 78, 35 S. C. R. 539.

Movables and Immovables — *Opposition as to Movables—Sale of Immovables—Sheriff — Return.*] — The plaintiff having caused to be seized at the same time movables and immovables in the possession of the defendant, and a third party having by opposi-

tion claimed the movables as his, the plaintiff may afterwards proceed to a sale of the immovables without waiting for the result of the opposition, for he is not bound to go further with the contest as to the movables. 2. The sheriff, having, before making a return of the writ, his proceedings, and the opposition, taken a copy of the writ and of the procès verbal of the seizure of the immovables, may, without other authority, and without waiting for judgment upon the opposition as to the movables, proceed to advertise and sell the immovables. *Gaudeau* v. *Tetu*, Q. R. 20 S. C. 402.

Notice — *Exemption — Telephone.*]—A seizure of goods under an execution and a notice that goods 20 miles away in the same bailiwick belonging to the same execution debtor are under seizure do not operate as a seizure of the latter goods. Quære, whether a debtor's right of exemption is absolute or a privilege to be exercised within two days. Schl v. Humphrey, 1 B. C. (pt. 2) 257, and in re Ley, 7 B. C. R. 94, questioned in this regard. Semble, goods cannot be seized by telephone. *Dickinson* v. *Robertson*, 11 B. C. R. 155, 1 W. L. R. 142.

Opposition — *Attack on Judgment — Jurisdiction.*]—A judgment, in execution of which a seizure has been made, cannot be attacked by an opposition à fin d'annuler, on the ground that the Superior Court had no jurisdiction to pronounce the judgment. *Coté* v. *Bernatchez*, Q. R. 25 S. C. 219.

Opposition — *Default of Contestation — Time — Leave to Contest — Consolidation of Actions.*]—Where an execution creditor has made default in contesting an opposition to his seizure within the time allowed, he will not be allowed after the time has expired to file his contestation and to join his cause to another cause in which he has seized the same goods. *Archibald* v. *Spenard*, 6 Q. P. R. 124.

Opposition—*Examination of Opposant.*] —The examination of an opposant will not be ordered unless the creditor seizing establishes, or there appears on the face of the record some reason leading the Court to believe that the opposition is made to unjustly retard the sale, or is unfounded, or would be shewn to be so by the opposant's examination. *Demers* v. *Bergevin*, 6 Q. P. R. 47.

Opposition—*Examination of Opposant.*] —An opposant, who claims property, stating that he has been doing business for "some time" previous to the seizure, under the same firm name under which the debtor was condemned, will be ordered to appear for examination on the opposition. *Ford* v. *Payette*, 6 Q. P. R. 57.

Opposition—*Insaisissabilité — Investment of Moneys Bequeathed — Declaration — Registration.*]—A declaration that a purchase of property has been made with moneys derived by the purchaser, under a condition of "insaisissabilité" can be set up against a creditor of the purchaser, although not registered until after the creditor had acquired his status as such. The following clause in a will, "My intention in making the bequests aforesaid being that the said property or that by which it shall be represented shall be insaisissable, the same being given to secure a provision for the support of the said beneficiaries," is not contrary to the provisions of art. 599, C. P. C., clauses 3 and 4, the law empowering a donor or testator to declare "insaisissables" not only immovables so disposed of by the will, but also such as might be acquired in place of such immovables. Judgment in Baird v. Morphy, Q. R. 23 S. C. 497, affirmed. *Baird* v. *Ferrier*, Q. R. 13 K. B. 317.

Opposition — *Judgment — Reduction of Amount — New Writ.*] — A judgment pronounced upon an opposition to a judgment has the effect of causing the execution issued and based upon a judgment obtained by default to lapse; and the party who has thus obtained judgment by default and has executed it, may not, after the sustaining in whole or in part of an opposition to the judgment, proceed with his execution, but must be content to reduce the amount to be levied upon his original writ to that fixed by the judgment upon the opposition. 2. The judgment sustaining an opposition, but granting to the plaintiff a part of his demand, should be executed by a new writ. *Demers* v. *Dufresne*, Q. R. 24 S. C. 141.

Partnership Property — *Ownership of Goods Seized—Transfer to Continuing Partner—Sheriff—Proceeds of Sale—Liability to Execution Creditor — Damages — Depreciation.*]—A partnership existing between C. and S. was dissolved, C. taking all the assets and assuming all the liabilities of the firm:—Held, that, in the absence of fraud, the goods of the firm were effectually transferred to C., and were subject to an execution placed in the hands of the defendant sheriff with instructions to levy upon and sell the goods of C. The defendant, after having levied upon the goods under the plaintiff's execution, sold the goods under two executions placed in his hands subsequently, and paid over the proceeds to the creditors at whose instance such executions were issued:—Held, that he was liable to the plaintiff in damages for so doing; but was not liable for depreciation resulting from delay in selling occasioned by the act of the Court. The case was not one for punitive damages, or for other damage than the actual value of the goods at the time of the sale. *Crowe* v. *Buchanan*, 36 N. S. Reps. 1.

Patent for Invention.]—A patent for invention granted by the Dominion Government may be seized in execution. *Farand* v. *Emond*, Q. R. 23 S. C. 2.

Patent of Invention — *Exigible Property.*]—A patent of invention is seizable, and an opposition based upon its alleged insaisissabilité will be dismissed upon motion. *Farand* v. *Emond*, 5 Q. P. R. 63.

Patent for Invention.]—Quære, whether a patent for invention can be seized under execution. *Walker* v. *Lamoureux*, Q. R. 21 S. C. 492.

Possession of Goods—*Joint Ownership.*] —A creditor can seize under ordinary execution only goods which are in possession of the debtor. 2. A third party, owner of an undivided interest in goods seized under execution against his co-owner, may prevent the

sale of the goods as regards his own rights. *Turner* v. *Bradshaw*, 6 Q. P. R. 184.

Product of Timber—*Permit to Execution Debtor to Cut and Remove from Crown Lands—Partnership—Purchasers— Claimants —Interpleader—Interest of Partner.*]—E. F. Kendall, an execution debtor, was the holder of a permit entitling him to cut and remove from certain lands of the Crown a quantity of railway ties. He entered into a contract with the Canadian Pacific R. W. Co. to furnish them with 30,000 ties on certain terms as to delivery and payment. To enable him to carry out the contract, he applied to the Bank of Ottawa for advances, which the bank agreed to make, on receiving an assignment of the moneys payable under the contract and other securities. E. F. Kendall and Thomas Robinson entered into partnership in the business of tie manufacturers, to be carried on upon lands comprised in the permit, and to include the carrying out of the contract with the Canadian Pacific R. W. Co. The agreement of partnership was at first oral, but, later, it was, at the instance of the Bank of Ottawa, reduced to writing and signed by the parties, and a certificate of the partnership was duly registered. The partners proceeded to the lands, and Robinson was left in control, in accordance with the partnership agreement. He established the camp and commenced to cut the ties, and got them out on the ice on an arm of the Lake of the Woods. In the spring they were boomed and finally towed to Norman's Bay, where they were seized by the sheriff. The boom timber and logs were cut by the partnership for the purposes of rafting the ties, and were properly taken for that purpose:—Held, the claim of the execution creditors could not take effect so as to deprive the partner Robinson of his rights, or prevent him from enforcing them in the name and on behalf of the partnership. The property in the ties was shewn to be in Kendall & Robinson and the Canadian Pacific R. W. Co., as purchasers from them, and the property in the boom timber and logs to be in Kendall & Robinson. A sale of Kendall's interest in the partnership would not pass the property to the purchaser, but would give him a right to an account of the partnership transactions with a view to ascertaining and realizing the interest of the execution debtor. But there were no means by which such a proceeding could be taken in this matter. The money in Court stood as security for the ties, boom, timber, and logs seized by the sheriff. It was not possible to determine in this proceeding whether Kendall was entitled to any, and, if so, how much of it. The materials for such an inquiry were not before the Court. Defendants' remedy, if any, was in some proceeding in which all questions between the partnership and the execution debtor could be properly inquired into and adjusted. Appeal dismissed. *Canadian Pacific R. W. Co.* v. *Rat Portage Lumber Co.*, 5 O. W. R. 473, 10 O. L. R. 273.

Property Already under Seizure — *Duty of Sheriff — Seizure upon Seizure.*]—A sheriff, having a judgment against the defendant, issued a fi. fa. addressed to the coroner (arts. 35, 36, C. P.), and the latter seized the immovables of the defendant. The defendant having lodged an opposition, the coroner returned the writ, the opposition, and all his proceedings. Subsequently the plaintiffs, having a judgment against the defendant, issued a fi. fa. addressed to the sheriff, and he seized thereunder the same immovables:—Held, that the old maxim "seizure upon seizure is invalid" exists no longer except as modified by the Code of Procedure; that the sheriff had not to note this second writ upon that addressed to the coroner; that art. 711, C. P., did not apply to this case; that the sheriff, upon receiving the second writ, had nothing to do but seize, since he had not then the first writ, and that writ had not been addressed to him. *Richer* v. *Michaud*, Q. R. 20 S. C. 442.

Property Declared by Will Insaisissable—*Seizure for Debt of Testator.*]—P. M. devised his property to L. M., without reserve, constituting him his universal legatee from the day of his death, upon the express condition that L. M. was to dispose of the property in favour of his children, in equal or unequal parts, as he should judge fit when making partition of his other perperty. L. M. accepted the devise. Then, by his will, he bequeathed his property (other than that which he had from P. M.) to his son J. B. M., the present defendant, on the express condition that he should preserve the property for his children and divide it amoug them equally or unequally. And, moreover, L. M., desiring to discharge the trusts mentioned in the will of P. M., made choice of his said son J. B. M. to receive the property left by P. M., and he gave him all such property, and added that he (L. M.) wished and intended that the property belonging to the testamentary succession of P. M. should be preserved in the same manner as the property devised by L. M., and he concluded his will as follows: "I wish and intend that the enjoyment of the property above devised to my son J. B. M. shall be insaisissable and I declare that I gave him this legacy à titre d'aliments." L. M. dying, J. B. M. accepted the will. The plaintiffs, having obtained judgment against J. B. M., as universal legatee, for a debt contracted by L. M., caused to be seized the immovables coming from P. M. J. B. M. lodged an opposition, setting up that the property was subject to a substitution in favour of his children, and invoking also the insaisissabilité clause:—Held, that the substitution provided by the will of L. M., as regards the property which came from P. M., in favour of the children of J. B. M., was valid, but that the decree did not purge the substitution; that the defendant, who was the grevé, could not set up the substitution by his opposition; that the insaisissabilité clause as regards the property coming from P. M., imposed by the will of L. M., was valid and within the powers of L. M., but it could not be invoked against the debts left by L. M., and the defendant, as his universal legatee, was bound to pay. *Richer* v. *Michaud*, Q. R. 20 S. C. 442.

Removal of Goods—*Obligation to Return.*]—Where the person appointed guardian of goods seized under execution removes them, he must, if the seizure is annulled, bring them back to the domicil of the execution debtor, who has a remedy by way of rule nisi. *Adams* v. *Mulligan*, 4 Q. P. R. 60.

Right of Debtor to Withdraw Effects.]—An opposition to a seizure, based on the fact that some of the effects seized could have been withdrawn and selected by

the debtor, must shew that he was not allowed to select and withdraw them; otherwise it will be dismissed on motion. *Beaubien Produce and Milling Co.* v. *Lecuyer*, 5 Q. P. R. 71.

Rule Nisi—*Option.*]—A rule nisi, against a guardian to effects seized under execution, which (besides giving him the option of paying the amount due the seizing creditor) gives him the option of producing the effects, or of paying the value thereof, without the value being mentioned or ascertained, is illegal, and will be set aside. *Simard* v. *Crevier*, Q. R. 19 S. C. 133.

Section of Railway.]—A section of a railway may be seized and sold separately; it is not necessary that the seizure should apply to the whole line. *Dillon* v. *Atlantic and Lake Superior R. W. Co.*, Q. R. 19 S. C. 533, 5 Q. P. R. 68.

Stay — *Appeal—Irregular Notice—Costs—Undertaking by Advocate to Repay—Costs of Levy.*]—The defendants, having served notice of motion to the Court in banc for a rule to shew cause why the verdict for the plaintiff should not be set aside, or for a nonsuit or a new trial, applied to the trial Judge, under J. O. Ord. 512, after seizure under execution issued upon the judgment, for a stay of proceedings, upon the grounds of irreparable loss and inability of the plaintiff to repay the amount levied in case the appeal should be successful:—Held, that there was jurisdiction to entertain the application, although the notice of motion was perhaps irregular in form. (2) That the fact that the plaintiff would not be able to repay the amount levied in case of an adverse decision on appeal is sufficient ground for granting stay. Stay ordered on security being given. (3) That execution for costs should be stayed unless the advocates give personal undertaking to repay them in case appeal succeeded. (4) That the defendant, having delayed making application until after issue of execution and seizure, should pay the costs and expenses incurred by reason of the delivery to the sheriff of the execution. (5) The costs of application must be paid forthwith by party applying. Merry v. Nickalls, L. R. 8 Ch. 205, and Cooper v. Cooper, 2 Ch. D. 492, followed. *Patton* v. *Alberta Coal Co.*, 2 Terr. L. R. 294.

Sufficiency.]—An opposition to a seizure alleging that the opposant is the owner of the animals seized, on account of having himself bought them and paid for them out of his own money, supported by an affidavit following the provisions of art. 647, C. P., is sufficient in law, and will not be rejected on motion. *Perron* v. *Marquis*, 4 Q. P. R. 174.

V. Sale Under.

Equity of Redemption — *Unassigned Dower in—Share in—Equitable Execution.*]—A right of dower in an equity of redemption before assignment is not exigible under a writ of fi. fa., nor is the share of one of several tenants in common of an equity of redemption. Where a person dies possessed of lands mortgaged by him, his widow, before assignment of dower, though entitled to redeem, has no estate in the land, and is therefore not an "assign" of her husband, nor a "person having the equity of redemption" within s. 29 of the Execution Act, R. S. O. 1897 c. 77, and her interest does not come within s. 30 of that Act, and therefore is not saleable under it nor under s. 33. In such a case an execution creditor seeking equitable execution should proceed under Rules 1016-1018, and not by action. *Canadian Bank of Commerce* v. *Rolston*, 22 Occ. N. 232, 4 O. L. R. 106, 1 O. W. R. 351.

Fixtures—*Opposition—Appeal — Title of Purchaser.*] — The appellants, a company having their place of business in the Province of Ontario, had sold certain machines to K. Bros. of Joliette, with a reservation of right of property. The mill in which these machines were installed having been seized with the machines at the suit of the curator under an assignment of K. Bros. for the benefit of creditors, and of a creditor of one of the insolvents, the appellants filed an opposition, which the respondent contested, and which the Superior Court dismissed. The appellants, nearly four months after the judgment of the Superior Court, appealed to the Court of Queen's Bench, which maintained the opposition; and this judgment was affirmed by the Supreme Court of Canada. However, in the interval between the judgment dismissing the opposition and the institution of the appeal, the creditor obtained from the prothonotary a writ of ven. ex., and, through the agency of a person named by the respondent, the curator obtained from a Judge an order for the sale of the mill and the machines. The sale took place after the appeal, but the appellants knew nothing of it until after they had obtained the judgment of the Supreme Court, and at that sale the respondent became the purchaser of the mill and the machines, and subsequently disposed of them:—Held, that the respondent, whom the appellants had informed of their right of property in the machines and the nullity of the seizure which had been made of them, could not, by instigating the order and becoming the purchaser at the sale, obtain a title which would be good against the appellants, and that in disposing of the machines as things belonging to him, the respondent had made himself responsible to the appellants for their value. *Waterous Engine Works Co.* v. *Bank of Hochelaga*, Q. R. 12 K. B. 258.

Goods—*Opposition to Sale—Notice—Parties—Debtor.*]—An opposition to the sale of movables will not be maintained unless notice of contestation has been given to the parties, including the debtor. *Valiquette* v. *Guilbault*, 5 Q. P. R. 163.

Goods — *Place of Sale — Residence of Debtor.*]—An execution debtor has the right to say that goods of his seized under the execution shall not be sold at the place of his residence at the time of sale, if such goods were not seized there and have not been taken there by him, but are in the control of the creditor, who proposes to remove them to the actual residence of the debtor. *Adams* v. *Mulligan*, Q. R. 19 S. C. 398.

Goods not Seized—*Irregular Sale—Acquiescence — Purchase in Good Faith.*] — A portion of a debtor's stock-in-trade having been seized under a writ of execution, the bailiff, on the day fixed for the sale, added other goods of the debtor to the list of those

seized, and, at the request of the debtor, who was desirous of repurchasing his stock-in-trade, sold the entire stock en bloc. The proceeds of the sale were distributed among the creditors in due course of law. The debtor having, shortly afterwards, made an abandonment of his effects, his curator, by the present action against the purchaser at the bailiff's sale, sought to have the sale annulled as irregular and void, and the goods returned, or their value paid to the plaintiff:—Held, that, although the sale was irregular, and improperly included goods which had not been seized or advertised for sale, yet the purchaser having acted in good faith and even offered to re-transfer the goods, the price being a reasonable one, and the proceeds distributed according to law, and the creditors, moreover, having suffered no injustice in consequence of the irregularity of the proceedings, the sale should not be annulled. *Bernier* v. *Dépocas*, Q. R. 24 S. C. 70.

Lands—*Advertisement — Distribution — Costs of Execution Creditor — Creditor — Creditors' Relief Act.*]—Where two writs of execution against lands were placed in the sheriff's hands on the same day, and, no further steps being taken by the first execution creditor, the second execution creditor directed the sheriff to advertise and sell the lands, which he did under the second execution creditor's writ:—Held, that the advertisement was in law the seizure of the lands under the second execution creditor's writ; and, there being no seizure or sale under that of the first, the second was entitled, under s. 26 of the Creditors' Relief Act, R. S. O. 1897 c. 78, to payment in full of his taxed costs and the costs of his execution, which exceeded the amount of the residue of the proceeds of the sale after payment of the sheriff's fees. *McGuinness* v. *McGuinness*, 22 Occ. N. 54, 3 O. L. R. 78.

Lands—*Collocation of Hypothecary Creditor—Right of Execution Debtor to Contest —Conditional Debt.*] — At the time of a sheriff's sale the judgment debtor has a right to contest the collocation of an hypothecary creditor, whose debt is conditional, and who is collocated as a simple creditor, inasmuch as, if the condition is not realized, the creditor will have received the money, and, not having furnished the security required from a conditional creditor, he will perhaps not be in a position to repay the amount which he has received. *Benoit* v. *Ste. Marie*, 5 Q. P. R. 222.

Lands — *Diligence — Creditors—Priorities.*]—In order that a first seizure of an immovable shall prevent a second one, it is necessary that at the moment when it is desired to proceed with the second, there shall be nothing to hinder the sale of the immovable under the first seizure. Therefore, if the creditor making the first seizure has suspended the sale of the immovables, he cannot oppose a seizure made by another creditor. *Garand* v. *Roussin*, Q. R. 19 S. C. 566.

Lands—*Ejectment — Defence — Adverse Possession—Evidence—Admission of Death—Deed — Certified Copy—Affidavit—Judgment —Registry of—Statute of Limitations.*]—In an action brought by the plaintiffs, trustees under the will of D., to recover possession of land bought by them at a sheriff's sale under execution on a judgment recovered by D. against M., the defendant relied upon his adverse possession of the land at the time of the sale:—Held, that the defence was not applicable to the case of a sheriff selling under execution. The objection was also taken that at the trial the plaintiffs failed to give evidence of the death of D.:—Held, that the objection was one which under Order 21, Rule 5, must be specifically taken; and the reception in evidence, without objection, of a certified copy of the will of D. was an implied admission of his death. At the trial the plaintiffs put in evidence a certified copy of the deed to M., the judgment debtor, without shewing that the original was not in the plaintiff's possession:—Held, that this was a matter as to which the plaintiffs should be permitted to amend by filing the usual statutory affidavit. Per McDonald, C.J., that the registry of the judgment obtained by D. had the same effect, so far as his title was concerned, as if he held a mortgage:—Held, also, the judgment being registered, and securing the title, that the Statute of Limitations would not begin to run until after the date of the recovery of the judgment. *Dowil* v. *Keefe*, 34 N. S. Reps. 15.

Land — *Formalities—Minutes of Seizure —Place of Sale.*]—The formalities prescribed by Arts. 706, 741, and 743, C. C. P., for the sale of immovables by the sheriff, are imperative, and the omission in the procès-verbal or minutes of seizure of the name of the street in which the immovables is situated is a fatal defect which annuls the sale. 2. Where the exceptions mentioned in Art. 741, C. C. P., do not apply, a sale of an immovable commenced at the registry office and terminated at the sheriff's office, instead of being made at the door of the parish church of the locality where it is situated, is null. *Sawyer* v. *Rioux*, Q. R. 18 S. C. 173.

Land — *Irregularities — Division Court Judgment — Transcript—Advertisement — Return—Inadequacy of Price — New Trial—Affidavits.*]—Held, that it was not an objection to the sheriff's sale that no execution was issued from the Division Court in which the judgment was recovered before the issue of the transcript to the County Court in 1866. According to Jones v. Paxton, 19 A. R. 167, Burgess v. Tully, 24 C. P. 549, is no longer applicable. 2. That, although the execution was issued against two defendants, while the transcript shewed a judgment against only one, and although the execution recited the wrong date for the judgment, these were mere irregularities which did not vitiate the sale. 3. That it was not necessary to the validity of the sheriff's deed that there should be an advertisement in the Gazette. The absence of an advertisement was a mere irregularity. 4. That the fact that there was no return to the fi. fa. goods did not invalidate the sale, but was a mere irregularity. Ross v. Malone, 7 O. R. 397, followed. 5. That the inadequacy of the price for which the lands were sold to the plaintiff might have been a ground for declaring that the deed should stand merely as security for the amount paid, but in this case there were other circumstances, and the trial Judge had made a finding of fact, viz., that the defendants authorized the sale, which made it impossible to so declare, there being evidence to support such finding. 6. That the affidavits filed for the purpose of obtaining a new

trial did not make out a case which would justify the Court in exercising its discretion to grant a new trial. *Staunton* v. *McLean*, 21 Occ. N. 587.

Lands — *Opposition—Contestation — Appeal—Sale Under Ven. Ex.—Rights of Purchaser.*]—The intervenant, the holder of a judgment against one V., having made a seizure under execution of an immovable of which V. was in possession, the plaintiff asserted an opposition afin d'annuler against this seizure, alleging that she was the owner of the immovable by virtue of a sale made by V. to her, and her opposition was contested by the intervenant, who alleged that the sale by V. to her was fraudulent. The opposition was maintained by the Superior Court, but that judgment was reversed by the Court of Review, which dismissed the opposition, maintained the seizure, and ordered a sale of the immovables under writ of ven. ex. By virtue of this last judgment the intervenant advertised the sale of the immovable upon ven. ex., and the sale took place and one C. became the purchaser. He sold to the defendant. After the sale under the ven. ex., but before the time for appeal had expired, the plaintiff appealed from the judgment of the Court of Review to the Court of Queen's Bench, and, not wishing to give security for the costs of the appeal, signed the declaration required by Art. 1214, C. P. C., consenting to execution upon the judgment against her. The Court of Queen's Bench reversed the judgment of the Court of Review and restored that of the Superior Court. The plaintiff then brought the present action to recover the immovable sold, and the intervenant (the judgment creditor) intervened in this action, and contested it:—Held, that the seizure having been made against one in possession animo domini, the sale, having taken place after the fulfilment of all the formalities required by law, and before the appeal of the plaintiff, was valid, and had wiped out the right of the plaintiff to the immovable itself, and left her only a claim upon the purchase money. *Renaud* v. *Denis*, Q. R. 23 S. C. 16.

Lands — *Priorities — Intervening Transfer — Sale — Distribution of Proceeds — Creditors' Relief Ordinance—Ultra Vires.*]—There having been lodged with the registrar a copy of fi. fa. lands in two several actions, with memoranda of the same land to be charged; the land standing in the defendant's name at the time of the lodging of the first fi. fa., but having been transferred to and standing in the name of a purchaser from the defendant at the time of the lodging of the second execution, and the lands having been sold under the first fi. fa.:—Held, following Roach v. McLachlin, 19 A. R. 496, and Breithaupt v. Marr, 20 A. R. 689, that the first execution creditor was entitled to the whole proceeds of the sale. The members of the Court were divided in opinion as to whether the Creditors' Relief Ordinance was ultra vires so far as it purported to affect executions against lands, as being inconsistent with the Territories Real Property Act. *Massey Manufacturing Co.* v. *Hunt, McCormick Harvesting Machine Co.* v. *Hunt*, 2 Terr. L. R. 84.

Land — *Usufructuary — Executrix — Title—Rights of Purchaser.*]—A sale of lands in an action against a widow, formerly commune en biens, as well personally as in the capacity of testamentary executrix of her husband and usufructuary, gives a perfect title to the purchaser, and he is bound to pay the purchase price. *Desrochers* v. *Mallette*, 3 O. P. R. 493.

Movables — *Revendication — Pleading.*]—A plaintiff who revendicates movable property may set forth, in answer to a defence alleging that the defendant bought the property at a judicial sale in virtue of a writ of execution prior to that upon which the goods were sold, that the second sale was simulated and only effected by the defendant forcing the locks of the house where the goods were deposited. *Belfrey* v. *Frank*, 4 Q. P. R. 337.

Patent for Invention—Irregularities at sale—Want of proper notice—Advertising—Setting aside sale—Action—Parties—Costs. *McLaughlin Automatic Air Brake Co.* v. *Allan*, 4 O. W. R. 67.

Reversal of Decree for Error—*Restitution.*]—Where goods were sold under an execution upon a decree reversed on appeal for error, it was held that restitution should be of the amount of the sale and not of the real value of the goods. *Robertson* v. *Miller*, 25 Occ. N. 76, 3 N. B. Eq. 78.

Sale of Equity of Redemption — *Purchase by Execution Creditor—Subsequent Conveyance to Debtor—Covenants — Incumbrances—Release.*]—Under a writ of fi. fa. against the lands of the original defendant (the mortgagor) the sheriff sold the equity of redemption in mortgaged land, and conveyed it to the purchaser in 1896. The purchaser was at the time the assignee of the judgment upon which the fi. fa. was founded. After holding the interest acquired by his purchase for a year, he sold it to the mortgagor, and made him the usual short form conveyance under R. S. O. 1897 c. 124. The moneys realized under sale were not sufficient to satisfy the judgment, and the writ was returned by the sheriff for renewal on 2nd August, 1899, but was not then renewed. In 1902 the purchaser assigned the judgment (so paid in part) to one S., and thereafter an alias writ of fi. fa. lands was issued and placed in the hands of the sheriff, and in respect of that execution S. was made a party in the Master's office to an action brought upon the mortgage:—Held, that the land was not affected by the judgment and execution while the purchaser retained his interest, but the effect of his sale and conveyance to the mortgagor was to invest the latter with a new interest in the land, and that interest fell under the operation of the fi. fa., and the statutory covenants, No. 4 as to incumbrances, and No. 8 as to the release of all claims, contained in the conveyance by the purchaser to the mortgagor, did not operate to release the judgment or the execution; and the latter was, therefore, a subsisting incumbrance. *Chittick* v. *Lowery*, 24 Occ. N. 15, 6 O. L. R. 547, 2 O. W. R. 957.

Sale of Land Under—Assignment for benefit of creditors — Priorities — Costs. *Elliott* v. *Hamilton*, 4 O. L. R. 585, 1 O. W. R. 705, 2 O. W. R. 141.

Sale of Land — *Charges—Insufficient Description in Advertisement—Opposition.*]—When an immovable seized in execution is advertised for sale, subject to charges which are not sufficiently described—in this case the sale was announced subject to charges created by an act, the date of which and the name of the notary were given without other description of the nature of the charges—the execution debtor may oppose the sale by way of opposition à fin d'annuler. *Corbeil* v. *Dagenais*, Q. R. 13 K. B. 205.

Sale of Property En Bloc — *Discretion of Sheriff—Oppression—Equitable Relief — Remedy at Law — Innocent Purchaser — Fixtures—Abandonment of Action Against one Defendant—Effect on Others.*]—A quantity of gold mining machinery, consisting of boilers, engine, stamps, etc., was sold by the sheriff en bloc, under execution, against the plaintiff company: — Held, that the method of sale, whether en bloc or otherwise, is a matter in the sound discretion of the sheriff, to be determined in each case by the particular facts, and that the question whether, in view of the particular facts, he has acted oppressively, must be determined in an action against him:—Held, also, that the equitable rule that where there is an adequate remedy at law, the Court will not exercise its equitable powers, was applicable to the state of affairs in this case. Quære, whether, even where the action of the sheriff is oppressive, the sale can be set aside as against an innocent purchaser, as irregular and void. Part of the property sold consisted of machinery ordinarily used in connection with a gold mining mill. The evidence shewed that the boiler could only be lifted out of its place by pulling off the top of the wall and that portion of the wall over the lugs of the boiler: also, that the mortar was connected to a foundation of cement and timber extending down to bed rock by a number of iron bolts 30 inches in length:—Held, that the mill was a fixture and a part of the real estate, and therefore not liable to be levied upon and sold by the sheriff as personal property:—Held, also, that the effect of the abandonment of their action as against the sheriff, by the plaintiffs, was not to release their action against remaining defendants. *Liscomb Falls Mining Co.* v. *Bishop*, 36 N. S. Reps. 395.

Sheriff's Sale — *Opposition—Security—Default—Chose Jugée—Appeal.*]—In proceedings for the sale of lands under execution, the appellants filed an opposition to secure a charge thereon, and under the provisions of Art. 726, C.P.Q., a Judge of the Superior Court ordered that the opposants should, within a time limited, furnish security that the lands, if sold subject to the charge, should realize sufficient to satisfy the claim of the execution creditor. On failure to give the security as required, the opposition was dismissed, and, on appeal to the Supreme Court of Canada, the judgment dismissing the opposition was affirmed: 35 S. C. R. 1. Subsequently the proceedings in execution were continued, and, on the eve of the date advertised for the sale by the sheriff, the opposants filed another opposition to secure the same charge, offered to furnish the necessary security, and obtained an order staying the sale:—Held, that the judgment dismissing the opposition on default to furnish the required security was chose jugée against the appellants, and deprived them of any right to give such security or take further proceedings to secure their alleged charge on the lands under seizure. Per Taschereau, C.J. In a case like the present an appeal to this Court might be quashed as being taken in bad faith. *Fontaine* v. *Payette*, 25 Occ. N. 138.

VI. Stay of Execution.

Death of Defendant—*Delay before Acceptance of Succession.*]—An heir-at-law has three months and forty days to make an inventory and deliberate upon the acceptance of the succession, and any execution against the property of the defendant issued after his decease may be suspended by means of a dilatory exception. *Garand* v. *Malo*, 4 Q. P. R. 228.

Garnishment Proceedings.]—Where a creditor of the plaintiff, before execution against the defendant, causes a writ of garnishment to be served on the defendant, such writ does not suspend the proceedings under the execution, unless the defendant deposits in Court the amount of the judgment, with interest and costs. *Montambault* v. *Niquette*, 4 Q. P. R. 411.

Judgment Affirmed by Court of Appeal — *Proposed Appeal to Supreme Court of Canada—Necessity for Leave—Powers of Master in Chambers and Judge of High Court—Grounds for Exercise.*]—After a verdict for judgment for the plaintiff, affirmed by the Court of Appeal, the Master in Chambers, on the application of the defendants, made an order staying proceedings till such time as leave to appeal to the Supreme Court of Canada could be moved for, unless the solicitor for the plaintiff would undertake to return, if now paid, the amount of the damages and costs awarded to the plaintiff, in the event of the judgment of the Court of Appeal being reversed:—Held, that the Master had no jurisdiction to make such an order: Rule 42, clause 17 (d). If a Judge of the High Court in Chambers has the power to make an order—and, semble, he has—this was not a proper case for the exercise of it. The judgment being for only $400 damages and costs, there was no appeal to the Supreme Court without leave, and there was no doubtful question of law of such general importance as to call for extraordinary interference. Quære, whether the stay of execution in such a case rests with the High Court or the Court of Appeal. *Tabb* v. *Grand Trunk R. W. Co.*, 24 Occ. N. 400, 8 O. L. R. 514, 4 O. W. R. 135. See also S. C., 8 O. L. R. 281, 3 O. W. R. 885, 4 O. W. R. 116.

VII. Other Cases.

Amount of Debt — *Addition of Costs of Former Writs.*]—The costs incurred upon a writ of execution against the movable property of the debtor and upon a seizure by garnishment may be added to the costs of suit for the purpose of justifying the issuing of a writ against immovable property. *Lemothe* v. *Wigney*, Q. R. 19 S. C. 201.

Disbursements—*Scale of — Opposition—Costs—Scale of.*]—When a writ of execution is issued from the Superior Court, the

disbursements must be according to the amount for which the writ is issued, but if the amount is less than $100, then it is the tariff of the 4th class of the Superior Court which must be applied; but when the execution of such writ is opposed by way of opposition afin d'annuler, alleging payment, which is sustained with costs, the fees of the attorney follow the amount claimed by the writ. *Morinville* v. *Baril*, Q. R. 20 S. C. 327.

Distribution — *Motion—Fees of Prothonotary.*]—A motion demanding the distribution of the moneys made upon execution among a number of creditors indicated in the notice of motion will be dismissed; the result of the motion would be to deprive the prothonotary of his fees. *Evans* v. *Chaput*, 4 Q. P. R. 199.

Expiry — *Renewal—Limitations Act.*]—An execution against an existing interest in lands ceases to be a lien thereon in ten years from the time of its delivery to the sheriff, even though it has been duly renewed from time to time, and kept in force continuously, and sale proceedings cannot be taken under it after that time. Neil v. Almond, 29 O. R. 63, approved. *In re Woodall*, 24 Occ. N. 350, 8 O. L. R. 288, 4 O. W. R. 131.

Expiry — *Renewal—Time—Amendment of Ordinance—Registration by Sheriff—Seizure of Lands.*]—The Judicature Ordinance (No. 6 of 1893), s. 327, enacted: "Every writ of execution shall bear date the day of its issue, and shall remain in force for one year from its date (and no longer, if unexecuted, unless renewed), but such writ may, at any time before its expiration, and so on from time to time during the continuance of the renewed writ, be renewed by the party issuing it for one year from the date of such renewal," etc. This section was amended by Ordinance No. 5 of 1894, s. 12 (which came into effect 7th September, 1894), by substituting "two years" for "one year" in both instances:—Held, that the amendment could not be construed as reviving or enabling an execution to be revived which had expired before the amendment was passed, nor as continuing in force for two years an execution which had been renewed only for one year. The registration by the sheriff of a writ of execution against lands in the Land Titles Office under s. 94 of the Territories Real Property Act, as amended by s. 16 of 51 V, c. 20, cannot be construed as a seizure, and is not sufficient to continue the execution in force without renewal. An execution issued on the 20th October, 1893, was renewed on the 20th October, 1894:—Held, that the renewal was made in time, and the execution continued in force. *McDonald* v. *Dunlop*, (*No. 2*), 2 Terr. L. R. 238.

Guardian of Goods Seized — *Removal of Goods—Obligation to Return.*]—Where the person appointed guardian of goods seized under execution removes them, he must, if the seizure is annulled, bring them back to the domicil of the execution debtor. *Adams* v. *Mulligan*, Q. R. 20 S. C. 203, 4 Q. P. R. 60.

Irregularity — Judgment — Amendment —Præcipe—Signature — Motion — Waiver. *Carbonneau* v. *Letourneau*, (Y.T.), 1 W. L. R. 273, 2 W. L. R. 113, 493.

Judgment for Part of Sum Claimed —*Appeal to Increase Amount.*]—A plaintiff who has obtained judgment for less than the amount demanded, and appeals from that judgment to have the amount increased, cannot, in the meantime, obtain an execution in satisfaction of the judgment so rendered. *Migneron* v. *You*, 5 Q. P. R. 60.

Priorities — *Chattel Mortgage—Creditors' Relief Ordinance.*]—Executions against goods placed in the hands of a sheriff subsequently to the making of a chattel mortgage by the execution debtor, on the goods seized, attach only on the equity of redemption, and are not entitled, under the Creditors' Relief Ordinance, to share with executions placed in the hands of the sheriff prior to the giving of the mortgage. Roach v. McLachlan, 19 A. R. 496, and Breithaupt v. Marr, 20 A. R. 689, followed. *Howard* v. *High River Trading Co.*, 4 Terr. L. R. 109.

Return by Bailiff—*Government Duty.*]—A bailiff who has made a sale of movables is bound to make a return of the writ and the proceedings had thereon, and at least the duty due to the government, and he cannot make the payment of the government duty by the party asking for the return, a condition precedent thereto. *Dubuc* v. *Duclos*, 7 Q. P. R. 168.

Return by Sheriff Nullae Terrae — *Same Writ Sent to Another Sheriff.*]—When a writ of execution de terris has been addressed to the sheriff of a district, and he has reported that he has found no property in his district to seize, the prothonotary may address the same writ to the sheriff of another district where the defendant has property. *Dillon* v. *Atlantic and Lake Superior R. W. Co.*, Q. R. 19 S. C. 533, 5 Q. P. R. 68.

Rule to Return — *Bailiff — Residence —Description — Service*]—A motion for a rule nisi must be personally served on the opposite party. 2. The rule nisi must contain, or it will be void, the residence and description of the party against whom it is directed. 3. One who seeks to obtain an order against a bailiff charged with a writ of execution must prove that he has intrusted such writ to the bailiff. *Massey-Harris Co.* v. *Plourde*, 9 Q. P. R. 400.

Sufficiency of Seizure—*Sale—Adjournments—Notice—Expiry of Writ.*]—The defendants contended that the baliff executing a writ of fi. fa. did not make a seizure, as required by law, of certain buildings, or that, if he did legally seize, he abandoned the seizure; that he did not give due notice of the sale, or at any rate of the adjournments; that the buildings were sold for an inadequate price; and that the writ had expired before the sale. The bailiff found the buildings locked. He did not enter them, or put a man in possession, but put up written notices on the buildings stating that he had seized them, and mentioning the date when and the place where he intended to sell:—Held, reasonably sufficient to constitute a seizure as against defendants, whether it would, or would not, have held the property as against

a subsequent bona fide purchaser from the owner for value, without notice. No notices of the several adjournments of the sale were made public by the sheriff, but the debtor must be presumed to have known of the day fixed for the sale, as a solicitor, at the sale, on the defendants' behalf, gave the bailiff a notice forbidding the sale. The seizure was made while the writ of execution was in force, and the sale then advertised was adjourned from time to time till the buildings were actually sold. The fact that the writ expired before the actual sale was, therefore, unimportant. *Dixon* v. *Mackay*, 22 Occ. N. 374.

Summary Inquiries in Aid of—Ascertainment of interest of execution debtor under will—Mortgage. *Hill* v. *Rogers*, 2 O. W. R. 979.

Territories Real Property Act—*Creditors' Relief Ordinance—Expiry — Renewal —Priorities — Seizure — Sheriff's Sale — Advertisement — Postponement—Appeal — Admission of Point of Law.*]—No question of the effect of the Creditors' Relief Ordinance being raised, the priorities of several executions against land depend not upon the date of their delivery to the sheriff, but upon the date of the deposit with the registrar of certified copies of the executions, accompanied by memoranda of the lands sought to be charged. (2) The sheriff's advertisement of sale of land is a seizure of the land. (3) The effect of s. 94 of the Territories Real Property Act is to provide that neither the delivery of the execution to the sheriff nor his seizure of the land binds the land, but only the deposit with the registrar of the copy-execution and accompanying memorandum. (4) Any seizure by the sheriff enures to the benefit of all execution creditors whose executions are then in his hands, and this notwithstanding that, in case the seizure is by way of advertisement, the advertisement mentions only one or some of such executions; and semble, also, notwithstanding that some of such executions were not in the sheriff's hands for a sufficient time to authorize an advertisement for sale under them alone. (5) The sheriff's advertisement of the sale of lands may properly run prior to the expiration of the year, during which he cannot actually sell; and semble, even if the date fixed for the sale fall short of the year, but the sale is adjourned to a date subsequent to the lapse of the year, the sale would not be bad on that account. (6) A sheriff having seized lands under an execution before it has expired can proceed with the sale of such lands after the lapse of the time for the renewal of unexecuted executions:—Held, on appeal to the Court in banc, that the priorities of several executions against lands is not affected by the provisions of s. 94 of the T. R. P. Act, and that therefore such priorities are not determined by the order in which copies-execution and accompanying memoranda are deposited with the registrar, but by the dates of delivery to the sheriff. (2) The distribution of the proceeds of the sale is governed by the provisions of the Creditors' Relief Ordinance. (3) Although no question was raised before the Judge of first instance, as to the effect of the Creditors' Relief Ordinance, and it was there conceded that the respective execution creditors had the right to have the proceeds of the sale applied on the executions in the order of their legal priority, this could not be construed as a consent on the part of the claimants to the fund that it should be disposed of in the same manner as if the Ordinance were not in force, but merely as a contention on their part that the whole fund should be applied on their executions, and in the absence of consent on the part of the sheriff and all the parties interested in the fund, the provisions of the Ordinance must govern its disposal. *Limoges* v. *Campbell*, 2 Terr. L. R. 356.

Writ of Possession — *Breaking House with Violence—Conservatory Seizure.*] — An action of conservatory seizure is subject to the same rules and delays as summary matters and attachments before judgment: arts. 956, 939, 922, C. C. P. 2. A judgment maintaining a conservatory seizure and ordering that the plaintiff be put in possession of the effects seized "under the authority of this Court," without fixing any delay for the delivery of the effects, is not executory until after the lapse of eight days from its date, and a writ of possession issued before the expiration of that time, without service of the judgment, and without a further order of the Court, is premature and illegal. 3. If the debtor be absent, or if there be no one to open the doors of the house, the seizing officer must draw up a minute of the fact, and obtain judicial authority to use all necessary force, but only in the presence of two witnesses. 4. It is a breaking in for an officer, by a false pretence, to procure a person within the house to open the door, and then, without permission, to rush in with violence. He must notify the inmates of his business and demand admittance. *Kaufman* v. *Campeau*, Q. R. 19 S. C. 479.

EXECUTION CREDITORS.

See MORTGAGE.

EXECUTORS AND ADMINISTRATORS.

Accounts—Disbursements — Payment for stock-taking — Advertising — Commission on collection of accounts — Costs of litigation. *Re Hart Estate*, 3 O. W. R. 785.

Account — *Predecessors — Acceptance — Action—Pleading.*]—A testamentary executor has the right to refuse to accept the account of his predecessors, if he believes it to be erroneous, and that even where his co-executor has accepted it. 2. But an executor cannot, without the concurrence of his co-executor, in answer to an action by their predecessors to compel acceptance of the account and discharge, set up a claim for the reformation of the account, and ask to have the plaintiffs condemned to pay a larger sum than that which appears by their account. *Desjardins* v. *Masson*, 3 Q. P. R. 538.

Account—*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

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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 certain promissory notes, 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 notes were payable to the estate of his deceased co-executor. *Cunnington* v. *Cunnington*, 21 Occ. N. 552, 2 O. L. R. 511.

Account of Executor—Assets—Sale of property—Disbursements — Auctioneer's fees —Vouchers — Declaration of indebtedness — Security — Advertisement for creditors. *Re Lilly* (N.W.T.), 1 W. L. R. 117.

Action against Administrator—*Saisie-conservatoire—Saisie-arrêt before Judgment.*]—A writ of saisie-conservatoire can be issued only in the three cases mentioned in art. 955 C. P. 2. In an action against the administrator of an estate there can be seized only the effects on which there is a lien, that is to say, the property of the estate, and not that of the defendant. 3. A writ of saisie-arrêt before judgment cannot be issued where the defendant conceals or withdraws not his own property, but that of the estate which he has administered, even where the property of the defendant is for the most part if not entirely the property of the estate. *Turcotte* v. *Dumoulin*, 5 Q. P. R. 206.

Action — Revivor — Cause of action — Criminal conversation—Indorsement on order of revivor —Case in Court of Appeal—Order of High Court. *Milloy* v. *Wellington*, 3 O. W. R. 37, 561, 4 O. W. R. 82, 6 O. W. R. 437, 10 O. L. R. 641.

Action against Executors—Claim by son against father's estate—Wages—Contract —Evidence—Corroboration—Statute of Limitations—Promise to pay when able. *Collins* v. *Collins*, 6 O. W. R. 71.

Action by Heir-at-Law to Set Aside Transfer—*Locus Standi.*]—The only living issue and heir-at-law of an intestate brought this action to set aside, on the ground of undue influence, a transfer of property made by the intestate to the defendant; and now applied for an order under Rule 194 or 195, appointing him administrator or administrator ad litem of the deceased:—Held, that the order could not be made under Rule 194, for the reasons given in Hughes v. Hughes, 6 A. R. 373, 389, nor under Rule 195, which was not applicable to a case of a plaintiff who without right or title has commenced an action, and then seeks to legalize his illegal act by an order of the Court. *Fairfield* v. *Ross*, 22 Occ. N. 413, 4 O. L. R. 534, 1 O. W. R. 631.

Action by Executors for Debt Due to Testator—Onus—Corroboration. *Thompson* v. *Coulter*, 1 O. W. R. 205, 2 O. W. R. 356. 3 O. W. R. 82.

Action by Old Executors—*Account—Contestation by One of Several New Executors.*]—Although several testamentary executors, appointed jointly and having the same powers, ought to act together, one of them may when they are sued by the executors whom they have replaced for acceptance of an account rendered by the old executors and a declaration that the latter have transferred the property of the succession to the new executors—contest such action alone with the object of opposing the approval of the account and the declaration that the new executors have received from the old executors all the property of the succession, but he may not demand the reformation of the account nor a judgment against the old executors for the benefit of the succession. *Desjardins* v. *Masson*, 1 Q. R. 11 S. C. 195.

Action under Fatal Injuries Act — *Status of Administrator—Person Having no Interest in Estate — Action Begun before Grant of Administration—Fiat—Judicial Act —Fraction of Day.*]—Action by the administrator of the estate of Augustino Fancelli, deceased, against Fauquier Brothers, to recover damages under Lord Campbell's Act for having negligently caused the death of deceased. Defendants, besides denying any negligence, pleaded that plaintiff was not at the time of the commencement of the action the administrator of the deceased. The damages were claimed in the statement of claim for Egidio and Creusa Fancelli, the father and mother of the deceased, both of whom were alleged to be living near Pisa, in Italy. It appeared at the trial that plaintiff had applied to the Surrogate Court of the district of Algoma, some time before the issue of the writ, for a grant to him of letters of administration, alleging himself to be authorized for the purpose by the father of the deceased, and that on 23rd January, 1903, an order was made by the Judge of that Court for the issue to the plaintiff of letters of administration, but that the letters of administration were not actually issued by the registrar until 26th January, 1903. The writ of summons in the present action was issued on 23rd January, 1903:—Held, letters of administration taken out after action and before the trial, when the plaintiff brings his action as administrator, are sufficient to support the action. The Judge of the proper Surrogate Court had on the day the writ was issued ordered that letters of administration should be issued to the plaintiff, which was a judicial act and must be treated as taking precedence in point of time over the issue of the writ, which was not a judicial act: Converse v. Michie, 16 C. P. 167; Clark v. Bradlaugh, 8 Q. B. D. 62. The existence of an order for

their issue before the commencement of the action was at all events such a declaration of his right to obtain them as would make them when issued relate back to the date of the order. The judgment of Idington, J., 24 Occ. N. 294, 3 O. W. R. 786, dismissing the action, should be set aside with costs of the present motion, and that judgment should be entered for the plaintiff with the costs of the action. *Dini* v. *Fauquier*, 4 O. W. R. 295, 25 Occ. N. 11, 8 O. L. R. 712.

Administration—*Cash on Deposit—Rate of Interest.*] — Executors found a sum of money belonging to the testator in the hands of a loan company upon savings bank account, and allowed it to remain there at 3½ per cent. per annum, for more than two years after obtaining probate of the will. In January, 1902, they closed the savings bank account, and invested the money at 4 per cent. in a debenture, but 20 days later, fearing that they would be called on to distribute the money, they took over the debenture themselves as from its date, and put the money into a chartered bank at 3 per cent. The trusts of the will, so far as the property not specifically devised was concerned, were to provide for annuities and to divide the surplus amongst the residuary legatees:—Held, that the executors would not have been justified in making long or permanent investments of the money which came into their hands; in strictness they should have deposited it from the beginning in a chartered bank, where it would have earned only 3 per cent.; and, in accounting, they should not be charged with more interest than they actually received, that is, 3½ per cent. while the money was on deposit with the loan company, 4 per cent. for the 20 days during which it was invested in a debenture, and 3 per cent. thereafter until distributed. Inglis v. Beaty, 2 A. R. 453, and Spratt v. Wilson, 19 O. R. 28, distinguished. *In re McIntyre, McIntyre* v. *London and Western Trusts Co.*, 24 Occ. N. 268, 7 O. L. R. 548, 1 O. W. R. 56, 3 O. W. R. 258.

Administration of Estate—Payment of voluntary debts — Bond — Consideration — Assignment of securities—Value. *Re Summers*, 1 O. W. R. 523.

Administration Order—Application for —Status of applicant — Creditor—Funeral expenses—Judgment. *Re Atchison, Atchison* v. *Hunter*, 2 O. W. R. 856, 1145.

Administrators Pendente Lite — *Investment of Moneys—Trustee Act—Trustee Investment Act.*] — The administrators pendente lite of an estate asked for an order declaring that they were empowered to invest moneys in their hands during the pendency of litigation concerning the will of the deceased, in securities authorized by the Trustee Investment Act. An action was pending in the High Court, in which the validity of the will was to be tried, and in the meantime the Surrogate Court appointed the executors administrators pendente lite. They had received a large amount of money, which they wished to invest at higher rates of interest than could be obtained from chartered banks, as the litigation was liable to be somewhat prolonged:—Held, that this was a proper case in which to apply for a direction under the Trustee Act, and that there was no difference in principle between the position of the applicants with regard to the money in their hands, and that of an executor or trustee under the Trustee Investment Act; and the order asked for was made. *In re Mackey*, 23 Occ. N. 115, 2 O. W. R. 230, 689.

Administrator — *Renunciation after Grant — Necessity for Order — Execution Issued by Next of Kin on Judgment Recovered by Intestate—Costs.*]—Letters of administration to the estate of H. N. K. were granted to his widow S. K., and to his two children, E. R. and R. K. S. K., by deed, assigned all her interest in the personal property to E. R. and R. K., and, by the same deed, purported to renounce all her right, authority, and power as administratrix of the estate. E. R. and R. K. obtained from the Judge of a County Court an order permitting them to issue execution on a judgment obtained by H. N. K. in his lifetime against defendant:—Held, following Jost v. McNeil, 20 N. S. Reps. 156, that S. K., having accepted letters of administration, could not renounce without the order of the Court of Probate, and that the order made on the application, and in the names of E. R. and R. K. only, was bad and must be set aside. The order was bad, further, for want of jurisdiction, because it permitted execution to issue on the judgment "for the benefit of the said R. R. and R. K.," instead of requiring any sum realized to be applied according to law under the direction of the Court of Probate. As the appellant had failed on the merits, a larger amount appearing to be due on the judgment than was claimed, there should be no costs to either party, either in this Court or in the Court below. *Kaulback* v. *Mader*, 35 N. S. Reps. 219.

Application for Letters of Administration by Stranger—*Public Administrator.*]—In the absence of an application by a person entitled by reason of relationship to the deceased, it is necessary, in order to justify the grant of letters of administration to a creditor or a person without interest, to shew by special circumstances that such grant is in the interests of the estate; otherwise the grant should be made to the public administrator for the district. *Re Morton*, 5 Terr. L. R. 409.

Application for Order—*Account—Affidavit Verifying—Application to Cross-examine —Practice.*]—Upon an application for administration an order was made under English O. 55, R. 10a, that the application stand over for six weeks, and that the defendant within one month render to the plaintiff a proper statement of his accounts and dealings with the estate, which was duly furnished and verified by affidavit. The plaintiff did not appear on the further hearing of the application, and some months had elapsed when this application was made to cross-examine the defendant on the affidavit:—Held, that, as the affidavit was not filed when notice of the application was served, but only (if at all) by the plaintiff himself on the return, the application must be refused. Quære, whether the Rule authorizes a direction that such accounts be verified under oath, and whether such an affidavit is an affidavit "used or to be used on any proceeding in the cause or matter." (J. O. 1893, s. 261, now Rule 282 J. O. 1898). The proper practice in order

to obtain explanations of any of the items of accounts so furnished seems to be to formulate objections on the further hearing, and have the disputed items adjudicated upon in Chambers. *Allan* v. *Kennedy*, 2 Terr. L. R. 285.

Application for Order—Will—Direction to executors to sell — Failure to sell real estate—Legatee—Payment of sum on account of legacy. *Re Ghent, Ghent* v. *Ghent*, 5 O. W. R. 148.

Assets—*Exemptions — Widow — Will — Election—Devolution of Estates Act—Gift of Another's Property — Insurance Moneys — Charge on.*]—The goods of a deceased husband, exempt from seizure, under the Execution Act, are not, except as to funeral and testamentary expenses, assets in the hands of the husband's executors for the payment of debts, the effect of s. 4 of that Act being to give his wife a parliamentary title thereto. The fact of the wife being residuary devisee under the husband's will does not put her to her election as to taking these goods, either under statutory title or under the gift of the residue, for, though such goods, apart from the statute, would pass under the residuary devise, it was otherwise here, for the husband would not, under the circumstances, be presumed to be dealing with such goods; nor would any such presumption arise from the fact that, under the terms of the will, the provision made for her should be in lieu of dower; nor did s. 4 of the Devolution of Estates Act affect her right, for that section must be read as being subject to s. 4 of the Execution Act. A piano belonging to the wife was dealt with by the husband under his will, as part of his estate, by giving it to his son:—Held, that the wife must elect either to allow the son to retain it, under the gift to him, or to take it herself, making good to the son the value thereof, out of the provisions made for her in the will. A policy of insurance for $2,000 was by the husband's will made payable to and for the benefit of his wife and son, and he apportioned the proceeds by giving the son $500 and his wife the residue thereof. The policy was charged with payment of a loan procured by the testator from the company:—Held, that the amount of the loan was payable by the wife and son pro rata out of their respective shares of such moneys, the gifts to them being specific. *In re Tatham*, 23 Occ. N. 530, 2 O. L. R. 343.

Bill of Costs—Service to testator—Proceeding for taxation — Application by residuary legatee — Assets—Indemnity. *Foley* v. *Trusts and Guarantee Co.*, 1 O. W. R. 526.

Bond—Liability of sureties for administration—Money in hands of administrator—Dual capacity — Guardian of infants — Termination of period of administration—Passing accounts before Surrogate Judge—Estoppel. *Reid* v. *Snobelen*, 3 O. W. R. 656, 4 O. W. R. 485.

Business Carried on for Benefit of Estate under Will—*Liability of Executor — Estoppel — Statute of Limitations.*]—An estate of a deceased was being administered in this action commenced in May, 1892, and V. brought into the Master's office in 1901 a claim for goods supplied to the executor, between July, 1890, and March, 1892, for use in carrying on the hotel business of deceased under authority conferred by his will. V. had, in May, 1893, sued the executor in a County Court for the price of the goods in question, but the County Court Judge dismissed the action, on the ground urged by the defendant that he was not personally liable, but that the claim should be against the estate. The executor claimed in the administration proceedings that the estate was insolvent, but in April, 1894, an order was made by consent for the transfer of all the assets to him personally, upon his undertaking to pay or settle with all the creditors of the estate and paying $1,200 into the hands of the trustees for the benefit of the children of the deceased and certain costs, and this order was carried out on both sides. The order contained provisions that the Master should forthwith adjudicate upon and settle all claims against the estate, that the executor should indemnify and save harmless the estate from all such claims, and that he should carry out and perform all the terms and provisions of the settlement:—Held, that a person supplying goods to an executor under such circumstances has no right against the estate, but he may sue the person who incurred the debt, and he also has a right to be subrogated to any right of indemnity which the executor has against the estate in respect of the liability so incurred. In re Frith, [1902] 1 Ch. 342; Dowse v. Gorton, [1891] A. C. at p. 199. 2. That the executor was estopped from disputing the claim against the estate. 3. That the claim was not barred by the Limitations Act. *In re Braun, Braun* v. *Braun*, 23 Occ. N. 96, 14 Man. L. R. 346.

Charging Administratrix with Loss of Estate—Contract for sale of land—Reasonable price—Statute of Frauds—Chattels. *Re Donaldson, Gibson* v. *Donaldson*, 2 O. W. R. 810, 3 O. W. R. 290, 4 O. O. R. 368.

Chattels Found on Person of Intestate—Action to recover possession—Proof of ownership—Corroboration — Declaration of trust as to land—Resulting trust — Illegal and immoral purpose—Bawdy house. *Bakewell* v. *Mackenzie* (N.W.T.), 1 W. L. R. 68.

Claim against Estate—Running count —Entries in books—Corroboration—Statute of Limitations. *Re Jelly, Union Trust Co.* v. *Gamon*, 6 O. L. R. 481, 2 O. W. R. 966.

Claim by Executor against Estate — *Matters Occurring before Death of Deceased — Corroboration — Devise to Executor — Whether in Lieu of Compensation—Negligent Mismanagement—Compensation.*]—The executor of a deceased person's estate was also the executor of an estate in which the deceased was beneficially interested. In passing his accounts in respect to the last named estate, after the deceased's death, the executor credited himself with having received for the deceased on account of her share in such last mentioned estate a specified sum of money. On subsequently passing his accounts in respect to the deceased's estate, and being charged with this sum, as having been received by him for the deceased, he alleged that he had not then received it, but had in fact

paid it out in small sums to the deceased during her lifetime:—Held, that this was not a matter occurring before the death of the deceased, and therefore, the evidence of the executor to establish his contention did not require to be corroborated under s. 10 of the Evidence Act, R. S. O. 1897 c. 61. A testatrix by her will devised to her brother certain lands free from incumbrances, with a direction for the payment out of general personal estate of any incumbrance thereon, and she appointed him her executor:—Held, that the devise was not given to him in his capacity of executor, but in his personal capacity, and therefore did not preclude him from claiming compensation for his services to the estate. Compton v. Bloxham, 2 Coll. 201, distinguished. Where an executor has been guilty of negligence, mismanagement, and breach of trust in his management of the estate, but there has been nothing of a dishonest or fraudulent character, and the losses resulting are capable of being compensated for, and made good in money, the executor is not to be deprived of compensation. *McClenaghan* v. *Perkins*, 23 Occ. N. 84, 5 O. L. R. 129, 1 O. W. R. 191, 752.

Claims of Creditors — Promissory note—Interest — Corroboration—Open account—Statute of Limitations—Work and labour—Release of claim. *Halliday* v. *Rutherford*, 1 O. W. R. 816.

Claim of Widow of Intestate to Share in Estate — Notice disputing—Action by widow to establish marriage — Declaratory judgment—Administration. *Fendal* v. *Wilson*, 2 O. W. R. 920.

Compensation of Executors—*Distribution of Corpus—Collection of Interest — Management of Estate.*]—An estate was not a simple one to deal with, owing to conflicting interpretations of the rights of the beneficiaries under the will, the nature of the trusts, their number and complication, and, to a more limited extent, the character of a portion of the assets. The executors took over about $60,000 worth of the property in cash, mortgages, notes, farm property, and furniture. Of this they distributed a little less than half, and set apart the remainder for payment of annuities, legacies not matured, etc. They collected about $16,500 of interest. They managed the estate for a period of a little more than four years down to the date of a report providing for their remuneration:—Held, that they were not entitled to an allowance upon taking over the estate, but should be allowed 2½ per cent. upon such portion of the corpus of the estate as they had taken over and distributed, and when the remainder of the corpus taken over should be distributed, they should have a like allowance upon the portions distributed from time to time; they should be allowed 5 per cent. on the interest collected, and to be collected; and $100 a year in addition, for the first two years, and $75 a year for the last two years, for management of the estate and services not covered by the other charges, including the care and preservation of the corpus. *In re McIntyre, McIntyre* v. *London and Western Trusts Co.*, 24 Occ. N. 268, 7 O. L. R. 548, 1 O. W. R. 56, 3 O. W. R. 258.

Corroborative Evidence — *Advance of Money—Claim for Interest—Promissory Note—Action for Consideration.*]—The plaintiff sued the surviving member of a firm, together with the representatives of a deceased member of the firm, for $1,000 lent by him, in the lifetime of the deceased, to the firm, for the purposes of the firm. He also claimed interest, alleging that this was spoken of at the time the money was borrowed, and that the deceased member of the firm had asked him what the interest would be, and he told her five per cent.; the surviving member of the firm denied all recollection of interest having been mentioned:—Held, that, inasmuch as there was corroboration as to the main fact, namely, the borrowing by the firm of $1,000, this was sufficient to entitle the plaintiff to recover the interest claimed. When a promissory note is taken from a borrower as collateral security for money lent to him, and not in payment, an action can be brought for the money lent, notwithstanding that, owing to the form of the note, an action thereon could not be maintained. *Secor* v. *Gray*, 22 Occ. N. 27, 3 O. L. R. 34.

Costs of Unsuccessful Action—*Personal Estate—Real Estate.*]—An executor, without direct authority or obtaining indemnity, brought an action to recover a sum of money alleged to belong to the testator, and this action was dismissed with costs, the personal estate being insufficient to pay the costs of the opposite party:—Held, that, though the general rule is that an executor acting in good faith is entitled to be recouped his costs of an unsuccessful action, this rule would not justify the executor resorting for this purpose to specifically devised real estate. *In re Champagne, St. Jean* v. *Simard*, 24 Occ. N. 234, 7 O. L. R. 537, 3 O. W. R. 515.

Creditor's Action against Executors—*Stay Pending Administration Suit.*] — A motion by the defendants, executors, to stay a creditor's action against them, on the ground that an administration action by a legatee was pending, in which an administration order had been granted, was opposed on the ground of inconvenience to the plaintiff and generally as to the right to grant a stay in such cases:—Held, that actions should be stayed against the estate, unless a fair consideration of the claim cannot be had by the referee. The affidavits of the plaintiff disclosed that it would be a hardship if compelled to come to Halifax to establish the claim before the referee; but it was stated that the referee would go to Sydney to inquire into the claim. The order to stay proceedings was continued until the referee should have an opportunity of considering the claim. *Brown* v. *McDonald*, 25 Occ. N. 131.

Creditor's Claim—Leave to prove after dividend paid to other creditors. *Millichamp* v. *Toronto General Trusts Corporation*, 3 O. W. R. 375.

Determination of Questions — Summary application—Domicil of intestate—Distribution of estate — Evidence—Administration order. *Re Englehardt*, 2 O. W. R. 627.

Distribution of Fund—Ascertainment of class—Vesting order — Costs—Unnecessary litigation. *Valentine* v. *Jacob*, 2 O. W. R. 167.

Estate of Deceased—Moneys in hands of son—Gift — Corroboration—Limitation of actions—Request or direction—Trustee—Reference — Report—Judgment—Irregularity—Execution—Costs. *Wendover* v. *Nicholson*, 2 O. W. R. 1108, 4 O. W. R. 475, 5 O. W. R. 654, 6 O. W. R. 529.

Evidence—*Corroboration.*]—Upon a claim in an administration action by a tenant against the estate of his deceased landlord for a balance due to him in respect of alleged advances, and for goods supplied, the books of the tenant, in which the transactions were set out, and cheques made by him in favour of the landlord, were held to be sufficient corroboration of his evidence, although the cheques did not shew on their face whether they had been given on account of rent or in respect of advances. *In re Jelly, Union Trust Co*, v. *Gamon*, 23 Occ. N. 327, 6 O. L. R. 481, 2 O. W. R. 966.

Fatal Accidents Act—*Conflicting Claims—Consolidation of Actions—Negligence.*]—A woman, claiming to be the widow of a man killed owing as alleged to the negligence of the defendants, brought an action against them, with her two children as co-plaintiffs, to recover damages. Subsequently another action was brought by another woman, also claiming to be the deceased's widow, to recover damages for the benefit of herself and her child, her marriage having taken place after an alleged divorce of the first plaintiff: —Held, that only one action would lie under the Act; that that action would be for the benefit of the persons in fact entitled; and that, there being no doubt as to the right of the children in the first action, the first action should be allowed to proceed and the rights of all parties worked out in it, the plaintiff in the second action to be represented by counsel at the trial if desired. Order of Falconbridge, C.J., 3 O. W. R. 640, 704, reversed. *Morton* v. *Grand Trunk R. W. Co.*, 24 Occ N. 351, 8 O. L. R. 372, 4 O. W. R. 126.

Fatal Accidents Act—*Damages—Funeral Expenses.*] — In an action under the Fatal Accidents Act and the Workmen's Compensation Act for the death of the defendants' servant by their negligence, as alleged, the plaintiff has no right to claim for funeral expenses. *Makarsky* v. *Canadian Pacific R. W. Co.*, 15 Man. L. R. 53.

Fatal Accidents Act — *Death of Beneficiary—Survival of Action.*] — Upon the death of the beneficiary on whose behalf an administrator is bringing an action under the Fatal Accidents Act, R. S. O. 1897 c. 166, the action comes to an end. It cannot be continued for the benefit of the beneficiary's estate, nor can a new action be brought by the beneficiary's personal representative. Judgment of Ferguson, J., 32 O. R. 234, 26 Occ. N. 437, reversed. *McHugh* v. *Grand Trunk R. W. Co.*, 21 Occ. N. 581, 2 O. L. R. 690.

Fatal Accidents Act — *Right of Action—Action before Grant of Administration—Fiat of Surrogate Court Judge.*]—This action was brought by the plaintiff as administrator of a workman who died in the service of the defendants, in consequence, as alleged, of their negligence. It appeared that the fiat of the Surrogate Court Judge directing letters to issue to the plaintiff was signed on the same day that the writ of summons in this action issued, but that letters were not actually issued until two days later. The plaintiff never had any personal right or interest in the subject-matter of the litigation: —Held, that the action must be dismissed, but without prejudice to the plaintiff bringing another action. *Dini* v. *Fauquier*, 24 Occ. N. 294, 3 O. W. R. 786. (Reversed 4 O. W. R. 295.)

Fatal Accidents Act — *Rights of Administrator—Rights of Relatives—Time Limit—Stay of Proceedings.*]—An unmarried man having come to his death by reason of injuries inflicted by the defendants, two actions were brought to recover damages occasioned by his death. The first in point of time was brought by the paternal grandfather and grandmother of the deceased, and the second by his mother, who had obtained letters of administration to his estate after the bringing of the first action. Upon a motion by the defendants to stay one or other of the actions:—Held, that, while the grandfather and grandmother could legally proceed with their action under R. S. O. 1897 c. 166, although brought within six months of the death, so long as there was no executor or administrator, yet an administratrix having been appointed and an action brought by her within the six months, she was entitled to proceed with it; and the first action was the one to be stayed. Lampman v. Township of Gainsborough, 17 O. R. 191, and Holleran v. Bagnell, 4 L. R. Ir. 740, explained and followed:—Held, also, that the administratrix would have the right in her action to claim damages sustained by the personal estate of the deceased. Leggott v. Great Northern R. W. Co., 1 Q. B. D. 599, followed. *Mummery* v. *Grand Trunk R. W. Co.*, *Whalls* v. *Grand Trunk R. W. Co.*, 21 Occ. N. 343, 1 O. L. R. 622.

Fatal Accidents Act—*Status of Widow—Grant of Administration Pendente Lite—Workmen's Compensation Act—Negligence—Release of Cause of Action—Rights of Mother—Expectation of Benefit—Discovery of Fresh Evidence—Damages—New Trial.*]—An action was brought to recover damages for the death of a workman employed by the defendants, owing to their alleged negligence. The plaintiff alleged that she was the widow of the deceased, but this was denied. She obtained as widow, pendente lite, letters of administration to the estate of the deceased, and amendments were made by which she claimed as administratrix for her own benefit as widow and for the benefit of the mother of the deceased. The defendants denied negligence, denied the plaintiff's status as widow and administratrix, and also set up a release of the cause of action. The trial Judge found against the plaintiff's status, but the jury found negligence, and assessed the damages at $1,500, apportioning that sum equally between the plaintiff and the mother:—Held, that there was evidence upon which the jury were justified in finding that the man's death arose from the negligence of the defendants without blame on his part; and therefore that there should not be a nonsuit or a new trial upon this branch of the case; Meredith, J., dissenting, and being of opinion that there should be a new trial. 2. That the release given by the plaintiff should not, on the evidence, be held binding on her; Anglin, J.,

hesitating. 3. That on the evidence the mother had no sufficient interest in her son's life or expectation from him to give her a right of action in respect of his death; and there should be a new assessment of damages unless the plaintiff was content to accept $750. 4. That there should be a new trial upon the question of the plaintiff's right as widow and administratrix, evidence having been discovered since the trial going to shew that the plaintiff was the true widow. 5. That if the letters of administration were rightly granted to the plaintiff as widow, they related back so as to validate the action. Trice v. Robinson, 16 O. R. 433, and Murphy v. Grand Trunk R. W. Co., unreported decision of a Divisional Court, 27th May, 1889, applied and followed. Judgment in 7 O. L. R. 747 reversed. *Doyle* v. *Diamond Flint Glass Co.*, 24 Occ. N. 368, 8 O. L. R. 499, 3 O. W. R. 320, 356, 415, 510, 921.

Foreign Will — *Action to Set Aside—Powers of Provisional Administrator Appointed by French Court.*]—The widow of W. C. H. died at London, England, leaving property in Great Britain, France, and Canada. By her last will she appointed "La Société Charitable de l'Asile de nuit à Paris" her universal legatee, and a French Court appointed L., a notary, provisional administrator of the succession. Subsequently the heirs of W. C. H. brought an action to have the will set aside, and afterwards the Court at Paris confirmed the appointment of L. for such time as might be necessary. L. then asked for an account from Mrs. H.'s former agent in Montreal, and obtained from the French Court an order allowing him to delegate his powers as provisional administrator to a designated person, with power to sue the former agent at Montreal for an account respecting the property in Canada. In the meantime, however, the Superior Court of Quebec had appointed M., a notary, judicial sequestrator of the property. L. brought the present action to obtain possession of the property from M., and relied on the facts above set forth:—Held, that the judicial sequestrator appointed by a Court of this province was the proper person to be in possession of the property in this province. *Lavoignat* v. *Mackay*, 21 Occ. N. 129.

Legacy — *Judgment for — Provisional Execution.*]—There may be a provisional execution of a judgment ordering an executor to hand over a devise or bequest to the devisee. *Massue* v. *Resther*, 3 Q. P. R. 499.

Letters of Administration — *Quebec Will—Notarial Form.*]—Where a will is in notarial form and in the custody of a notary in the province of Quebec, letters of administration with a certified copy of the will annexed, will be granted on proof by affidavit of the death and domicil of the testator, of the law of Quebec, and of the original will being executed in accordance therewith; that the original will is in the custody of a notary in that province; and that the executors named in the will are acting thereunder. *In re Robertson*, 22 Occ. N. 211.

Maintenance — Infant — Custody—Advice. *Re Cornell*, 1 O. W. R. 56.

Official Administrator—*Heirs out of Jurisdiction — Letters of Administration.*]—The official administrator is not allowed to take out letters of administration in opposition to the heirs of the deceased, such heirs being resident out of the jurisdiction, but having an attorney-in-fact within the province to manage the estate, and there being no evidence that the deceased had any debts or any substantial personal property, although he died possessed of real estate within the province subject to a mortgage. *In re Lelaire*, 9 B. C. R. 429.

Order—Summary application for—Insolvent estate—Creditors—Conduct of proceedings—Discretion of Court. *Re Yocom, Honsinger* v. *Hopkins*, 1 O. W. R. 85.

Passing Accounts—*Corroboration—Payment of Claims—Statutory Declarations.*]—A Judge sitting on the Probate side of the Court passing accounts is not bound by the rule of procedure requiring claimants against the estate to give corroborative proof of their claims. This rule of procedure is applicable only when the claim comes to be contested in Court. Semble, a Judge sitting without a jury is not bound any more than is a jury to apply it under all circumstances. The responsibility of paying claims falls upon the administrator; he must use care and judgment in considering them, and if he does so fairly and honestly, and in the interest of the estate, he will on passing his accounts be allowed such as he has thought fit to pay. Remarks on the usual form of statutory declaration proving claims. *In re Blank Estate*, 5 Terr. L. R. 230.

Passing Accounts of Administratrix —Carrying on business of deceased—Liability for loss—Liability for goods destroyed—Neglect to sell—Negligence—Goods claimed by administratrix in her own right—Gift—Inventory—Mistake—Delivery — Land standing in name of administratrix—Jurisdiction of Probate Court—Payment to manager of estate. *Re Nugent* (N.W.T.), 2 W. L. R. 3.

Personal Liability—*Promissory Note—Debt of Estate—Renewal—Consideration—Statute of Frauds—Amendment.*]—Action on a promissory note payable on demand, signed by the defendant, as "executor of an estate," but not expressly restricted to payment out of the estate:—Held, that the defendant was personally liable. The note was given in renewal of a former one (similarly signed) which was not a demand note, but payable at a definite time, the debt being originally the testator's:—Held, that there was a good consideration, for the former note, if not for the demand note, namely, forbearance on the part of the plaintiffs, and the defendant was liable thereon; and his antecedent liability was a valuable consideration for the demand note; s. 27, Bills of Exchange Act. Upon appeal from an order for judgment on the pleadings leave to amend by setting up the Statute of Frauds was refused. *Union Bank of Canada* v. *McRae*, 21 Occ. N. 409, 496.

Powers of Executors—*Sale of Land—Payment of Debts—Devises in Fee—Executory Devises Over—Devolution of Estates Act—Trustee Act.*]—A testatrix gave to her daughter some personal effects and $4,000 to be paid by her son, charged on property devised to the son; all the rest of her property she gave to her son, charged with $4,000. She then directed that in case of the death of either the son or daughter without issue,

the whole survivor, without is testatrix, part of th daughter t ren, the so ers and sis land was debts:—He out the cor and a fort make a go tion of Es ss. 4, 9, 16 O. c. 129, Act enables of debts, ar fied by s. 1 make it cle sell for the there were were debts guardian, o non-concurri necessary w distribution executors by exercisable last clause or persons i tator's whol mean a devi persons, and ders to one successively, devises over his whole fe it may be, devise of his be, whether any less inte sons, either common. In 54 L. T. N. proved. *In* 215, 7 O. L.

Powers o *cising—Exten* powers of an day may resu the combinat dispositions r the executor. 339.

Power to *cies—Trustee Act.*]—P. died leaving a will tors and gave sonal, to his bequests, and wife he was t due of the pr to go to the places in the drawn), the "from the tim the sale of I Humewood is to the executo power of sale, were a portion wood" in the by the executo under such co made in any Estates Act,

the whole of the property was to go to the survivor, and in case of the death of both without issue, to brothers and sisters of the testatrix. The executors contracted to sell a part of the real estate to the appellant, the daughter being alive and having three children, the son alive and unmarried, and brothers and sisters being also in existence. The land was incumbered and there were other debts:—Held, that the executors, even without the concurrence of the son and daughter, and a fortiori with their concurrence, could make a good title, either under the Devolution of Estates Act, R. S. O. 1897 c. 127, ss. 4, 9, 16, or under the Trustee Act, R. S. O. c. 129, s. 18. Section 9 of the former Act enables executors to sell for the payment of debts, and the power to sell is not qualified by s. 16. That section was intended to make it clear that executors had power to sell for the purposes of distribution where there were no debts as well as where there were debts; and the consent of the official guardian, on behalf of infants, lunatics, and non-concurring heirs or devisees, is only necessary when the sale is for purposes of distribution only. The power of sale given to executors by s. 18 of the Trustee Act was exercisable in this case, notwithstanding the last clause of s. 20; "a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest," does not mean a devise of a life estate to one or more persons, and a remainder or several remainders to one or more others, either jointly or successively, and with, it may be, executory devises over to still other persons, so that his whole fee simple, or less estate, whatever it may be, is disposed of; but it means a devise of his whole interest, whatever it may be, whether it be an estate in fee simple or any less interest, to the same person or persons, either as joint tenants or tenants in common. In re Wilson, Pennington v. Payne, 54 L. T. N. S. 600, 2 Times L. R. 443, approved. *In re Ross and Davies*, 24 Occ. N. 213, 7 O. L. R. 433, 3 O. W. R. 215.

Powers of Executors—*Time for Exercising—Extension.*]—An extension of the powers of an executor beyond a year and a day may result from previous wills, and from the combination of different testamentary dispositions relative to the appointment of the executor. *Brunet* v. *Marien*, 4 Q. P. R. 330.

Power to Sell Lands—*Charge of Legacies—Trustee Act—Devolution of Estates Act.*]—P. 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 was 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, and 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 1st July, 1886, shortly before the death of the testator:—Held, 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 s.-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. *In re Moore and Langmuir*, 21 Occ. N. 562.

Proof of Character—*Action — Inscription.*]—A plaintiff who sues in the character of executor upon a lease made by him in that character to the defendant is not bound to produce documents proving his capacity as such before inscribing for hearing ex parte. *Leclaire* v. *Huot*, 3 Q. P. R. 389.

Removal of Executor — Insolvency—Misconduct — Administration order—Undertaking—Costs. *Godbold* v. *Godbold*, 1 O. W. R. 233, 357.

Removal of Executor—*Action for—Personal Capacity.*]—An action for the removal of a legal mandatary, in this case an executor, on the ground of his mal-administration and of fraudulent acts of which he is accused, should be brought against him personally and not as executor. *Mercier* v. *Gosselin*, 5 Q. P. R. 80.

Removal of Executors — *Account — Pleading—Exception to Form.*]—A demand for the removal of testamentary executors and a demand for reddition de compte are not incompatible. 2. The fact that the defendants have already rendered an account, and therefore the plaintiff has only an action for reformation of the account, is not a ground for an exception to the form. *Donohue* v. *Donohue*, 4 Q. P. R. 300.

Specific Legacy—Realization—Set-off—Debt barred by statute—Retainer. *Holt* v. *Perry*, 2 O. W. R. 424.

Substitution—*Power to Sell Property and Reinvest—Mortgage by Grevé—Creditors —Attachment of Debts.*]—The testator left his property to the defendant, subject to a substitution in favour of the children of the defendant, with a stipulation of insaisissabilité. The will, however, permitted the executors, of whom the defendant was one, to sell the property on condition of employing the moneys arising from the sale in the purchase of property of the same value as the property sold, the property so acquired to represent that sold. The defendant in 1869 sold one of the immovables of the estate, and in 1873 he bought in his own name a lot upon which he built a house. In 1895 he charged and hypothecated this land in favour

of his children to the amount of $10,440, which was the cost price, to serve and be instead of, as the deed said, a reinvestment for the children in accordance with the provisions of the will, up to the amount of the price so paid. The deed of hypothecation reserved to the defendant the right to remove the hypothec, and invest elsewhere, whether in purchasing new properties or upon other sufficient securities: — Held, that the deed of hypothec did not constitute a valid reinvestment of the moneys arising from the sale of the property of the estate, and that the revenues of the immovable acquired by the defendant in his own name could be attached by his creditors. *De Serres* v. *Leclaire*, Q. R. 23 S. C. 454.

Supposed Death of Intestate—Evidence of death—Application by public administrator for letters of administration. *Re Tjerstrom* (Y.T.), 1 W. L. R. 385.

Surrogate Courts — *Grant of Administration—Nominee of Next of Kin in Ontario—Discretion—Revocation — Fraud.*]—Only one of the next of kin, the sister, of an intestate, resided in Ontario, and, upon the consent of the sister and her children, letters of administration were granted by a Surrogate Court to the defendant, the husband of the sister's daughter. A brother of the intestate, resident in the United States, brought this action to revoke the grant. It was stated in the defendant's petition that all of the next of kin had renounced in his favour, but it was plain from the renunciation, which was filed, that this statement was intended to refer only to the next of kin resident in Ontario:—Held, that the Surrogate Court had before it all those who were required by s. 41 of the Surrogate Courts Act, R. S. O. 1897 c. 59, to be cited or summoned, and the consent and request of all of them that the defendant should be appointed administrator, and, having regard to the nature of the property of the deceased, and the age and illiteracy of his sister, that the Judge had not exercised his discretion improperly in directing the grant to be made to the defendants. Semble, that, even if the discretion had been improperly exercised, the grant would not have been revoked. The practice of the Surrogate Courts in this Province is to apply the provisions of s. 59 of the Act more liberally than do the English Courts the corresponding provision of the English Probate Act. Held, also, affirming the finding of the Surrogate Court, that the defendant had not made false suggestions nor concealed material facts for the purpose of obtaining the grant. *Carr* v. *O'Rourke*, 22 Occ. N. 207, 3 O. L. R. 632, 1 O. W. R. 331.

Survival of Action—*Tort—Power to Appoint Administrator ad Litem.*]—R. S. O. 1897 c. 129. s. 11, providing that in case any deceased person has committed a wrong to another in respect to his person or his real or personal property, the person so wronged may maintain an action against the administrators or executors of the person who committed the wrong, does not give authority to maintain an action against one who is an administrator ad litem merely, but only against an administrator in the ordinary sense of the term, that is, a general administrator clothed with full power to collect the assets, pay the debts, and divide the estate. Therefore, for this reason, apart from others, the appointment of an administrator ad litem should be refused in this action, which was brought against five persons for malicious prosecution, one of whom had died pending the action, and whose widow and children refused to administer to the estate. *Hunter* v. *Boyd*, 22 Occ. N. 50, 3 O. L. R. 183, 1 O. W. R. 79, 2 O. W. R. 724, 1055.

Taking Possession of Estate—*Debtor Opposing Claim for Account—Period of Year and a Day—Commencement of—Cessation of Executor's Functions.*]—The fact that a debtor of an estate resists an action en reddition de compte brought against him by an executor, alleging that he is not accountable to the estate, does not prevent the executor from taking possession of the estate; nor is he prevented from doing so because the debtor, having been ordered to render an account to the executor, renders an account in which he brings himself out free of debt to the estate, so long as the executor contests such account. 2. In consequence, the period of a year and a day commences to run from the date of the death of the testator, the executor being presumed to have known the will from that date. 3. If the year and a day from the death have elapsed during the pendency of the contest as to the account, then there is plainly a cessation of the functions of the executor, and the proceeding is suspended until the legatee or heir takes up the conduct of it in place of the executor. *Frascaur* v. *Paradis*, Q. R. 20 S. C. 246.

Technical Breaches of Trust—*Relief from—Limitation of Actions—Trustee Acts.*]—Where it was held that the appointment of executors to carry out the alternative provisions of the will never took effect, it was also held that the persons named as executors, having applied for and obtained probate, became trustees for the persons entitled upon an intestacy; payments made by them to those who would have been beneficially entitled if the alternative provisions had taken effect were breaches of trust; but the statute of limitations was a bar to a recovery in respect of any of those breaches which occurred more than six years before the action was brought: R. S. O. 1897 c. 129, s. 32.—Held, moreover, that the executors were entitled to be relieved from personal liability for all breaches of trust committed by them under 62 V., 2nd sess., c. 15, they having acted honestly and reasonably, in view of the facts that the construction of the will was doubtful; the trial Judge took the same view of its effect as they did, and for eleven years everybody interested in the estate acquiesced in that view. *Henning* v. *Maclean*, 21 Occ. N. 434, 2 O. L. R. 169.

Trust—Breaches of—Negligence—Claim by executor against estate—Corroboration—Payment in lifetime of testator—Admission—Compensation—Devise in lieu of—Construction of will. *McClenaghan* v. *Perkins*, 1 O. W. R. 191, 752.

EXEMPTIONS.

See ASSESSMENT AND TAXES—BANKRUPTCY AND INSOLVENCY—EXECUTION—FRAUDULENT CONVEYANCE — MUNICIPAL CORPORATIONS — PLEADING — REVENUE — SALE OF GOODS.

EXHIBITION ASSOCIATION.

See NEGLIGENCE.

EXHIBITS.

Filing—*Letter—Original or Copy.*]—A party who seeks to adduce in evidence a letter written by himself will not be ordered to file the original, that being in possession of the addressee. *Chaput* v. *Charland*, 6 Q. P. R. 33.

Production after Return—*Leave to Inscribe Ex Parte.*]—An inscription for hearing ex parte will be struck out with costs, where the plaintiff, who has filed his exhibits after the return of his action, has not obtained leave of the Judge to foreclose the defendant. *Maclean* v. *Meloche*, 4 Q. P. R. 204.

Production after Return—*Leave to Inscribe Ex Parte — Notice — Costs.*] — A plaintiff who has filed his exhibits after the return of his action, will be allowed, on motion, to obtain the foreclosure of the defendant from pleading, if a sufficient delay has elapsed since notice of the filing of the exhibits was given to the defendant, but such motion will be granted without costs. *Trenholme* v. *Provost*, 4 Q. P. R. 316.

EXONERETUR.

See ARREST.

EXPENDITURE.

See MUNICIPAL CORPORATIONS.

EXPERTS.

See COSTS—JUDGMENT.

EXPLOSIVES.

See MUNICIPAL CORPORATIONS.

EXPRESS COMPANY.

See CARRIERS.

EXPROPRIATION.

See CONSTITUTIONAL LAW—CROWN—DAMAGES — MUNICIPAL CORPORATIONS — RAILWAY—TRESPASS TO LAND.

EXTRADITION.

Appointment of Extradition Commissioners — *Federal Parliament—Extradition Act—Constitutionality — Prohibition—Notice to Adverse Party—Excess of Jurisdiction.*]—Upon presentation of a petition for the issuance of a writ of prohibition, the Judge may require notice to be given to the parties having an adverse interest in the proceedings. 2. The Judge to whom the application is presented, in view of the effect of the issuing of the writ, which would be to tie up the inferior jurisdiction for an indefinite time, will go fully into the reasons urged on the merits of the application. 3. The writ of prohibition lies whenever a court of inferior jurisdiction exceeds its jurisdiction, if there is no other remedy equally convenient, beneficial, and effectual, and it may also be used to restrain any body of persons or officers assuming to exercise judicial or quasi-judicial powers, although not strictly or technically a court. 4. The writ should not be granted except in a substantially clear case of want of jurisdiction and where there is an imminent danger of failure of justice. 5. The Extradition Act, R. S. C. c. 142, in so far as it enacts that the Governor-General in council may appoint Extradition Commissioners other than members of a court already constituted and organized by the provincial authorities, is constitutional and within the powers of the federal parliament. 6. Doubted, that a writ of prohibition is the proper means of bringing before the Court the question of the constitutionality of a statute under which a court or an officer pretends to act. *In re Gaynor*, 7 Q. P. R. 115.

Arrest and Remand of Accused—*Writs of Habeas Corpus—Jurisdiction—Procedure.*]—The respondents, having been arrested in Montreal by order of an extradition commissioner for an alleged extradition offence committed in the State of Georgia, were remanded by him for the purpose of affording the prosecution an opportunity of proving its case. Thereafter one Judge in Quebec issued, on their application, and then quashed, writs of habeas corpus, while another Judge afterwards issued similar writs and discharged the respondents from custody, on the ground that no extradition offence had been disclosed against them in the proceedings before him:—Held, that this was the question which the Extradition Commissioner had jurisdiction to investigate on the remand which he had ordered; that his remand warrant could not be treated as a nullity; that the respondents were in lawful custody; and that, in consequence, the Judge had no jurisdiction to order their release. *United States of America* v. *Gaynor*, [1905] A. C. 128.

Assault with Intent to Murder—*Treaty—Evidence on Inquiry.*]—Where a fugitive offender from the United States is charged with an assault with intent to murder, in an information laid under the Extradition Act, R. S. C. c. 142, the evidence must sufficiently establish the existence of the intent. *In re Kelly*, 22 Occ. N. 262.

Bail Pending Appeal—*Habeas Corpus—Powers of Judge of Court of Appeal.*]—An application to a Judge of the Court of Appeal

to admit to bail a person committed for extradition, pending an appeal to that Court from an order of a Judge of the High Court refusing, upon habeas corpus, to discharge the applicant, was refused on the grounds, (1) that it did not appear that the applicant was in actual custody, and (2) that it was doubtful whether a Judge of the Court of Appeal had power to make the order, a matter of bail not being incidental to the appeal (Jud. Act, s. 54). Quære, as to the propriety of granting bail in extradition proceedings otherwise than de die in diem, pending the hearing of a motion for habeas corpus on an appeal. *In re Watts*, 22 Occ. N. 130, 3 O. L. R. 279, 1 O. W. R. 129.

Child-stealing — *Contempt of Foreign Court—Parent Stealing His Own Child—Foreign Law — Criminal Code.*]—The prisoner and his wife were absolutely divorced in the State of Illinois, where they were domiciled, by a decree which gave the custody of their child, five years old, to the wife, with permission to the prisoner to take it out with him in the day time, but to return it the same day. The prisoner, having thus obtained the child, brought it to Canada:—Held, following In re Murphy, 26 O. R. 163, 23 A. R. 386, that "child stealing" being mentioned in the existing Extradition Treaty between the United States and Great Britian, as one of the extradition crimes, the Court should, in the absence of any evidence to the contrary, assume the crimes to be identical in the two countries, and the onus did not rest upon the prosecutor of proving what the foreign law was. The evidence taken before the extradition commissioner shewed a case of child stealing under s. 284 of the Criminal Code, and, in the absence of evidence of the foreign law, that was sufficient. Section 284 of the Criminal Code does not exclude the case of father and child. Though what was done was a contempt of Court, yet if a man has committed a crime it does not become the less a crime because it also happens to be a contempt. As to the prisoner's contention that he had acted in good faith because he had been advised that the decree of divorce having been obtained collusively, was a nullity, this was a matter which might properly be set up as a defence by the prisoner upon his trial, but could not be dealt with by the magistrate, who had before him the decree of the foreign Court and the oath of the wife that she did not collude. *In re Watts*, 22 Occ. N. 166, 3 O. L. R. 368, 1 O. W. R. 133.

Embezzlement — *Hearsay Evidence—Removal of Goods—Master and Servant—Larceny.*]—The prisoner was remanded for extradition for the crime of embezzlement committed in Texas. The facts relied on were set forth in the deposition of the owner of the property alleged to have been embezzled. He stated that twenty thousand sheep and other property were placed by him under the charge of the prisoner, as foreman, on a ranch 350 miles distant from the owner's place of residence, in the State of Texas; and that the property was removed without his knowledge from the ranch. There was no evidence except that of the owner as to the removal or as to the receipt by the prisoner of the proceeds of sale, and the owner's evidence as to those matters was merely hearsay:—Held, that the evidence did not shew embezzlement nor larceny, and the prisoner must be discharged. *In re Piaget*, 21 Occ. N. 536.

Foreign Warrant—*Proof of—Return—Discharge.*]—A warrant under the Extradition Act, R. S. C. c. 142, s. 6, for the apprehension of a fugitive was issued upon duly authenticated copies (1) of an indictment found by a grand jury in a foreign country charging the accused with an extraditable offence, (2) of a bench warrant issued upon the said indictment, accompanied by a copy of a return thereto by the sheriff dated 10th April to the effect that he could not find the accused and believed that he was without the jurisdiction, and (3) of depositions of witnesses tending to shew that the accused was guilty of the offence charged. On the hearing, the proceedings above mentioned were put in as evidence subject to objection, and the sheriff gave evidence that the accused whom he identified, had been in custody from about the 1st May until the sittings of the Court at which he was indicted, and that he was at that sittings discharged from his custody:—Held, that, in order to give jurisdiction to a Judge to issue such a warrant, either a foreign warrant of arrest must be proved or an information or complaint must be laid before the Judge at or before the time of the issue of the warrant. That, in case of a foreign warrant, it must be shewn to be outstanding and in full force, and that the evidence failed to establish this. Semble, that in case of a foreign warrant, the original must be produced. The accused was therefore discharged. *In re Bongard*, 5 Terr. L. R. 10.

Forgery — *Uttering Forged Document—Intent.*]—There was evidence that the prisoner handed to a young woman in charge of a telegraph office a letter purporting to be signed by a vice-president of the telegraph company, in these words: "To any employé. Western Union Telegraph Company. This will introduce Mr. J. O. Goelet, a personal friend of the management of this company. Any favours shewn him will be duly appreciated by the corporation and myself." The vice-president whose name was used did not himself sign it, nor authorize any one else to sign it for him, nor was he aware of it. There was evidence that the prisoner shortly afterwards gained the affections of the young woman, and proposed, under the name of J. O. Goelet, to marry her, although he had a wife living. There was no evidence that any person named J. O. Goelet existed. There was no evidence to shew that the prisoner had himself written any part of the document:—Held, that the facts were sufficient to make out a prima facie case that the prisoner presented the document with the intention that the young woman should believe and act upon it as genuine, to her own prejudice, within the meaning of s. 422 of the Criminal Code; and therefore a prima facie case of uttering a forged document, within the meaning of s. 424; and an order for extradition was right. The language used in s. 422 is intended to extend to cases which would not have come within any former common law or statutory definition of forgery in force in Canada. *In re Abeel*, 24 Occ. N. 231, 7 O. L. R. 327, 3 O. W. R. 85.

Habeas Corpus — *Desistment — New Trial—Res Judicata—Certiorari—Extradition*

Commissioner — Jurisdiction — Warrant— Description of Offence—Extradition Treaties.] —A writ of habeas corpus, in an extradition matter, issued upon the order of a Judge, then discharged by the same Judge, does not prevent the issue of another writ and does not constitute res judicata, when: (a) there are new allegations in the petition upon which the second writ is issued; (b) the petitioner has desisted from his first writ before judgment and alleges this desistment in his second petition; (c) the second writ is addressed to the same gaoler and is executed in a different district. 2. The petitioner may validly desist from a writ of habeas corpus at any time before judgment, and if, in spite of the desistment, judgment is rendered, it does not constitute res judicata, and cannot be set up against the second writ. 3. After the issue of a writ of habeas corpus, in an extradition matter, the Judge seised of the writ may issue a writ of certiorari in aid, addressed to the extradition commissioner who has issued the warrant, to return the whole of the proceedings before him, including the information or complaint and the documents relating to it. 4. In order to form an opinion upon the merits, the Judge after the return of the proceedings under the certiorari, is not confined to the warrant of arrest, to see if the extradition commissioner had jurisdiction, but he may go behind the warrant and see what it is founded on. 5. An extradition commissioner has no jurisdiction to proceed to extradition, unless his warrant, as well as the documents upon which it issues, is legal and contains a legal description of an offence mentioned in the treaties. 6. In an extradition matter, the date of committing the offence is an essential element in the description of the offence, and if it is not in the warrant, the warrant is illegal. 7. The warrant, the complaint, and the documents relating to it, must shew clearly that the offence is within the treaties. 8. The extradition commissioner cannot in his warrant change the offence stated in the complaint so as to bring it within the treaty. *Ex p. Gaynor and Greene*, Q. R. 22 S. C. 109.

Kidnapping Child—*Offence of Mother —Judicial Award of Custody to Father—Extraditable Offence.*]—After a judgment declaring the consorts divorced, and awarding the custody of the child to the father, the mother may be extradited for the offence of kidnapping it. The fact that at the time the judgment was pronounced, the mother was in possession of the child, is no bar to the extradition, any more than the fact that she escaped with it between the pronouncing of the oral judgment in divorce and the entry thereof in the register; and the offence to be extraditable, need not be one against the federal laws of the United States, the demanding country. *In re Lorenz*, 7 Q. P. R. 101.

Larceny — *Law of Canada—Extradition Crime.*] — In extradition proceedings the Judge is to find: (1) whether there is prima facie evidence of the commission by the accused of an offence which, if committed in Canada, would be an indictable offence by the law of Canada, and, if it be so found, then (2) whether there is prima facie evidence that the offence is one of the crimes described in the extradition arrangement with the foreign country seeking extradition. "Grand larceny in the second degree" is an extradition crime under the extradition arrangement between Great Britain and the United States of 1889-90. *In re F. H. Martin (No. 1)*, 2 Terr. L. R. 301.

Larceny — *False Pretences — Form of Warrant.*]—"Obtaining money or property by false pretences" is an extradition crime within the meaning of the Extradition Act, and the extradition arrangement between Great Britain and the United States of America. A warrant of committal under the Extradition Act, which recited the Judge's determination that the prisoner should be surrendered in pursuance of the Act, "on the ground of his being accused of grand larceny in the second degree within the jurisdiction of the State of Minnesota," was held sufficient. *In re F. H. Martin (No. 2)*, 2 Terr. L. R. 304.

Locus Standi in Court of Foreign State—*Commissioner of Extradition — Jurisdiction — Interference by Judge — Habeas Corpus — Committal — Territorial Jurisdiction—Judge Seised of Case — Exclusion of Other Judges.*] — Foreign sovereigns and States have the right to appear and intervene in cases before the Court of the province of Quebec. 2. A commissioner of extradition acting under the authority of the Extradition Act, has equal authority with a Judge of the Superior Court; and it is only when, assuming to act as a commissioner, he does something which is ultra vires, or otherwise acts illegally, that Superior Courts, or Judges thereof, become seised with revisory, amendatory, or appellate powers over his acts. 3. When a prisoner, whose extradition is sought, has been brought before a Judge of the Superior Court on a writ of habeas corpus issued before the committal of the accused and before the conclusion of the inquiry before the commissioner, the powers of the Judge are limited to determining whether the commissioner has jurisdiction to make the inquiry, i.e., whether he is legally seised of the case; when, however, the writ of habeas corpus was issued after the committal of the accused, the Judge has the power to review the case against him. 4. The jurisdiction of an extradition Judge or commissioner extends over the whole province for which he has been appointed; he may therefore order a prisoner to be brought before him from any part of the province in which he has been arrested. 5. A Judge of the Superior Court before whom a prisoner, whose extradition is sought, has been brought on a writ of habeas corpus, has absolute control over him until he has passed from the hands of such Judge; and until then no other Judge has the right to interfere in the matter by habeas corpus or otherwise. *In re Greene and Gaynor*, Q. R. 22 S. C. 91.

Perjury — Affidavit in alimony suit in California Court—Jurisdiction of extradition commissioner — Warrant of commitment—Description of offence—Self-imposed oath—Jurisdiction of California Court—Truth of statement in affidavit — Materiality—Evidence of criminality—Canadian crime. *Re Collins* (B.C.), 2 W. L. R. 164.

Prohibition — *Extradition Commissioner — Appeal — Inferior Tribunal — Power of Federal Government to Appoint.*]—An appeal lies to the Court of King's Bench

from a decision refusing to grant a writ of prohibition. An extradition commissioner is not an inferior tribunal within the meaning of art. 1003, C. P. The federal government has power to appoint extradition commissioners. *Gaynor and Greene* v. *Lafontaine*, 7 Q. P. R. 240.

Receiving Stolen Property—*Evidence—Inferences—"Money, Valuable Security, or Other Property"—Ejusdem Generis.*]—Upon a motion for the discharge of a prisoner committed for extradition, no evidence can be considered except that upon which the prisoner stands committed, and into the weight of that evidence, or even its sufficiency to sustain the charge, no inquiry can be made. The fact of the silence of a person accused of receiving stolen property, upon hearing statements made as to his alleged guilt by the person who stole the property, is admissible in evidence as leading to the inference of his guilty knowledge. Having regard to the interpretation clauses of the Extradition Act, R. S. C. 1886 c. 142, crimes referred to in the "extradition arrangement" of 1890 between Great Britain and the United States, come within the Act. The words "other property" used in that arrangement as to the crime of "receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained," must be construed as relating only to things of the same type as "money" or "valuable security;" and a prisoner accused of receiving a stolen pair of shoes was discharged from custody. *In re Cohen*, 24 Occ. N. 359, 8 O. L. R. 143, 4 O. W. R. 103.

EXTRA-JUDICIAL CORPORATION.

See COMPANY.

EXTRAS.

See CONTRACT.

FACTOR.

See PARTNERSHIP.

FACTORIES.

See MUNICIPAL CORPORATIONS — NUISANCE.

FACTORIES ACT, ONTARIO.

See MASTER AND SERVANT.

FACTORY.

See NEGLIGENCE—NUISANCE.

FAIR COMMENT.

See DEFAMATION.

FALSE ARREST.

Absence of Malice—*Arrest not Justified—Aggravation by Pleading—Liability for Arrest.*]—In this case, acting without malice, the defendant caused the arrest of the defendant for obtaining money by false pretences, without first demanding from the plaintiff the proof of his title to certain land which the plaintiff offered as security for the loan of $300, and in an action for the arrest made allegations which he could not support:—Held, that he was liable in damages under Art. 1053, C. C. Under the circumstances he was ordered to pay $25 damages and the costs of an action of the fourth class. *Laliberté* v. *Gingras*, Q. R. 21 S. C. 466.

Absence of Malice — *Probable Cause—Burden of Proof.*]—In an action for damages for false arrest the onus is on the plaintiff to prove that there was not probable cause for the arrest and that the defendant was actuated by malice. Malice alone is not sufficient: there must be absence of probable cause. The theory of probable cause according to English law does not prevail in Quebec; the rule of the French law must be applied. *Giguère* v. *Jacob*, Q. R. 10 K. B. 501.

Action—*Pleading — Reasonable and Probable Cause.*[—A plaintiff may sue for damages for false arrest, alleging that the information, trial, and conviction were irregular, null, arbitrary, malicious, ultra vires, that the conviction was quashed as such upon certiorari, and that the plaintiff has suffered damage owing to the fault, negligence, and imprudence of the defendants, and their employees, such allegations being, in effect, sufficient charges of want of probable and reasonable cause. *Leonard* v. *Delorme*, 6 Q. P. R. 349.

Malice—*Want of Reasonble and Probable Cause—Functions of Judge and Jury—Appreciation of Evidence—Misdirection.*] — In an action for damages for false arrest, the function of the jury is only to find whether the evidence adduced establishes facts from which good faith and reasonable and probable cause, or malice and want of reasonable and probable cause, can be deduced; the inferences of good or bad faith, reasonable and probable cause, or the absence thereof, to be drawn from such facts, is a question of law to be determined by the Court alone; and the jury ought to be guided on questions of law by the Court. In this case the evidence did not establish that the arrest of the defendant had been made in good faith and with probable cause on the part of the defendant; and therefore the verdict of the jury, rendered under the erroneous direction of the Judge, as regards the effect of the evidence upon this point, should be set aside. *Bélanger* v. *Larocque*, Q. R. 25 S. C. 403.

FALSE BIDDING.

See VENDOR AND PURCHASER.

FALSE EVIDENCE.

See CRIMINAL LAW.

FALSE IMPRISONMENT.

See MALICIOUS PROSECUTION.

FALSE PRETENCES.

See CONVERSION — CRIMINAL LAW.

FALSE REPRESENTATIONS.

See DEED—INSURANCE — SALE OF GOODS—TRADE-MARK AND TRADE NAME—VENDOR AND PURCHASER.

FAMILY ARRANGEMENT.

See LIMITATION OF ACTIONS.

FAMILY COUNCIL.

See INFANT.

FARM CROSSINGS.

See RAILWAYS AND RAILWAY COMPANIES.

FATAL ACCIDENTS ACT.

See DAMAGES—MASTER AND SERVANT.

FEES.

See ARBITRATION AND AWARD—BAILIFF — COURTS — REFERENCE AND REPORT.

FELONY.

See CRIMINAL LAW.

FENCES.

Boundary between Farms — "Snake fence"—Relaying — Encroachment. *Armstrong* v. *Annett*, 2 O. W. R. 692.

Line Fence — *Mitoyen—Ownership — Petitory Action.*]—Where a line fence is "mitoyen," that is to say, made and kept up by the neighbouring owners at their joint expense, it is generally divided into equal parts between the neighbours, each one being the sole owner and responsible for his part. 2. In such a case one neighbour has the right to bring a petitory action against the other, where the latter has taken possession of the part of the fence belonging to the other. *Proulx* v. *Renaud*, Q. R. 23 S. C. 511.

FERRY.

Breach of Grant — *Subsequent Lease —Damages — Crown.*]—The Crown, having granted to the suppliant certain ferry rights over a river between two cities, subsequently leased certain property to two railway companies to be used for the construction of a bridge across the river between the cities, and also gave permission or license to a railway company to extend its track over certain property belonging to the Dominion Government on one side of the river, to enable the company to make closer connection with an electric company:—Held, that the granting of the leases and license did not constitute a breach of any contract arising out of the grant of the ferry; and that the Crown was not liable to the suppliant in damages in respect of the matters complained of in his petition. Semble, that, if the leases and licenses prejudiced the rights acquired by the suppliant under his ferry grant, he would be entitled to a writ of scire facias to repeal them. *Brigham* v. *The Queen*, 20 Occ. N. 423, 6 Ex. C. R. 414, 30 S. C. R. 620.

See CARRIERS.

FERRY COMMISSION.

See MASTER AND SERVANT.

FINAL JUDGMENT.

See APPEAL—BILLS OF EXCHANGE AND PROMISSORY NOTES—JUDGMENT.

FINAL ORDER.

See APPEAL—COMPANY.

FINES.

Imposition by Court — *Remission by Municipal Council—Rights of Crown.*]—The petitioner was convicted of the offence of personation at a municipal election in the city of Montreal, and was sentenced by the Recorder to an imprisonment of one month, and to the payment of a fine of $500, and, in default of payment, to a further imprisonment of six months. After the expiration of his term of imprisonment, the city council remitted the fine, and the Recorder's Court having refused to issue the necessary order to the keeper of the common gaol for the petitioner's discharge from custody, he sought to obtain his liberation under

a writ of habeas corpus:—Held, that, although by s. 517 of the charter of the city of Montreal, 62 V. c. 58, it is provided that all fines sued for and recovered in the Recorder's Court shall belong to the city, and by the same statute, s. 518, it is provided that to the council alone appertains the right to remit the whole or part of any fine belonging to the city, yet under 63 V. (Q.) c. 7, which provides that the Crown's right to fines is not affected by provisions of municipal charters, the fine in question did not belong to the city of Montreal, but to the Crown (there being no private prosecutor), and therefore, even if s. 518 of 62 V. c. 58 were constitutional (a question which did not require to be decided in the present case), the city council had no right to remit the fine, and the petitioner was not entitled to be liberated. *Ex. p. Armitage*, Q. R. 11 K. B. 163.

See CRIMINAL LAW.

FIRE.

Destruction of Work in Progress — *Incidence of Loss—Owner or Contractor.*]—The hot water furnace in a house of the defendant having been damaged by frost, the defendant requested the plaintiff, a plumber, to make the necessary repairs. The latter not wishing to do the work for a fixed price, unless it were the price of a new outfit, it was agreed that the plaintiff should make the repairs, furnish the materials, at an advance of 12 to 15 per cent. upon the price which he himself should pay, and should charge 35 cents per hour for the time of his men. During the night which preceded the day which would have seen the completion of the work, the house was destroyed by a fire, which was an accidental one:—Held, that, under these circumstances, the plaintiff not having undertaken the work in furnishing the materials and in charging himself with doing all the work and to render it perfect for a fixed price (art. 1684, C. C.), the loss did not fall upon him, and that he could claim for the time of his men and the price of his materials, such materials being regarded as sold to the defendant according as they were placed in his house. *Jean* v. *Papineau*, Q. R. 19 S. C. 438. (See Murphy v. Forget, ib. 135.)

Negligence in Setting Out — Destruction of neighbour's property—Cause—Admissions — Laches — Costs. *Sutherland-Innes Co.* v. *Shaver*, 2 O. W. R. 237.

Precautionary Measure — *Destruction of House — Municipal Corporation—Liability.*)—A fire threatened to assume large proportions and to destroy a considerable part of a city. It was considered proper, in order to arrest the progress of the fire, to pull down the respondent's house. The circumstances justified such demolition as a measure of prudence and of public safety in respect to that part of the city. But it turned out that the fire was extinguished before it reached the site of the respondent's house:—Held, that the demolition of the house was lawful. 2. That the city corporation was bound to indemnify the respondent. *City of Quebec* v. *Mahoney*, Q. R. 10 K. B. 378.

Railways—*Negligence—Onus of Proof.*]—In an action against a railway company, carrying on business under legislative sanction, to recover damages resulting from a fire alleged to have been caused by a spark from an engine, the plaintiff must, in addition to giving evidence from which it may reasonably be inferred that the fire was caused as alleged, also give some evidence of negligence on the part of the defendants, e.g., in the construction or management or want of repair of the engine, and the onus is not upon the defendants to prove that they have adopted and used with due care reasonable contrivances to avoid the danger of fire. *Oatman* v. *Michigan Central R. W. Co.*, 21 Occ. N. 107, 1 O. L. R. 145.

Setting out — *Adjoining Owners—Escape of Fire — Maintaining of Dangerous Thing—Liability for—Negligence — Costs.*]—Action for damages. The plaintiff and defendant were adjoining land owners, and a fire, started in brush and fallen timber by the defendant for the purpose of clearing his land, spread on to the plaintiff's lands:—Held, applying the principle of Rylands v. Fletcher, L. R. 3 H. L. 330, that the defendant maintained the fire at his own risk, and was responsible for the damage caused by it. Judgment for the plaintiff for $300. Costs on County Court scale only allowed, as the action should have been brought in a County Court. *Crewe* v. *Mottershaw*, 22 Occ. N. 422, 9 B. C. R. 246.

Setting out—Injury to adjacent property—Prairie Fires Ordinance (N.W.T.)—"Let" or "permit" — Abstaining from action. *Macartney* v. *Miller* (N.W.T.), 2 W. L. R. 87.

See LANDLORD AND TENANT — NUISANCE — PLEADING—RAILWAY.

FIRE ESCAPE ACT, B.C.

See INNKEEPER.

FIRE INSURANCE.

See INSURANCE.

FISHERIES.

British Columbia Foreshore Lease—Powers of chief commissioner of lands and works — Non-exclusive right — Injunction. *Capital City Canning and Packing Co.* v. *Anglo-British Columbia Packing Co.* (B.C.), 2 W. L. R. 53.

License — *Renewal—Exclusion of Co-licensee — Tenants in Common—Use and Possession—Profits—Account.*]—A Dominion Government fishery license for one year, without right of renewal, was taken out a number of consecutive years by the plaintiff and the defendants until 1899, in which year and in the year following, the license was taken out and the fishing thereunder was carried on by the defendants. The plaintiff and defendants

owned as tenants in common fishing gear used in fishing under the license. They were not partners in respect of the license, and each catch of fish was divided at the time it was made among such of the licensees as assisted in it. The expense of repairing the fishing gear was proportionately borne by the plaintiff and defendants up to the years 1899 and 1900, when it was borne by the defendants. In the years 1899 and 1900 the fishing gear was possessed and used exclusively by the defendants in fishing under the license:—Held, that the plaintiff was not entitled to a declaration of interest in the license, nor to a share of the earnings thereunder for the years 1899 and 1900, and that the defendants were not liable to account to him for profits from the use by them of the fishing gear in those years. *Guptill* v. *Ingersoll*, 21 Occ. N. 414, 2 N. B. Eq. Reps. 252.

Regulations — *Foreigners — Order in Council — "Temporarily Domiciled."*]—The defendants resided in Pennsylvania; they came to the county of Yarmouth in three successive years for the express purpose of trout-fishing in the inland waters of the county, employing Canadian boats and boatmen; they erected a substantial fishing camp on Crown land at the fishing grounds, in which they lived while engaged in fishing, and where their accoutrements remained from season to season. Each of the defendants was convicted of a violation of certain regulations made under s. 16 of the Fisheries Act:—Held, that an appeal lay to the County Court from these convictions. 2. That the defendants were not "temporarily domiciled in Canada," within the meaning of an order in council providing that foreigners when so domiciled should be exempt from the regulations requiring permits. 3. That they were properly convicted. *Rex* v. *Townsend*, 21 Occ. N. 569.

See REVENUE — WATER AND WATERCOURSES.

FISHERIES ACT.

See CRIMINAL LAW.

FIXTURES.

Buildings — *Crown — Intention.*] — The plaintiff sued for the delivery by the defendants of certain buildings erected by M. upon land the title to which was, at the time of such erection, and continued to be, in the Crown. The plaintiff claimed title through a sale made to her under an execution issued from the County Court of Selkirk, on an alleged judgment recovered by the plaintiff's husband against the defendants, under which execution the bailiff purported to sell the buildings as chattels of M., who erected them about 19 years before action, and lived in them till about 1896; he did not actually reside in them at the time of the seizure under execution, but he took possession again before this action was brought. The buildings were not so affixed to the freehold as to require that anything should be broken or separated by force in order to remove them. M. did not own the land:—Held, that the presumption was that it was not intended that the buildings should become part of the freehold; the onus was on M. to shew that it was so intended. If the buildings became part of the freehold, they became the property of the Crown, the owner of the freehold. But the evidence shewed that M. tried to sell the buildings to the Crown, his actions in so doing being those of an owner, and not of one seeking compensation for the buildings as a matter of grace. *Dixon* v. *Mackay*, 22 Occ. N. 394. Reversed 24 Occ. N. 28.

Hypothecation as Attached to Land —*Separation and Sale—Rights of Hypothecary Creditor—Preferential Claim*]—An hypothecary creditor has a right to be paid in preference to ordinary creditors, according to the order of his hypothec, out of the proceeds of sale of movable articles, immovable by destination and hypothecated as such, sold at a judicial sale as movables separated from the property to which they were attached, subject to his hypothec. *McCaskill* v. *Richmond Industrial Co.*, Q. R. 23 S. C. 381.

Machinery — *Conditional Sale — Lien of Manufacturers—Rights of Mortgagee—Priorities — Statute — Retroactivity.*] — A woollen company purchased from the plaintiffs, on the instalment plan, a steam engine under an agreement in writing which provided that it should not become the property of the vendee until the payment of all the instalments, and should be removable by the vendor on failure of the vendee to pay as agreed. The engine was affixed to the freehold of the vendee by bolts and screws to iron plates embedded in concrete to prevent it from rocking and shifting, and might have been removed at any time without injury to the freehold. It was used for driving the machinery in the factory of the vendee. Default having been made in the payment of the instalments, the engine was claimed by the vendor and also by the defendant, a mortgagee of the land on which the mills were situate and all the mill plant, engines, etc., who took his mortgage after the engine had been installed and without notice of the plaintiffs' claim. The mortgage was foreclosed by the defendant, and the mortgaged property was bought in by him under a sale in equity, for an amount less than the mortgage debt. The plaintiffs were not parties to the foreclosure proceedings, but were aware of the pendency of the same. No report of the sale or motion to confirm was made:—Held, that the engine was sufficiently annexed to the land to become part of the freehold, and passed to the defendant under his mortgage. By the mortgage to the defendant the engine passed as part of the realty, and on his taking possession, if not by virtue of the mortgage alone, all right in the plaintiffs to retake it was put an end to. The Act 62 V. c. 12, s. 8, s.-s. 2, which provides that where goods or chattels are sold on the instalment or hire and purchase system, and the property is not to pass until payment, the right of the owner shall not be affected by such goods or chattels being affixed to the realty, does not apply to past transactions where the goods had been affixed to and become part of the realty before the passing of the Act. *Goldie and McCulloch Co.* v. *Hewson*, 35 N. B. Reps. 349.

Machinery in Factory—Rights of mortgagee—Intention. *Schiedell* v. *Burrows*, 1 O. W. R. 558, 793.

Mortgage—*Plant — Temporary Absence from Factory.*]—A mortgage of an electro-plating factory, "together with all the plant and machinery at present in use in the factory," does not cover patterns used in the business, sent from time to time from the factory to foundries to have mouldings made, and not in the factory at the time of the making of the mortgage. Judgment of Ferguson, J., 1 O. L. R. 229, 21 Occ. N. 186, reversed. *McCosh* v. *Burton*, 21 Occ. N. 371, 2 O. L. R. 77.

Suspensive Conditional Sale—*Replevin — Title — Registration.*] — In order that movable property placed on real property for a permanancy and incorporated therewith, should become immovable by destination, one ownership as well of the movable as the immovable upon which the former is placed, must be vested in the same person. 2. Movable property which, had it been owned by the proprietor of the real estate upon which it was placed, would have become immovable by destination, may, even after a sheriff's sale of the immovable while the movable property was so attached to it, be revendicated by its owner. 3. The title to such movable property preserved under a suspensive conditional sale providing that the ownership shall not pass until full and final payment of the price, and that the property shall not become immovable until that time, and with a stipulation that any money paid on account shall be imputed as rent, is, without registration, a valid and sufficient title. *Leonard* v. *Willard*, Q., R. 23 S. C. 482.

Vendor and Purchaser—*Shop Fittings —Gas and Electric Light Fittings.*]—Shop fittings, consisting of shelving made in sections, each section being screwed to a bracket affixed to the wall of a building, the whole being readily removable without damage either to the fittings or the building, and gas and electric light fittings, consisting of chandeliers which were fastened by being screwed or attached in the ordinary way to the pipes or wires by which the gas and electric currents were respectively conveyed, and were removable by being unscrewed or detached without doing damage either to the chandeliers or the building, were placed in it by the owner of the freehold land on which it stood: —Held, that these articles became part of the land and passed by a conveyance of it to the defendants. Bain v. Brand, 1 App. Cas. 762, Holland v. Hodgson, L. R. 7 C. P. 328, Hobson v. Gorringe, [1897] 1 Ch. 182, Haggert v. Town of Brampton, 28 S. C. R. 174, and Argles v. McMath, 26 O. R. at p. 248, followed. *Stack* v. *T. Eaton Co.*, 22 Occ. N. 322, 4 O. L. R. 335, 1 O. W. R. 511.

FORCIBLE ENTRY.

See LANDLORD AND TENANT.

FORECLOSURE.

See MORTGAGE.

FOREIGN ACTION.

See STAY OF PROCEEDINGS.

FOREIGN CHATTEL MORTGAGE.

See BILLS OF SALE AND CHATTEL MORTGAGES.

FOREIGN COMMISSION.

See EVIDENCE.

FOREIGN COMPANY.

See ASSESSMENT AND TAXES—COSTS—COMPANY—INSURANCE—WRIT OF SUMMONS.

FOREIGN CORPORATION.

See JUSTICE OF THE PEACE—WRIT OF SUMMONS.

FOREIGN DIVORCE.

See HUSBAND AND WIFE.

FOREIGN FORUM.

See SALE OF GOODS.

FOREIGN JUDGMENT.

See JUDGMENT—PARTNERSHIP.

FOREIGN LANDS.

See JURISDICTION.

FOREIGN LANGUAGE.

See CRIMINAL LAW.

FOREIGN LAW.

See EXTRADITION—INSURANCE.

FOREIGN PARTNERS.

See PENALTIES AND PENAL ACTIONS.

FOREIGN PATENT.

See PATENT FOR INVENTION.

FOREIGN VESSEL.

See SHIP.

FOREIGN WILL.

See EXECUTORS AND ADMINISTRATORS.

FOREIGNER.

See REVENUE—WRIT OF SUMMONS.

FORFEITURE.

See CONTRACT — LANDLORD AND TENANT — LIQUOR LICENSE ACT — MINES AND MINERALS—MORTGAGE—PLEDGE— VENDOR AND PURCHASER.

FORGERY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

FORTUNE TELLING.

See CRIMINAL LAW.

FRANCHISE.

See ASSESSMENT AND TAXES—MUNICIPAL CORPORATIONS.

FRANCHISE ACT.

See PARLIAMENTARY ELECTIONS.

FRAUD AND MISREPRESENTATION.

Action for Damages for Fraudulent Representations Inducing Contract — Failure to prove actual fraud. *Scott* v. *Sprague's Mercantile Agency of Ontario, Limited*, 4 O. W. R. 454, 5 O. W. R. 237.

Contract—Action to set aside—Purchase of interest in timber limits—Costs—Parties. *Yelland* v. *Irwin*, 2 O. W. R. 1045.

Contract—*False Representations — Suppression of Fact — Cancellation — Sale of Goods.*] — The plaintiff's traveller obtained from the defendant an order for a quantity of gin, by falsely representing that the combine of large dealers in gin, by which the price of gin had been fixed at certain rates, was still in existence, and would continue to exist, and by suppressing the fact that the plaintiff and three other important members had left the combine, a fact which would have the effect of reducing prices:—Held, that the misrepresentation and suppression of facts were material, inasmuch as the defendant would not have bought at the price agreed on, if he had known the actual state of affairs, and that the defendant was justified in demanding the cancellation of the contract. *Letellier* v. *Lafortune*, Q. R. 26 S. C. 260.

Contract — *Representations Subsequently Made.*]—False and fraudulent representations made by a party to a contract after it has been entered into, which had no influence in inducing it, cannot be deemed sufficient grounds for setting aside the contract, and recovering money paid pursuant thereto. *McNaughton* v. *Hudson*, 37 N. S. Reps. 191.

Contract—*Rescission—Mining Lease.*] — The defendant, by falsely stating to the plaintiffs that he had obtained a lease of a similar mica property from another proprietor for $30 per ton on the mica extracted, which statement he supported by producing a pretended copy of the lease in his own writing, induced them to lease their mica property to him on the same terms. The plaintiffs would not have agreed to the lease but for the deceit practised:—Held, that the representation that the defendant had obtained a lease of a similar property for $30 per ton, being a principal consideration for entering into the contract, the plaintiffs were entitled, under arts. 992 and 993, C. C. to obtain its resiliation. Barnard v. Riendeau, 31 S. C. R. 234, followed. *Doucet* v. *Clercx*, Q. R. 23 S. C. 107.

Conviction for — Fruit Marks Act — Possession of fruit for sale — Packages — "Faced or shewn surface." *Rex* v. *James*, 1 O. W. R. 520, 2 O. W. R. 342, 4 O. L. R. 537.

Crown Patent—Tax sale — Evidence — Letters of deceased solicitor—Costs. *Beatty* v. *McConnell*, 5 O. W. R. 541, 6 O. W. R. 882.

Defence to Action for Insurance Premium—*Evidence of Mistaken Belief.*]—One who has signed (without reading it) a document containing an engagement to take a policy of insurance and to pay the first premium, believing it, upon representations made to him by the person who obtained his signature, to be a request for information with regard to an insurance upon his life, may, in an action for the premium, prove by witnesses the mistake under the influence of which he signed. *Imperial Life Assurance Co.* v. *D'Aigneault*, Q. R. 25 S. C. 75.

President of Company — False statement of earnings—Dividends—Proof of misrepresentations—Witness — Previous statutory declaration—Effect on credibility—Proof of acting on misrepresentations — Damages. *Northern Navigation Co.* v. *Long*, 6 O. W. R. 982, 11 O. L. R. 230.

Sale of Shares — Deceit—Knowledge of vendor—Reliance of purchaser. *Burnett* v. *Nott*, 2 O. W. R. 201.

Sale of Shares—Action for deceit—Cause of purchase. *Clark* v. *Gray*, 1 O. W. R. 370.

Sale of Shares—Fraud of agent—Notice to company—Right to recover money paid. *Stokes* v. *Continental Life Ins. Co.*, 1 O. W. R. 640.

Sale of Shares—Misrepresentations as to value—Damages—Reconveyance of land conveyed as part of consideration—Ratification — Election — Liability of principal for misrepresentations of agent—Costs. *Gardiner* v. *Bickley and Bennett* (Man.), 2 W. L. R. 146.

Undue Influence—*Husband and Wife.*] —Held, upon the evidence in this case, that the transfer of property in question was executed by the husband under the undue influence and coercion of the wife, and without independent advice, and was rightly set aside. *Hopkins* v. *Hopkins*, 21 Occ. N. 14, 27 A. R. 658.

Undue Influence — *Misrepresentation — Ratification.*] — The plaintiff in this action sought to set aside a transfer of land which the defendant had obtained from him by the exercise of what the Judge held to have been both fraud and undue influence, but the defendant contended that the plaintiff had, after the commencement of the action, compromised and settled it by signing the agreement referred to in the judgment:—Held, that the alleged ratification as well as the original transfer had been obtained by fraud and undue influence and that the transfer should be set aside with costs. Bridgman v. Green, 2 Ves. Sr. 627, and Moxon v. Payne, L. R. 8 Ch. 881, followed. *Atkinson* v. *Borland*, 14 Man. L. R. 205.

FRAUDULENT CONVEYANCE.

Action to Set Aside—Absence of fraudulent intent—Creditors lying by—Agreement—Consideration. *Bowman* v. *Winn*, 3 O. W. R. 90.

Action to Set Aside—Absence of collusion and fraud—Sale at fair value—Chattel mortgage — Estoppel — Change of position. *Greer* v. *Fitzgerald*, 5 O. W. R. 339.

Action to Set Aside — Evidence — New trial—Conspiracy—Costs—Parties—Damages. *Canada Carriage Co.* v. *Lea*, 6 O. W. R. 633, 11 O. L. R. 171,

Action to Set Aside — Insolvency of grantor—Intent to defeat creditors—Failure to prove—Husband and wife—Husband going into business—Absence of hazard. *Farquharson* v. *Dowd*, 6 O. W. R. 760.

Action to Set Aside—Execution creditors—Amendment—Action on behalf of all creditors — Family arrangement—Change of trustees — Formation of company — Assignment of interest in estate—Invalidity against creditors — Equitable execution — Form of judgment. *Union Bank of Canada* v. *Brigham*, 5 O. W. R. 142.

Action to Set Aside—Evidence—Depositions on discovery — Written statement of mortgagee—Right of action—Creditors—Subsequent incumbrancer—Insufficient security—Conveyance from parent to child—Valuable consideration—Onus—Corroboration. *Bank of Montreal* v. *Scott*, 3 O. W. R. 523.

Action to Set Aside — *Limitation of Time—Parties.*] — An action to annul acts done by a debtor in fraud of his creditors' rights, must, as regards third persons, be brought within a year from the date when the creditor had knowledge thereof; and all parties to the deed sought to be annulled, must be made parties to the suit. *Smith* v. *Bouffard*, Q. R. 25 S. C. 448.

Action to Set Aside—*Judgment Creditor —Lapse of Execution — Homestead Entry— Trustee—Evidence — Costs.*] — In an action to set aside a conveyance of lands as a fraud upon creditors, if the action is not brought on behalf of all the creditors of the debtor, the plaintiffs must shew that they have obtained both judgment and execution, and if their executions have elapsed for want of renewal before the commencement of the action, the action will fail. A. D. made a homestead entry on certain lands, but by mistake his homestead duties were performed on adjoining lands. The government cancelled his entry but agreed to sell the lands to the nominee of A. D. at $1 an acre. In pursuance of this agreement the lands were sold by the government to one Alloway, as A. D.'s nominee, and Alloway received a patent for the same:—Held, that Alloway held the lands as trustee for A. D., and that a transfer of the lands from Alloway to the defendant, the wife of A. D., for which the defendant gave no consideration, and which was made at a time when A. D. was, to the knowledge of the defendant, in insolvent circumstances, should be set aside as fraudulent and void. A letter written by A. D. to one of the plaintiffs subsequently to the date of the transfer attacked was held to be inadmissible as evidence against the defendant. Costs in case of partial success of the plaintiff. *McDonald* v. *Dunlop* (No. 2), 2 Terr. L. R. 238.

Action to Set Aside—*Parties—Grantor.*] —The execution debtor is not a necessary nor a proper party to an action by execution creditors to set aside a conveyance made by him as fraudulent and void as against them, no relief being claimed against him except costs. Participation in fraud is not a sufficient ground for adding a party for purpose of rendering him liable for costs. *McDonald* v. *Dunlop* (No. 1), 2 Terr. L. R. 177.

Action to Set Aside—Previous action—Different creditors—Res judicata—Intent to defraud—Evidence—Subsequent conveyance—Purchaser for value—Notice—Purchase money—Equitable relief. *Burns* v. *McCarthy*, 4 O. W. R. 29.

Action to Set Aside—*Sale of land à Réméré—Equity of Redemption only Left— Contract Prejudicing Creditors.*]—A sale of land à réméré, which leaves the vendor without other means of paying his debts than that of his right to redeem, is a contract which is calculated to prejudice his creditors, the right to redeem being less valuable than the ownership of the land, and therefore may be set aside as a fraud on creditors. The fact that

the purchaser furnished the vendor with money to pay some of his creditors, is evidence of the fact that he knew that the vendor had creditors, and acted in fraud of their rights. When it is a question of the credibility of a witness who gave evidence before the trial Judge an appellate Court ought only to set a different value on the evidence of such witness when the manner of the witness furnishes strong reasons for so doing, and in doubtful cases ought to follow the trial Judge. *Laflamme* v. *Fortier*, Q. R. 27 S. C. 96.

Action to Set Aside—Voluntary conveyance—Insolvency—Absence of fraudulent intent by grantee—Submission to pay purchase money into Court—Rights of creditors—Equitable relief. *Urquhart* v. *Aird*, 4 O. W. R. 501, 6 O. W. R. 155, 506.

Creditor—Right of, to attack—Mortgagee—Simple contract creditor. *Thomas* v. *Calder*, 1 O. W. R. 26.

Declaration—*Sale—Exemption — Homestead.*]—The defendant Mrs. R. conveyed land to her son without consideration because she thought she might thereby prevent the sale of the land to realize the plaintiff's claim, and both she and her son admitted that fact in this action, and that the property was the mother's and that the son had no interest in it. The plaintiff sought a declaration that the land belonged to the mother and that the son held it only as trustee for her and asked a sale of the land to satisfy the the lien of his registered judgment: — Held, that the plaintiff was entitled to the declaration asked for, but not to a sale, as the property was exempt under s. 9 of the Judgments Act, R. S. M. 1902, c. 91, it being the actual residence and home of the judgment debtor, and not worth more than $1,500. Roberts v. Hartley, 14 Man. L. R. 284, 23 Occ. N. 53, and Merchants Bank v. McKenzie, 13 Man. L. R. 19, distinguished. *Logan* v. *Rea*, 24 Occ. N. 30, 14 Man. L. R. 543.

Exemptions — *Lien of Registered Judgment — Taking Proceedings under, while Debtor in Occupation—County Courts Act—Judgments Act.*]—The registration of a certificate of judgment, under ss. 196 and 197 of the County Courts Act, R. S. M. c. 33, as amended by 55 V. c. 7, s. 5, binds and charges the land of the judgment debtor, though it may be his actual residence or home, and the creditor may take proceedings to realize where ever the defendant ceases to be entitled to claim the property as his exemption. Frost v. Driver, 10 Man. L. R. 319, 15 Occ. N. 169, followed. 2. When a debtor has absolutely conveyed all his interest in the land on which he resides by a conveyance valid and binding on him, even when set aside by the Court as against creditors, the claim that the land is an exemption of his under s. 12 of the Judgments Act, R. S. M. c. 80, can no longer be maintained. Brimstone v. Smith, 1 Man. L. R. 302, and Massey-Harris Co. v. Warrener, not reported, followed. 3. Under such circumstances, when the debtor has made a conveyance of his home, which is fraudulent against creditors under 13 Eliz. c. 5, the creditor is entitled to an immediate order for sale of the property to realize the amount of the judgment and costs. Taylor v. Cummings, 27 S. C. R. 592, distinguished. *Roberts* v. *Hartley*, 22 Occ. N. 185, 23 Occ. N. 53, 14 Man. L. R. 284.

Husband and Wife—Intent—Consideration. *McDonald* v. *Hennessy*, 1 O. W. R. 559.

Husband and Wife—Judgment against husband—Enforcement against lands standing in name of wife—Trust—Registration of certificate of County Court judgment—Voluntary conveyance—13 Eliz. c. 5—Statute of Limitations — Claim arising after conveyance — Costs. *Keddy* v. *Morden* (Man.), 2 W. L. R. 373.

Injunction—Receiver—Money in custodia legis. *Bank of Ottawa* v. *McLeod*, 1 O. W. R. 565.

Insolvency — *Knowledge — Action to Set Aside—Parties—Consideration.*]—The notorious insolvency of a debtor is not sufficient ground upon which to set aside his deed, if he was not aware of the insolvency, and if the one to whom he conveyed was not aware of it. 2. A deed cannot be set aside as made in fraud of creditors of the grantor unless all the parties to the deed are before the Court. 3. Want of consideration in a sale of lands is evidence of simulation and nullity of the sale. *Connolly* v. *Baie des Chaleurs R. W. Co.*, 5 Q. P. R. 383.

Insolvency — *Right of Repurchase — Pledge.*]—A pretended sale by an insolvent, who keeps possession of the articles sold and reserves the right of re-purchasing them within a certain time, is void as constituting a pledge without dispossession; and in any event such sale is void as being fraudulent. *Edgerton* v. *Lapierre*, 5 Q. P. R. 389.

Interim Injunction—*Deposit in Bank—Judgment Creditor—13 Eliz. c. 5.*]—A conveyance by an insolvent debtor in good faith and for valuable consideration, though made with intent to defeat creditors, to the knowledge of the purchaser, is not void under 13 Eliz. c. 5. An interim injunction granted restraining the transfer of property by the grantee in a suit by a judgment creditor of the grantor impeaching the conveyance as fraudulent under the statute 13 Eliz. c. 5. Application refused of a judgment creditor for an injunction order restraining the wife of a debtor from withdrawing money on deposit in her name in the government savings bank alleged to belong to the husband. *White* v. *Ham*, 24 Occ. N. 244, 2 N. B. Eq. Reps. 575.

Prescription—*Fraud on Creditors—Simulated Deeds.*]—The prescription enacted by art. 1040, C. C., applies only to deeds made in fraud of creditors, and not to deeds attacked by creditors assimuiated. *In re Simpson and Gagnon*, 6 Q. P. R. 436.

Status of Judgment Creditor Attacking—Execution—Husband and wife — Evidence—New trial. *Burnett* v. *Bock*, 2 O. W. R. 182.

Summary Application to Set Aside—Rule 1015 et seq. — Evidence — Burden of proof — Local Judge—Jurisdiction—Residence of solicitors. *Wendover* v. *Nicholson*, 2 O. W. R. 1108, 4 O. W. R. 475, 5 O. W. R. 645, 6 O. W. R. 529.

Summary Application to Set Aside—Liability to execution—Evidence—Partnership

— Company — Fraud — Suspicious circumstances — Issue. *Carbonneau* v. *Letourneau* (Y.T.), 1 W. L. R. 273, 2 W. L. R. 113, 493.

Voluntary Deed—*Creditors—Absence of Fraudulent Intent.*]—The defendant's father, believing himself solvent, in January, 1903, conveyed land voluntary to the defendant. At that time he owned shares in the plaintiff company, and had borrowed money from the company upon them, but these shares up to the time of the failure of the company in June, 1903, were saleable above par, and considered then and at the time of the loan ample security for the amount of it. On the evidence, no fraudulent intent on the part of the grantor could be inferred:—Held, that, although, at the time of action brought to set aside the conveyance, the plaintiff company were, by reason of it, hindered in recovering their claim, this was not the necessary consequence of the conveyance, within the meaning of R. S. O. 1897 c. 147, and therefore the conveyance could not be set aside. Spirett v. Willows, 3 De G. & Sm. 293, and Freeman v. Pope, L. R. 5 Ch. 538, specially considered. *Elgin Loan and Savings Co.* v. *Orchard*, 24 Occ. N. 292, 7 O. L. R. 695, 3 O. W. R. 781,

Voluntary Mortgage — *Subsequent Transfer to Creditor—Pressure—Consideration—Priorities—Future Support of Grantor—Statute of Elizabeth.*]—In 1877 C. made a conveyance, by way of mortgage, to H. The conveyance was made without consideration, and in fraud of creditors, and was voidable as against creditors and subsequent purchasers for valuable consideration. In 1896 H., at the request of C., assigned the mortgage so made to W., who was a creditor of C., and pressing for payment:—Held, that the mortgage, although fraudulently made in the first instance, was validated by the assignment to W. for valuable consideration; that the giving of time by W. to C. in connection with the antecedent indebtedness, was sufficient consideration to support the assignment. But the validating of the mortgage would not affect the right to priority of the party claiming under a second mortgage made by C. previously to the assignment of W.:—Held, also, following McNeil v. McPhee, 31 N. S. Reps. 140, that a deed made by C., the sole consideration for which was the future support of the maker and his wife by the grantee, was not founded upon valid consideration, within the Statute of Elizabeth. *Conrad* v. *Corkum*, *Whitford* v. *Corkum*, 35 N. S. Reps. 288.

FRAUDULENT PACKING.

See CRIMINAL LAW.

FRAUDULENT PRACTICES.

See MUNICIPAL ELECTIONS.

FRAUDULENT PREFERENCE.

Judgment — *Attack on — Time.*]— A judgment, and the judicial hypothec thereby created upon the property of the debtor, while he is insolvent, and with the intention of obtaining a fraudulent preference over other creditors of the debtor, may be attacked within the time mentioned in art. 1040, C. C. 2. A judgment is a judicial contract. 3. The time for contesting the fraudulent act of a debtor runs not only from the date of the distribution of his property, establishing his insolvency, but from the date of the knowledge of the fraud by the creditor, that is to say, from the prejudice which the fraudulent act causes him. *Banque Nationale* v. *Common*, Q. R. 22 S. C. 284.

Land Purchased by Debtor — *Patent Issued to Another—Evidence—Presumption.*]—The plaintiff claimed a declaration that a certain piece of land purchased from the Dominion Government in the name of the defendant J. was the property of his brother, the defendant R., and should be sold to realize the plaintiff's registered judgment against R. At the time of the purchase in 1888 R. was indebted to the plaintiff in a sum of over $1,800, and to another person for over $4,000, and it was shewn that J. had never paid anything on the land either for the purchase money or taxes, and had never received anything by way of rent or profits; also that the money for the first instalment has been advanced by another brother, that R. had paid the rest of the purchase money from the proceeds of the land, of which he had always enjoyed the use and occupation; and that the Crown patent for the property was issued to J. in 1892 without his having applied for it. The defendants at their examination for discovery before the trial swore that the whole transaction was bona fide and that R. was J.'s agent throughout in respect of the property, but R. was not called as a witness for the defence. J., also, in a letter to R. written in 1899, had referred to the property as "your land:"—Held, that the proper conclusion upon the whole evidence was that the land was really R.'s property and had been purchased and held in J.'s name for the purpose of preventing creditors from realizing out of it, and that the plaintiff was entitled to the relief asked for. Semble, that when a defendant who is in Court does not give evidence to support his case, the Judge is entitled to make every reasonable presumption against him. Barker v. Furlong, [1891] 2 Ch. 172, followed. *Miller* v. *McCuaig*, 20 Occ. N. 27, 13 Man. L. R. 220.

Simulated Sale of Chattels—*Presumption—Pledge.*]—Although a sale of movable effects may be perfect without delivery, the want of déplacement gives rise to the presumption that the sale was simulated. 2. The laws of the province of Quebec do not permit chattel mortgages, and, in a prominent degree, refuse recognition of subterfuges whereby a creditor may secure advantages at the expense of his fellow-creditors. 3. Where it appears that a pretended deed of sale, without any delivery having taken place, is, in reality, an unlawful pledge of the movables affected, such deed will be annulled. *In re Goyer*, Q. R. 21 S. C. 502.

FRAUDULENT ENTRY OF HORSES AT EXHIBITIONS.

See CONSTITUTIONAL LAW.

FRAUDULENT REMOVAL AND CONCEALMENT OF GOODS.

See CRIMINAL LAW.

FRAUDULENT REPRESENTATIONS.

See VENDOR AND PURCHASER.

FREE LIBRARY.

See MUNICIPAL CORPORATIONS.

FRIENDLY SOCIETY.

See INSURANCE.

FRUIT MARKS ACT.

See CRIMINAL LAW.

FUGITIVE OFFENDERS ACT.

See CRIMINAL LAW.

FUNERAL EXPENSES.

See EXECUTORS AND ADMINISTRATORS—WILL.

FURTHER DIRECTIONS.

See BANKRUPTCY AND INSOLVENCY.

FUTURE RIGHTS.

See COURTS.

GAMING.

Dealing in Shares — *Broker—Payment of Differences—Illegality — Criminal Code, s. 201.*]—The defendant instructed the plaintiffs to sell shares for him; the plaintiffs asked for cover, and the defendant paid $600; no time was fixed for delivery; the plaintiffs asked the defendant for more, as shares were rising, and finally called for $2,400, which the defendant refused to pay. The plaintiffs then, as they alleged, purchased the shares to satisfy their own liability, and sued for amount paid:—Held, that, as no stock was ever delivered or intended to be delivered, and as the intent was to make a profit from the fluctuations of the stock market, the transaction was illegal. *British Columbia Stock Exchange, Limited*, v. *Irving*, 8 B. C. R. 186.

Municipal By-law—*Ultra Vires—Municipal Act—Gambling in Private House—Conviction Quashed.*]—Motion by defendant to quash his conviction by the police magistrate for the city of Toronto for allowing a game of chance to be played for money upon his premises, contrary to a by-law of the city, purporting to be founded on a clause in the Municipal Act empowering the municipality to pass by-laws "for suppressing gambling houses and for seizure and destroying faro banks, rouge et noir, roulette tables, and other devices for gambling found therein:" R. S. O. 1897 c. 223, s. 549 (4.) The legislation pointed at houses where gaming or gambling was practised, and houses kept for such purpose. The inquiry in this case was not as to whether the place in question was a "gambling house," and there was no evidence to induce that conclusion. One instance was proved, or perhaps two, in which cards for gain had been played at the house, but that fell far short of what would be required to attach to it the character of a "gambling house:"—Held, the element of frequency at least was essential to make out that any place is a gambling house, and isolated instances on Sundays, when Jews or others come together in private houses to play cards, were not within the scope of this statute. The by-law far transcends the terms of the enabling statute, and assumes to make illegal that which was not in contemplation of the legislature as expressed in the statute. The conviction should be quashed because resting on an invalid by-law. *Rex* v. *Spegelman*, 5 O. W. R. 33, 9 O. L. R. 75.

Wager — *Illegality—Action to Recover Stake.*]—A deposit of money with a stakeholder to abide the result of a foot-race is not an illegal transaction under C. S. N. B. c. 87, s. 2, and no action will lie against the winner of the bet, who has received the money from the stake-holder after the decision of the event. *Seely* v. *Dalton*, 36 N. B. Reps. 442.

GARANTIE.

Action en Garantie—*Quasi-tort.* —An action en garantie will lie even in a matter of tort or quasi-tort. *Marchand* v. *Dominion Transport Co.*, 7 Q. P. R. 133.

GARNISHMENT.

See ATTACHMENT OF DEBTS.

GAS WORKS.

See COMPANY.

GIFT.

Assignment of Right to Crown Lands—*Notarial Act—Parent and Child—Subsequent Patent to Donor — Rights of Donee—Want of Registration of Act—Sale of Timber — Right to Payment — Apparent*

Owner.]—By a notarial act the parents of a family of twelve living children assigned and abandoned to one of their sons all the rights, privileges, and advantages resulting and belonging to them by virtue of an Act of the legislature assented to 2nd April, 1890, intituled an Act giving the privilege to the father and mother of a family of twelve living children, of a grant of 100 acres of public land. The notarial act recited that the assignment or abandonment was made gratuitously and out of parental love, and purported to give the son the right to enjoy and dispose of such rights and privileges, as owner thereof and in perpetuity, upon the charges, clauses, and conditions imposed by the statute: — Held, Casault, C.J., dissenting, that this act of donation granted to the donee the lot which the donors had claimed from the government, and to which afterwards the latter had given the donors a title of concession; and that it was not necessary to render the donee proprietor of such lot that the donor should make a new assignment. 2. That the acceptance of the gift appeared by the same act, and that the signature of the notary affixed to the act after that of the donee made the act of donation perfect, and it was not necessary that the donee should notify the donors of the perfecting of the act. 3. That the defendants, from whom the donee claimed the value of wood cut upon this lot, they being neither heirs, legatees, nor creditors of the donors, and not pretending to have any right in or to the lot, were not in a position to set up the want of registration of the act of donation. 4. That the defendants, if they paid the amount claimed to the donee, he having the apparent title, would be discharged as regards the heirs of the donors, if they should become entitled by virtue of the want of registration. 5. That the statute 53 V. c. 26 authorizes such a gift inter vivos. *Gélinas* v. *St. Maurice Lumber Co.*, Q. R. 21 S. C. 270.

Contemplation of Marriage—*Breach by Donee—Recovery of Gift.*]—A man and woman were engaged to be married. The man had a claim against the woman for moneys advanced to her or expended on her behalf, in respect of certain business transactions not connected with their contemplated marriage. The man gave the woman a receipt for the amount of his claim, but no money passed: — Held, upon the evidence that the man made the woman a present of the claim in view of the contemplated marriage, and it having been broken off by her act, that he was entitled to recover the amount of his claim. Williamson v. Johnson, 62 Vt. at p. 383, specially referred to. *Ryan* v. *Whelan*, 21 Occ. N. 406.

Deposit in Bank—Parent and child—Improvidence. *Anthony* v. *Cummings*, 2 O. W. R. 647.

Donatio Mortis Causa—Bank deposit in names of donor and donee—Survivorship—Evidence. *St. Jean* v. *Danis*, 1 O. W. R. 790.

Donatio Mortis Causa—*Banker's Pass Book—Delivery of.*]—Held, that a banker's pass book given upon receipt of a deposit, which was numbered, and in which it was stipulated that the deposit would not be repaid without production of the pass book, is a good subject of donatio mortis causa. The book was contemporaneous with the debt, was delivered to the creditor, was essential to the proof of the contract, and the production of it essential before the money could be demanded. The delivery of such a pass book, in anticipation of death, operates as a transfer of the debt due by the bank in respect of the money or deposit, to take effect upon death. *Brown* v. *Toronto General Trusts Corporation*, 21 Occ. N. 28, 32 O. R. 319.

Donatio Mortis Causa — *Deposit Receipts—Cheques and Orders — Delivery for Beneficiaries — Corroboration — Construction of Statute.*]—McD., being ill and not expecting to recover, requested his wife, his brother being present at the time, to get from his trunk a bank deposit receipt for $6,000, which he then handed to his brother, telling him that he wanted the money equally divided among his wife, brother, and a sister. The brother then, on his own suggestion or that of McD., drew out three cheques or orders for $2,000 each, payable out of the deposit receipt, to the respective beneficiaries, which McD. signed and returned to his brother, who handed to McD.'s wife the one payable to her and the receipt, and she placed them in the trunk from which she had taken the receipt. McD. died eight days afterwards: —Held, affirming the judgment in 35 N. S. Reps. 205, Sedgewick and Armour, JJ., dissenting, that this was a valid donatio mortis causa of the deposit receipt and the sum it represented, notwithstanding that there was a small amount for interest not specified in the gift. By R. S. N. S. 1900 c. 163, s. 35, an interested party in an action against the estate of a deceased person cannot succeed on the evidence of himself or his wife, or both, unless it is corroborated by other material evidence:—Held, that such evidence may be corroborated by circumstances or fair inferences from facts proved. The evidence of an additional witness is not essential. *McDonald* v. *McDonald*, 23 Occ. N. 135, 33 S. C. R. 145.

Donatio Mortis Causa — Evidence — Corroboration. *O'Connor* v. *O'Connor*, 2 O. W. R. 737, 794, 5 O. W. R. 10, 701, 751.

Donatio Mortis Causa — *Evidence — Moneys and Notes — Delivery of Keys of Box.*]—The defendant's father, a man of ninety-eight years of age, who had been living in her house, was taken suddenly ill, retired to his room and lay down on his bed, and while she was endeavouring to make him comfortable, he handed her a small wallet containing three keys, and said, "All the money and notes I have got are yours." One of the keys was that of a trunk in his room and another of a cash box (in which the money and notes were) in the trunk. There was evidence that he had a foreboding that it would be his last illness, and that he intended to give his property to the defendant. She retained the keys until his death. In an action by the administrators of his estate for the money and notes:—Held, that there was a good donatio mortis causa. In re Mustapha, Mustapha v. Wedlake, 8 Times L. R. 160, followed. *Charlton* v. *Brooke*, 23 Occ. N. 286, 6 O. L. R. 87, 2 O. W. R. 684.

Donatio Mortis Causa—*Future Succession—Illegal Consideration—Ratification by Will—Power of Executor—Seisin.*] — Judgment in Q. R. 8 Q. B. 511, affirmed. *Consumers' Cordage Co.* v. *Converse*, 30 S. C. R. 618.

Donatio Mortis Causa — *Mortgage.*]— The holder of two mortgages, while very ill and about to start on a journey for the benefit of his health, handed the mortgages and some title deeds to the defendant, telling her that they were for her and that he would execute an assignment of them to her if one were prepared and sent to him. The mortgagee died two months later, no assignment having been executed by him, and one of the mortgages having been partly discharged by him:—Held, that there had not been a donatio mortis causa of the mortgages, but merely an incomplete and effective gift inter vivos, and that the mortgages formed part of the mortgagee's estate. *Wood* v. *Bradley*, 21 Occ. N. 107, 1 O. L. R. 118.

Donatio Mortis Causa—*Savings Bank Deposit Book—Trust—Remedy in Equity.*]— A deceased person in her last illness, and shortly before her death, handed to the defendant a government savings bank pass-book, in which was credited in the names of the defendant and the deceased a sum of money deposited in their names, and at the same time told the defendant to pay to the plaintiff $400 out of the bank, pay some debts owing by the deceased, and her funeral expenses; to which the defendant assented. The money on deposit belonged to the deceased, but could be withdrawn by the defendant on delivery up of the pass-book, whether before or after the deceased's death:—Held, (1) that the pass-book was a good subject of a donatio mortis causa; (2) that there was a valid donatio mortis causa constituted by trust, and enforceable in equity, in favour of the plaintiff. *Thorne* v. *Perry*, 21 Occ. N. 95, 2 N. B. Eq. Reps. 146. Affirmed, 35 N. B. Reps. 398.

Donatio Mortis Causa — *Savings Bank Deposit—Delivery of Pass Book—Evidence —Corroboration.*]—The money at the credit of a savings bank depositor may pass as a donatio mortis causa by the delivery of the savings bank book by the depositor to the donee with apt words of gift, the deposit being subject to the condition that no part of it can be withdrawn without the production of the book. Any evidence which is sufficient to prove any fact against the estate of a deceased person is sufficient to prove a donatio mortis causa; that is, any evidence which is believed and is corroborated as required by the statute may be acted upon. *In re Reid*, 23 Occ. N. 334, 6 O. L. R. 421, 2 O. W. R. 918.

Donatio Mortis Causa — *Solicitor and Client—Absence of Independent Advice—Invalidity of Gift—Corroboration.*]—Held, per Moss, C.J.O., and Garrow, J.A., that where, at the time of the making of an alleged donatio mortis causa, the relationship of solicitor and client existed between the parties, who were the only persons present at the time, no previous intimation of the intention to make the gift having been given to any one, nor any disinterested person called in, nor any advice or explanation of the nature of the proposed gift given to the deceased, such gift could not be supported; Maclennan, J.A., dissenting. Per Osler, J.A.—Apart from the question of confidential relationship, the plaintiff's testimony as a litigant making a claim upon the estate of a deceased person in respect of a matter occurring before the death, had not been corroborated by some other material evidence, as required by s. 10 of the Evidence Act. *Davis* v. *Walker*, 23 Occ. N. 83, 5 O. L. R. 173, 1 O. W. R. 1, 745.

Intention — Incomplete gift — Loan of chattels—Detention—Replevin. *Jewish Colonization Assn.* v. *Baratz* (N.W.T.), 2 W. L. R. 97.

Inter Vivos — *Promissory Notes—Evidence.*]—The defendant, by representations that he had been presented by one M., deceased, with several promissory notes, as a gift, a few days before the death of M., induced the plaintiff to give him a new note for the balance due by the plaintiff to M., on the old notes alleged to have been given to the defendant. The notes in question were not indorsed by the deceased, and there was no evidence of the alleged gift apart from the defendant's statement. In an action by the plaintiff, asking that the note given by him to the defendant be delivered up to him:—Held, 1. That the evidence of the defendant was inadmissible to prove the fact of the donation alleged, the debt represented by the notes being a civil and not a commercial debt. 2. Even if the defendant's evidence were admissible, the words which he deposed as those which had been used by the deceased, viz., "ces billets, je te les donne au cas ou je mourrais," were not sufficient to establish a valid donation inter vivos. *Elkenberg* v. *Mousseau*, Q. R. 19 S. C. 289.

Marriage Portion — *Renunciation of Right to Benefit from Parent's Estate — Heirship.*]—Under the old law, as under the Civil Code, it was possible, in a contract of marriage, for the future wife, receiving a dowry from her father and mother, to renounce her right to any benefit from their estates. 2. This right of légitime continued to exist in the province of Quebec until the date of the Civil Code, but it cannot, since the introduction of the unlimited power of disposing of property by will, be exercised to the prejudice of testamentary dispositions. 3. In order to have a right to légitime, the person claiming it must be an heir; to renounce légitime is to renounce right of succession. 4. The plaintiff, by a marriage contract made in January, 1853, having accepted certain gifts from her father and mother in lieu of her share in their future succession, thereby renounced in advance her right of succession to her father and mother, and it was held that she could not now claim anything from their estates, since she was not an heir. *Duval* v. *Fortin*, Q. R. 23 S. C. 392.

Moneys Deposited in Bank—*Terms of Deposit Receipt—Testamentary Disposition —Costs.*]—Action by John R. Hill against the personal representative of his deceased father, William Hill, for a declaration that a certain deposit receipt and the moneys represented by it were the property of plaintiff and not part of the estate of his deceased father. William Hill, deceased, owned $400 on deposit in the Bank of Ottawa to his credit. He procured from the bank a deposit receipt for this amount "payable to William Hill and John R. Hill, his son, or either, or the survivor." The understanding between William Hill and his son was that it should remain subject to the father's control and disposition while living, and that

whatever should be left at his death should then belong to the son. The father's request to the bank manager, upon which the deposit receipt issued, was "to fix the money so that his son John would get it when he was done with it." He told John himself that he wanted him to get the money when he (the father) was gone. He retained the deposit receipt intact in his own possession, and it was found amongst his papers at the time of his death. These facts are deposed to by the son John, the plaintiff:—Held, upon plaintiff's own evidence, that the purpose of William Hill, deceased, was to make a gift to his son, plaintiff, in its nature testamentary. As such it could only be made effectually by an instrument duly executed as a will. The father retaining exclusive control and disposing power over the $400 during his lifetime, the rights of the son were intended to arise only upon and after his father's death. This was in substance and in fact, a testamentary disposition of the money, and, as such, ineffectual. Action dismissed. Cost out of funds in question. *Hill* v. *Hill*, 5 O. W. R. 2, 25 Occ. N. 41, 8 O. L. R. 710.

Parent and Child—Bounty or bargain — Undue Influence — Mental competence. *Thorndyke* v. *Thorndyke*, 1 O. W. R. 11.

Parent and Child — Business relationship — Undue influence — Onus. *Fisher* v. *Fisher*, 1 O. W. R. 442.

Parent and Child — Confidential relationship — Improvidence — Lack of independent advice — Reference — Account — Inquiries — Statute of Limitations — Costs. *Wendover* v. *Nicholson*, 2 O. W. R. 1108.

Parent and Child — *Fiduciary Relationship—Undue Influence — Principal and Agent — Absence of Independent Advice.*]— In the case of a gift attacked on the ground of undue influence, something more must be shewn than the mere fact that the donee was the agent of the donor, and in the absence of proof of more the donee is not called upon to shew independent advice. The fact in this case of the donee being the son of the donor was held not to alter the principle applicable, the son being, as was found on the evidence, the agent and business manager of the father; and the gift in question, which was made to the son as trustee for his children in consideration of services rendered by the son, was upheld. Judgment in 31 O. R. 414, 20 Occ. N. 65, reversed. *Trusts and Guarantee Co.* v. *Hart*, 21 Occ. N. 493, 2 O. L. R. 251.

Parent and Child — Insurance policy —Indorsement—Undue influence—Failure of proof—Costs. *Holderness* v. *Patterson*, 3 O. W. R. 583.

Replevin — *Concubinage — Partners—Pleading.*] — To an action for replevin of goods the subject of a gift, the defendant may plead that one of the donors was living in concubinage with the donee at the time of the gift. 2. The defendant will not be allowed to plead as against the donee that the gift is void because made by the donor in order to escape his creditors. 3. In replevying articles given by a partnership, it is not necessary to make all the partners parties if a single one of them is detaining the articles in question. 4. The defendant cannot plead to a saisie-revendication that other creditors are claiming the right to the same articles. 5. Preuve avant faire droit will be ordered where the donor alleges that he has sold the articles replevied with the assent of the donee. *Rousseau* v. *Verdon*, 5 Q. P. R. 219.

Revocation — *Condition — Maintenance of Donor.*]—A gift is not an onerous gift equivalent to a sale by a reason only that the donee is obliged to lodge, feed, warm, and maintain the donor. 2. A gift may be revoked on the ground of ingratitude when the donee, who is obliged to lodge, feed, warm, and maintain the donor, uses with regard to the donor base and insulting expressions and drives him from the house. *Rousseau* v. *Majeur*, Q. R. 18 S. C. 447.

Revocation — *Ingratitude — Arrest of Donor by Donee—Judgment in Slander.*]—A donee, who causes to be imprisoned, under a judgment for damages for slander, one of the donors, an old man of 83 years of age and in bad health, thus separating him from his wife, the other donor, also ill, where the donors, who have given all the property they possess, have nothing to pay the damages except an alimentary pension, insaisissable and hardly sufficient for their subsistence, which the donee allows them under the terms of the gift, is guilty of ingratitude which has the effect of revoking the gift. *Depatie* v. *Charbonneau*, Q. R. 22 S. C. 80.

Revocation — *Parties — Co-donee — Transfer of Rights—Mortgage—Exception—Demurrer.*]—It is not necessary, in an action for the revocation of a gift on the ground of ingratitude, to bring before the Court as a party one of the donees who has since, as is alleged in the action, transferred all his rights to his co-donee, the defendant, in consideration of a mortgage upon the property the subject of the gift. The neglect to make a party of one whose presence before the Court is necessary affords grounds at the most for a dilatory exception, but does not cause, as a matter of law, the absolute rejection of the demand. *Jacob* v. *Klein*, 3 Q. P. R. 519.

Savings Bank Deposit — *Instructions —Testamentary Instrument—Survivorship—Duty of Bank — Trustee.*] — M. deposited money in a bank and wrote to the manager of the bank as follows: "Please put the amount of my deposit, $674.89, in the savings department of your bank in such a way that I can draw it during my life, and after my death it can only be drawn by Mrs. B. E." The manager made the entry in the form of a credit to M. and Mrs. B. E., "payable to either or survivor:"—Held, that the legal rights must be decided, after the death of M., by what he instructed the manager to do; what he expressed in the letter was nothing more or less than a testament, and effect could not be given to it, in the absence of the formalities required by the Wills Act. It was not a donatio mortis causa nor a gift inter vivos. The delivery of the pass book to Mrs. B. E. did not alter the case. The bank was not a trustee for M. during his life and after his death for the defendant. *Spruce* v. *Edwards*, 25 Occ. N. 118.

Simulated Donation — *Execution against Donor—Opposition—Contestation by*

Creditor—Claim Arising after Gift.]—Where the donor does not intend to give and does not divest himself of the thing given, and the donee does not intend to receive the thing as a gift, there is no real donation, and art. 1039, C. C., does not apply—this article applying only where there is a real contract, and not where the contract is simulated. The thing which is nominally given may be seized, therefore, as being still in the possession of the donor. 2. A person who only becomes a creditor subsequent to the execution and registration of a simulated deed of donation of movables by his debtor, may nevertheless allege and invoke the fact of simulation, in his contestation of an opposition, based on such pretended deed of donation, made to a seizure effected by the creditor. Lighthall v. O'Brien, Q. R. 6 S. C. 159, approved. *Sisenwain* v. *Roque*, Q. R. 23 S. C. 115.

Undue Influence—*Confidential Relations—Evidence—Parent and Child—Public Policy—Principal and Agent.*]—The principle that, where confidential relations exist between donor and donee, the gift is, on grounds of public policy, presumed to be the effect of those relations, which presumption can only be rebutted by shewing that the donor acted under independent advice, does not apply so strongly to gifts from parent to child or from principal to agent. Thus, in case of a gift to the donor's son, for the benefit of the latter's children, when the son had for years acted as manager of his father's business, when he was the only child of the donor having issue, and when the donor, nine years before his death, had evidenced his intention of making the gift by signing a promissory note in favour of the son, by renewing it six years later, and by voluntarily paying it before he died, such presumption does not arise. Judgment of the Court of Appeal, 2 O. L. R. 251, 21 Occ. N. 493, reversing that of a Divisional Court, 31 O. R. 414, 20 Occ. N. 65, affirmed. *Trusts and Guarantee Co.* v. *Hart*, 23 Occ. N. 36, 32 S. C. R. 553.

Use of Chattels During Lifetime—*Possession — Prescription — Will—Legacy.*]—Held, that, even if family portraits passed under a donation, for the use of the respondent's wife, of furniture, pictures, paintings, engravings, etc., yet this donation, having effect only during her lifetime, lapsed at her death, and the appellant, as the special legatee of the portraits under the will of the donor, became entitled thereto. 2. The respondent, as one of the executors of the donor's will, having knowledge of the fact that the portraits were bequeathed to the appellant, had no possession which could serve for purposes of prescription. *Hart* v. *Hart*, Q. R. 12 K. B. 508.

GOLD COMMISSIONER.

See MINES AND MINERALS — WATER AND WATERCOURSES.

GOODWILL.

See PARTNERSHIP.

GRAND JURY.

See CRIMINAL LAW.

GUARANTY.

Consideration — Novation — Statute of Frauds. *Bailey* v. *Gillies*, 1 O. W. R. 325, 4 O. L. R. 182.

Construction — Future liability. *St. Lawrence Steel and Wire Co.* v. *Leys*, 2 O. W. R. 624, 3 O. W. R. 80, 6 O. L. R. 235.

Duration of — *Promissory Notes — Payment.*]—Where a guaranty given by the defendant to the plaintiff was, that, in consideration of his indorsement for one F. of certain promissory notes given by him for the purchase of a bankrupt stock, he, the defendant, would guarantee the due payment of such notes at maturity, provided he was not called upon to pay in all more than $2,000, the effect thereof was, that it was to continue in force to the full extent of $2,000 until the last of the notes was paid, and the defendant could not before such event relieve himself from liability by transmitting to the plaintiff $2,000 which he had received from F., being the proceeds of a portion of the stock. *Struthers* v. *Henry*, 21 Occ. N. 124, 32 O. R. 265.

Written Statement—Mercantile agency—Creditor not privy to—Statute of Frauds—Sale of Goods. *Harris* v. *Stevens*, 1 O. W. R. 109.

See PRINCIPAL AND SURETY.

GUARDIAN.

Costs—*Right to Retain.*]—A guardian appointed by the Court has a lien and right of retention, from the time of the affixing of the official seal, for his costs as such guardian. *In re Watson and Trudeau*, 7 Q. P. R. 74.

Removal—*Action or Petition.*]—Proceedings for the removal of a guardian ought to be by action and not by petition. *Ex p. McNicholl*, 7 Q. P. R. 50.

Socage—*Parent.*]—As a mother can now inherit from her children, she is no longer capable of acting as their guardian in socage. Guardianship in socage may be considered as gone into disuse, and it can hardly be said to exist in the province. *Hopper* v. *Steeves*, 34 N. B. Reps. 591.

See COURTS—EXECUTION—HUSBAND AND WIFE—INFANT—LUNATIC—MONEY IN COURT.

HABEAS CORPUS.

Adjournment—*Expenses—Costs—Discretion—Leave to Appeal.*]—When the officer or other person to whom a writ of habeas corpus is directed has obeyed it by bringing

up the body and making his return, the Judge or Court may make an order for payment by the applicant of the expenses of such officer or person. Dodd's Case, 2 De G. & J. 510, followed. The costs of proceedings by habeas corpus are governed by s. 119 of the Judicature Act, R. S. O. 1897 c. 51, and are therefore in the discretion of the Court or Judge. Regina v. Jones, [1894] 2 Q. B. 382, followed. Where, in obedience to a habeas corpus, the person to whom it was directed produced the body of an infant before a Judge in Chambers, and filed affidavits in answer to the writ, making his return thereto, and the applicant thereupon applied for an enlargement, which the Judge granted upon condition of the applicant paying to the respondent a sum for counsel fee and expenses, and the applicant appealed from the order embodying such condition to a Divisional Court, which dismissed the appeal, giving the applicant leave, however, to have her original application heard upon payment of the sum already ordered to be paid, and a further sum, the Court of Appeal refused the applicant leave to appeal from the order of the Divisional Court. *Re Weatherall*, 21 Occ. N. 256, 1 O. L. R. 542.

Affidavits—*Irregularity—Crown Rules—Costs.*]—On a motion for a habeas corpus, the preliminary objections were taken that the affidavits proposed to be read in support of the prisoner's discharge had not been served upon the interested party, that the affidavits filed were not indorsed with a memorandum stating on whose behalf they were filed, and that the affidavits had been interlined and corrections had been made therein which had not been initialled and re written in the margin by the commissioner: Crown Rules 15, 163, 17, 352, 348, and 463:—Held, that these Rules governed and the irregularities should not be condoned. The applicant must pay the costs of this application, but should have leave to renew his motion. *In re Hayes*, 21 Occ. N. 87.

Application for — *Forum — Districts — Judges—Court of King's Bench—Consent.*] —A person deprived of his liberty, who wishes to obtain the issue of a writ of habeas corpus, must make his application for such writ to any Judge who may be in the district in which the prisoner is confined, and who is qualified and authorized to exercise his judicial functions therein. 2. If there be no Judge within the limits of such district, the application for a writ of habeas corpus may be made either to a Judge in any adjoining district, or to any Judge in the city of Montreal or in the city of Quebec, according as an appeal from the district where the applicant is confined would be brought to one or the other city. 3. The Court of King's Bench, appeal side, has original jurisdiction at Montreal or Quebec in matters of habeas corpus with respect to any person confined in a district from which appeals are brought to one or the other city; but a Judge of the Court of King's Bench has no jurisdiction to grant an order in Chambers in such matter, unless it be first established that there was no Judge within the limits of the district where the prisoner is confined, when the application was made to such Judge of the Court of King's Bench. 4. Where a Court or Judge is not vested with jurisdiction by law, the consent of the parties cannot confer jurisdiction. *Ex p. Tremblay*, Q. R. 11 K. B. 454.

Jurisdiction — *County Court Judge — Liquor License Act—Conviction—Findings of Fact—Review.*]—A Judge of a County Court has no jurisdiction to grant an order under the Habeas Corpus Act (Consolidated Statutes c. 41) unless the person applying is confined within the Judge's county. Where there is conflicting evidence in a case for selling liquor contrary to the Liquor License Act, 1896, the finding of the committing justice on questions of fact can not be reviewed on an application for an order in the nature of a habeas corpus. *Rex* v. *Wilson, Ex p. Irving*, 35 N. B. Reps. 461.

See ALIENS—ARREST — CRIMINAL LAW—INFANT—JUSTICE OF THE PEACE.

HABENDUM.

See DEED.

HAIL INSURANCE.

See INSURANCE.

HANDWRITING.

See EVIDENCE.

HARBOUR COMMISSIONERS.

Pilot—*Sentence to Pay Fine—Notice to Pilot — Appearance and Defence—Excessive Pilotage.*] — A sentence to pay a fine pronounced against a pilot by the Montreal Harbour Commissioners will not be quashed because the accused was not notified of the inquiry except by letter, if he appeared upon such notice and defended himself against the accusation. 2. The commissioners have no right to condemn a pilot because he has, in pursuance of an engagement with a line of packet boats, piloted more vessels than the commissioners allowed. *Auger* v. *Montreal Harbour Commissioners*, 3 Q. P. R. 553.

HAWKERS.

See MUNICIPAL CORPORATIONS.

HEARSAY EVIDENCE.

See EVIDENCE.

HIGH COURT OF JUSTICE FOR ONTARIO.

See COURTS.

HIGH SCHOOLS.

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HIGHWAY.

See MUNICIPAL CORPORATIONS—WAY.

HIGHWAY CROSSING.

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HIRE OF CHATTELS.

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HIRE RECEIPT.

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HOLDER IN DUE COURSE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

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See COURTS—LANDLORD AND TENANT.

HOMESTEAD.

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HORSE.

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HOUSEBREAKING.

See CRIMINAL LAW.

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HOUSE OF ILL FAME.

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HUSBAND AND WIFE.

I. ACTIONS BY AND AGAINST — PARTIES AND SERVICE, 710.
II. ALIMONY, 717.
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I. ACTIONS BY AND AGAINST — PARTIES AND SERVICE.

Absent Husband — *Service — Authorization of Wife as Sole Defendant.*]—When a husband who is absent is made a party to a cause for the purpose of assisting and authorizing his wife, the defendant, and when it does not appear by the report of the bailiff that any attempt has been made to serve him in this province, a petition to a Judge for authorization by the Court of the wife's being brought before the Court in the action, will be dismissed. *Crédit Foncier Franco-Canadien* v. *Dufresne*, 4 Q. P. R. 244.

Action — *Parties—Joint Liability.*]—An alimentary debt not being joint or indivisible, a person sued for such a debt cannot require another relative equally liable to be added as a party; but, in such a case, the defendant should be ordered to pay the half only of the alimentary allowances demanded. *Larochelle* v. *Lafleur*, Q. R. 19 S. C. 358.

Action against Wife — *Authorization —Service on Husband.*]—A married woman, whose husband, made a party for the purpose of authorizing her, has not been served, may have the action dismissed with costs upon exception to the form delivered by her after having been judicially authorized to appear before the Court. 2. The plaintiff in such a case will not be permitted afterwards to serve process in the action upon the husband so made a party. *Jarvis* v. *Allaire*, 5 Q. P. R. 316.

Action by Wife—*Position of Husband—Judgment for Separation of Property — Default in Execution—Exception to the Form.*] —Where, in an action by a married woman, her husband is made a party only to authorize and assist her, conclusions demanding a judgment in favour of "the plaintiffs" must be interpreted as if they read "the plaintiff" only. 2. It is for a defendant who sets up default in the execution of a judgment ordering separation of property alleged by the plaintiff, to shew, upon his exception to the form, such default in execution. *Drolet* v. *Bélanger*, 5 Q. P. R. 312.

Action to Compel Provision of Maintenance — *Necessities—Relatives — Concurrent Obligations—Parties — Infants —Tutrix.*]—An action for maintenance may be brought, although the claimant, at the date of its institution, is in possession of a sum of money sufficient to supply his or her wants for a short time to come, e.g., in this case, sufficient for about twelve months. It is not necessary that the claimant should wait until the money in hand is totally exhausted before instituting an action to have his right to maintenance determined. 2. The obligation of relatives by blood and relatives by alliance to furnish a maintenance is concurrent, and not successive. The father-in-law may, therefore, be condemned to contribute his proportion of the maintenance of a daughter-in-law, even where it appears that the father is equally able to furnish maintenance. (See Q. R. 19 S. C. 358.) 3. The mother is entitled to sue for aliment on behalf of her children, without being named tutrix to them. *Larochelle* v. *Lafleur*, Q. R. 20 S. C. 184.

Authorization of Wife — *Declaration of Widowhood — Estoppel — Husband actually Alive.*[—Want of authorization of a wife under the control of her husband as a party to a suit is a nullity which nothing can cure, and of which all those who have any interest existing and actual may take advantage. 2. In this case, although the defendant passed for a widow, and although she had called herself a widow in certain deeds and writings, such action on her part did not modify her absolute incapacity to be a party to the suit without authorization, where she swore that her husband was still alive, and the plaintiff had not proved that he was dead. Judgment in Q. R. 21 S. C. 506 reversed. *O'Malley* v. *Ryan*, Q. R. 23 S. C. 94.

Authorization of Wife — *Exceptions by Wife.*]—A married woman can not take part in litigation, or take exception to a judgment, and to the form, without authorization. When her husband, duly called upon with her to authorize her to ester en justice, does not appear, it is deemed a refusal of authorization. In this case it was incumbent on the married woman defendant to have the authorization granted by the Judge before presenting her exceptions. *Charbonneau* v. *Vendette*, 7 Q. P. R. 164.

Authorization of Wife — *Writ — Declaration.*]—If a married woman is sued as being authorized to be a party, it is not necessary that the authorization appear upon the writ; it is sufficient if it is alleged in the declaration. *Derose* v. *Derose*, Q. R. 25 S. C. 273.

Authorization of Wife — *Want of — Exception to Form.*]—In an action by a married woman, separate as to property, who alleges that she is authorized by her husband, actual want of authorization must be alleged by way of exception to the form, and an allegation to that effect contained in a defence will be set aside upon motion. *Comtois* v. *Sénécal*, 6 Q. P. R. 307.

Authorization of Wife — *Pleading — Opposition — Swearing to — Proper Officer —Costs against Wife — Community — Res Judicata.*]—It is not necessary to allege specially the authorization given by a Judge to a married woman to be a party to a cause, if such authorization appears somewhere in the proceedings for which such authorization is required. 2. An opposition sworn to before the prothonotary of a district different from that in which such opposition is filed, is, nevertheless, sworn to before a competent officer: Art. 23 C. P. 3. Although costs have been incurred for the purpose of obtaining possession of real estate of a married woman, it does not follow that she should be obliged to pay them in any other quality than as common, when the judgment which has been pronounced against her for such costs has not determined in which quality she is obliged to pay them. Therefore, it cannot be set up, against an opposition alleging that the married woman is only obliged to pay such costs in her quality of common, that, in view of the judgment in the principal action in which she has been ordered to pay costs jointly and severally with her husband, there is res judicata as to her liability on this head, and a like ground of opposition will not be rejected as frivolous upon a motion for that purpose. *Vidal* v. *Latulippe*, Q. R. 21 S. C. 219.

Community — *Action by — Lunatic Husband—Curator.*]—The action for damages for an injury sustained by a wife commune en biens belongs to the community, and can be maintained only by the husband, or, if he has been interdict for insanity, by his curator. *Sauriol* v. *Clermont*, Q. R. 10 K. B. 294.

Community — *Action by — Personal Injuries to Wife—Witness.*]—A wife, commune, may sue with her husband to recover damages for personal injuries sustained by her, and in such an action has a right to be a witness on her own behalf. *Sullivan* v. *Town of Magog*, Q. R. 18 S. C. 107.

Community — *Action by — Personal Injuries to Wife.*]—The right of action for damages for personal injuries sustained by a married woman, common as to property, belongs exclusively to her husband, and where

she is joined in the action, she may be dismissed from the case on demurrer. *Troude v. Meldrum*, Q. R. 20 S. C. 531.

Community — *Action by — Slander of Wife — Defence in Law.*]—Action for damages for verbal injuries, begun by a married woman, commune en biens, assisted by her husband:—Held, that the claim sued for belonged to the community. 2. That the husband alone could begin an action for and in the name of the community. 3. That the objection should be taken by défense en droit, and not by exception to the form. *Goyette v. Brunelle*, 3 Q. P. R. 464.

Community — *Action by — Wife as Witness.*]—Where in an action pertaining to the community the wife is joined with her husband, the wife has no more right to testify in the cause than if the action had been instituted by the husband alone. *Dunfy v. Kelly*, Q. R. 20 S. C. 231.

Conservation of Wife's Personal Property—*Intervention.*]—A wife contractually separate as to property may be a party to an action without the assistance or the authorization of her husband, or of a Judge, when she seeks the administration and conservation of her personal property; therefore, she may alone intervene in a cause for the conservation of her personal property, such a proceeding being only an act of simple administration *Beauchamp v. Beauchamp*, 4 Q. P. R. 400.

Defamation — *Wife Suing Alone.*] — A married woman common as to property assisted by her husband, or upon his refusal authorized by a Judge, has a personal right of action to protect her honour, and may bring, in her own name, an action for defamation. Such action does not belong solely to the husband as chief of the community, and an exception to the form based upon that ground will be dismissed with costs. *Girard v. Trembiay*, 6 Q. P. R. 63.

Defence — *Nullity of Marriage — Malice —Preuve Avant Faire Droit.*]—In an action for an account by an infant married woman, assisted by her husband, against her tutor, where the latter pleads, by exception to the form, the nullity of the marriage as contracted without consent, preuve avant faire droit will be ordered upon a reply to an exception alleging that such consent has been refused through malice and interest, and against the unanimous feeling of the family council. *Levy v. Levy*, 6 Q. P. R. 250.

Husband Detaining Wife's Property —Action of detinue—Proof of demand and refusal — Evidence of conversion. *Lintner v. Lintner*, 2 O. W. R. 1117.

Joint Action — *Goods Sold—Amendment.*]—The plaintiff was described in the writ of summons as a public merchant, wife of F. A., adding the words "and the said A. to authorize his said wife." The action was for the price of goods sold in the course of the wife's business. The defendant demurred on the ground that, the plaintiff being commune en biens, the price of the goods was due to the community, and therefore the action should have been by the husband alone. After service of the demurrer, the plaintiff made a motion to amend the writ by adding "and the said F. A. also personally." This was granted on payment of costs. *Pleau v. Clément*, 3 Q. P. R. 406.

Joint Defendants—*Service of Process on — Bailiff's Report.*] — Service upon a wife, séparée de biens, but not séparée de corps, of two copies of the writ of summons, one for herself as the principal defendant, and the other for her husband, made a defendant as tutor to the plaintiff's infant children, is sufficient and regular, and is not vitiated by the fact that the bailiff alleges in his report that he served both defendants. *Corbeil v. Beaudoin*, 4 Q. P. R. 44.

Libel by Wife — *Liability of Husband —Verdict for $10—Costs.*]—Action against a husband and wife for damages for a libel published by the wife. At the trial in Vancouver the jury returned a verdict in the plaintiff's favour for $10:—Held, by Martin, J., following Seroka v. Kattenburg 17 Q. B. D. 177, that the husband was liable; and, also, that the costs should follow the event. *Mackenzie v. Cunningham*, 22 Occ. N. 43, 8 B. C. R. 206.

Marriage of Woman Pendente Lite—*Rights of Husband.*]—If, during the pendency of a suit a woman who is a party to the suit is married, with a settlement under which her property is to be separate from that of her husband, the husband may obtain leave to take part in the suit for the purpose of authorizing his wife, but not on his own behalf. *Toupin v. Boule*, 5 Q. P. R. 137.

Married Woman—*Action against.*]—If a woman, although separate as to property and engaged in a business as a merchant, is sued without her husband having been cited to authorize it, the action will be dismissed. *Vanasse v. Bellefeuille*, 7 Q. P. R. 206.

Married Woman Sued as Widow — *Exception to Form.*]—An action against a boarding-house keeper, who was held out and declared herself to be a widow, will not be dismissed on an exception to the form, although the defendant is married and common as to property. *Normandin v. Desrochers*, 7 Q. P. R. 93.

Negligence — *Injury to Wife.*]—An action for damages for injuries caused to a married woman, common as to property, must be brought by her husband alone, and the action will, upon demurrer, be dismissed as to the wife if she is made a plaintiff. *Major v. Paquet*, 6 Q. P. R. 20.

Recovery of Damages for Death of Son — *Claim by both Husband and Wife— Community.*]—In the case of an action to recover damages for the death of a son, the damages and the action to recover them, are personal, and are part of the community of property; and the husband common as to goods has the right to bring such action as the head of the community. When two plaintiffs who sue jointly, designate themselves as husband and wife, without alleging separation as to property, they are presumed to be under a legal community as to property. There is nothing to prevent a husband and wife common as to property from

bringing an action jointly concerning the property of the community. *St. Laurent* v. *Telephone Co. of Kamouraska*, 7 Q. P. R. 293.

Slander of Wife — *Sole Right of Husband to Sue.*]—In the case of community of goods, the husband has the sole right of action for recovery of damages for slander of his wife. 2. The wife cannot be joined with the husband in the institution of the action, even if the latter acts in his personal capacity and not solely to authorize her; and upon demurrer, the demand of the wife will be dismissed. *Caron* v. *Larivé*, 5 Q. P. R. 332.

Tort — *Personal Injuries of Wife.*]—A married woman common as to property may be joined with her husband in his claim as head of the community to damages, a part of which is based upon personal sufferings which she has endured. *Prévost* v. *Village of Ashuntic*, Q. R. 24 S. C. 408.

Wife Sued Alone—*Absence of Authorization—Nullity — Objection — During — Costs.*]—Proceedings taken against a wife under the control of her husband, before being authorized either by the husband or by the Court, are absolute nullities, and will be so declared upon demand even after enquête and at the argument. 2. Nevertheless, a demand of authorization of the defendant made by the plaintiff also at the argument should be granted. 3. No order can be made as to the costs of the proceedings of either party before such authorization. *Demers* v. *Dufresne*, 4 Q. P. R. 130.

Wife Sued Alone — *Authorization by Husband — How Shewn.*]—In an order that a wife may be regarded as authorized by her husband as defendant to an action, it is not sufficient that he should have assisted during the trial by giving instructions to the attorney and by being present, but it is necessary that such authorization should appear on the record, or that the husband should be a party to the cause with his wife, without which he escapes the jurisdiction of the Court. *Thibaudeau* v. *Désilets*, Q. R. 10 Q. B. 183.

Wife Sued Alone—*Defamation—Service of Process—Authorization of Husband—Execution of Judgment — Goods of Community.*]—A wife commune en biens, defendant in an action, is not validly served with process unless copies of the writ and declaration are served upon her husband as well as upon her. Service at the conjugal domicil, made by leaving with the husband for the defendant a copy of the writ in which the husband is named "to authorize his wife," is insufficient and void. 2. In an action for damages for slander, against a wife under control of her husband, default of authorization of the wife, either by the husband or the Court, vitiates and renders void a judgment recovered against her. 3. The facts that the husband has received from the bailiff the copy of the writ and declaration intended for his wife, that he has chosen the advocate for the defence, and that he has been present at the hearing, do not constitute a sufficient authorization, and the husband has the right to maintain an opposition to the judgment against the wife in an action for damages being executed against the property of the community. *Thibaudeau* v. *Désilets*, 4 Q. P. R. 1.

Wife Sued Alone — *Promissory Note — Exception.*]—A married woman, séparée de biens, may be sued alone, without her husband, upon a promissory note signed by her; and an exception to the form upon the ground that her husband was not made a party as authorizing her, is not well founded. *Fraser* v. *Ogilvie*, 3 Q. P. R. 424, 546.

Wife Sued Alone — *Separation — Lunacy of Husband—Contract of Wife—Authorization—Curator—Act of Commerce—Exception to Form.*]—1. A wife who has obtained a judgment declaring her séparée de biens, but has not caused it to be executed, and has in a contract made by her described herself as a wife séparée de biens, without mentioning whether such separation is contractual or judicial, cannot set up that her contract is void by reason of the non-execution of such judgment. 2. The curator of the husband declared interdit has no capacity to authorize any act of the wife, and, consequently, is not a necessary party to an action against the wife. 3. When a husband is interdit, it is for the Court to authorize the wife, and such authorization may be given at any stage of the cause. 4. Keeping boarders is not an act of commerce necessitating marital authorization; and, even if it were, the absence of authorization would not be a ground of exception to the form. *Parizeau* v. *Huot*, 3 Q. P. R. 395.

Wife Sued with Husband as Mis-en-cause—*Failure to Serve Husband—Authorization of Court.*]—The plaintiff sued "Dame M. P. D. the wife, separate as to property, of F. J. B., and the said F. J. B., made a party to assist his said wife." Process in the action was served on the wife herself on the 15th November, 1901, at Quebec. It was not served on the husband. The action was entered in Court on the 21st November. On the same day the defendant alone, without the assistance of her husband, and without any authorization, appeared by her advocates. On the 23rd November, the plaintiff served those advocates with a notice of a petition, alleging that the husband had left the country not to return, that it was impossible to serve him, and praying that the Court would authorize the defendant to defend the present cause, which was an hypothecary action: —Held, that the wife not being able in such an action to defend without the assistance or the authorization of her husband, or the authorization of the Court, the plaintiff, who sued her as assisted by her husband, and who could not, because the husband had left the country, effect service upon him, should, before bringing the action, have obtained the authorization of the Court. Such authorization should be refused him in the case as it stood, because the wife was not regularly before the Court; and the service which had been made and the appearance which she had entered by her advocates were absolutely void. The question how a married woman may be authorized or served, discussed. *Crédit Foncier Franco-Canadien* v. *Dufresne*, Q. R. 21 S. C. 108.

Wife Suing Alone — *Account — Partition.*]—A married woman, common as to property, cannot bring an action for an ac-

count and en partage unless her husband be made a co-plaintiff with her in the suit. *Giroux* v. *Giroux*, Q. R. 19 S. C. 372.

Wife Suing Alone—*Dismissal of Action—Petition of Husband to Set Aside.*]—A husband, commune en biens, cannot proceed by way of petition to set aside a judgment dismissing the action of his wife on the ground of her incapacity to sue, which ground was raised ore tenus. *Lefebvre* v. *Dominion Wire Mfg. Co.*, 3 Q. P. R. 417.

II. ALIMONY.

Cruelty—Desertion — Provocation—Misconduct of wife — Offer to receive back. *Payne* v. *Payne*, 6 O. W. R. 428, 10 O. L. R. 742.

Cruelty not Amounting to Personal Violence—Threats — Wife leaving husband—Justification — Condonation—Costs—Custody of infant child. *Lovell* v. *Lovell*, 5 O. W. R. 401, 640, 6 O. W. R. 621.

Cruelty—Condonation. *Reynolds* v. *Reynolds*, 6 O. W. R. 782.

Desertion — *Offer to Receive Wife Back—Bona Fides.*]—The defendant in an action for alimony offered to "receive the plaintiff as his wife at any time when she is prepared to come and reside with and accept the home he is able to provide for her and conduct herself as a wife reasonably should;" but the trial Judge, being satisfied upon the evidence that desertion had been proved and that the defendant's offer was not honestly made, but solely for the purpose of avoiding a judgment for alimony:—Held, following Rae v. Rae, 31 O. R. 321, that such offer, under the circumstances, was not sufficient to defeat the plaintiff's claim. *Emes* v. *Emes*, 25 Occ. N. 19, 15 Man. L. R. 352.

Divorce Suit — *Evidence of Husband.*]—In a suit for divorce and alimony the respondent, the husband, is not a competent witness on the question of alimony. *Norton* v. *Norton*, 23 Occ. N. 17.

Husband without Means.] — A husband, who is not able to earn his own living and who has no income beyond what will barely support him, will not be ordered to pay an alimentary allowance to his wife. *Dupuis* v. *St. Mars*, 5 Q. P. R. 404.

Interim Alimony — *Action for Separation — Desertion.*]—A wife, sued for séparation de corps, who, without the authorization of the Court, has left the conjugal domicil, has no right to an alimentary allowance from her husband pending the action. *Protain* v. *Prévost*, Q. R. 23 S. C. 8.

Interim Allowance — *Petition for — Time.*]—A petition for interim alimony cannot be presented before the expiration of the time for filing the preliminary pleadings. *Christin* v. *Christin*, 3 Q. P. R. 387.

Interim Allowance — *Petition for — Time — Residence of Wife.*]—A petition by the wife for a provisional allowance, in an action for separation from bed and board, will not be granted until the wife's place of residence pending the suit has been fixed by the Court. *Lauzon* v. *Hébert*, 3 Q. P. R. 448.

Interim Order—Application for—Affidavit—Irregularity—Direction to have re-sworn—Alleged insanity of plaintiff—Necessity for next friend — Merits of action—Chances of ultimate success—Discretion. *Thrower* v. *Thrower*, 3 O. W. R. 541.

Interim Order — *Defendant without Means.*]—An order for interim alimony will not be made against a defendant where it is not shewn that he has the means to comply with such an order, if made. *Pherri* v. *Pherril*, 24 Occ. N. 62, 6 O. L. R. 642, 2 O. W. R. 1096.

Interim Order — Disbursements — Foreign defendant—No assets in jurisdiction—Provision for wife. *Mosher* v. *Mosher*, 4 O. W. R. 407.

Interim Order—Right to — Amount—Disbursements. *Lovell* v. *Lovell*, 5 O. W. R. 401, 640, 6 O. W. R. 621.

Interim Order—*Husband's Offer to Pay for Necessaries.*]—It is not a sufficient answer to a motion for interim alimony where cruelty is alleged, that the husband has offered to allow the wife to get whatever is necessary for the house, in which both are living but not on friendly terms, and to pay for all such goods. Snider v. Snider, 11 P. R. 140, distinguished. Lovell v. Lovell, 5 O. W. R. 401, 640, followed. *Theakstone* v. *Theakstone*, 10 O. L. R. 386, 6 O. W. R. 400, 436.

Interim Order——*Time for Applying—Commencement of Allowance—Merits.*] — 1. Under Rule 433 of the King's Bench Act, an application for interim alimony may be made as soon as the defence is filed or the time for filing one to the original statement of claim has elapsed. 2. Unless the statement of claim makes a demand for a specific sum by way of interim alimony, as contemplated by Rule 601 of the King's Bench Act, it should only be allowed from the date of the order, not from the commencement of the action. 3. The merits of the defence set up should not be looked into or considered on an application for interim alimony. Foden v. Foden, [1894] P. 307, Campbell v. Campbell, 6 P. R. 128, and Keith v. Keith, 7 P. R. 41, followed. *McArthur* v. *McArthur*, 15 Man. L. R. 151, 1 W. L. R. 1.

Judgment—*Liability of Estate of Husband—Costs.*]—The obligation to furnish an alimentary allowance is not transmissible to heirs as a debt of the estate of the person who was under obligation to furnish the allowance, even when such person has been adjudged to do so in his lifetime, in this case by a judgment pronounced in an action for separation begun by a married woman against her husband, which judgment required the husband to pay alimony to his wife during her life. In this case, also, the costs were divided, even the costs of the appeal, on account of the relationship of the parties and the fact that they had proceeded by way of joint factum under Arts. 509 et seq., C. P. C. *Davidson* v. *Winteler*, Q. R. 13 K. B. 97.

Justification of Wife Leaving — Violence—Adultery — Misconduct of wife. *Falvey* v. *Falvey*, 2 O. W. R. 476, 832.

Lunatic Wife — *Admission to Asylum—Removal by Relatives.*]—A husband on two occasions procured the release of his wife from the provincial lunatic asylum, where he had procured her admission as a lunatic. After her second release she grew worse, becoming violent and dangerous, and he again applied for her admission, which was refused, it being insisted that she would only be admitted as a warrant patient, whereupon he took proceedings under s. 12 of R. S. O. 1897 c. 317, which resulted in her being committed to gaol as a dangerous lunatic, whence she was transferred to the asylum. Her relatives then applied to the Lieutenant-Governor and obtained her release, and she went to live with them, and claimed alimony:—Held, that an action therefor would not lie. *Hill* v. *Hill*, 21 Occ. N. 525, 560, 2 O. L. R. 289, 541. Leave to appeal refused in Hill v. Hill, 22 Occ. N. 107, 3 O. L. R. 202.

Multiplication of Actions.] — If a husband has sued his wife in separation from bed and board, and recovered by judgment in his favour, while a similar action by the wife is still pending, the latter, who has demanded a pension alimentaire in her action, will not be permitted to bring a new action for alimony, as she can obtain such alimony in the case already pending. *Hainault* v. *Beland*, 5 Q. P. R. 382.

Wife Leaving Husband—Misconduct—Cruelty—Justification—Antenuptial contract—Construction — Enforcement — Declaratory judgment. *Edgeworth* v. *Edgeworth*, 2 O. W. R. 404, 3 O. W. R. 71.

III. Community.

Action by Wife — *Authorization by Husband — Declaration—Personal Property.*]—Article 1298, C. C., does not take away from a wife, common as to property, the right of exercising, with the authorization of her husband, personal actions belonging to her. 2. It is necessary, however, that the declaration in such an action should make it appear that the personal property which she claims does not fall into the community. *Donohue* v. *Donohue*, 4 Q. P. R. 300.

Action by Wife Alone—*Tort—Refusal of Husband to Join.*]—A married woman, commune en biens, authorized de justice upon the refusal of her husband, may maintain an action in her own name alone to recover damages for injuries to her person and her honour by acts of violence of which she has been the victim. 2. Although the compensation which she obtains may be the property of the community, the principle of the action must chiefly be considered, and it has a character peculiarly related to her person and honour, which she has the right to protect even against her husband. *Baker* v. *Gingras*, Q. R. 20 S. C. 85.

Death of One Consort — *Continuation of Community — Inventory—Prescription.*]—At the time of the dissolution of community by the death of one of the consorts in 1845, the common assets consisted of bare necessaries of small value and exempt from seizure. There was no inventory or procès-verbal de carence made, and, subsequently, the survivor contracted a second marriage. In an action by a child of the first marriage claiming a share in continuation of community:—Held, that there was no necessity for an inventory of property of such insignificant value, and that failure to make an inventory or procès-verbal re carence did not, under the circumstances, effect a continuation of community. Judgment in Q. R. 9 O. B. 44 reversed. *King* v. *McHendry*, 20 Occ. N. 373, 30 S. C. R. 450.

Gift by Husband to Child — *Fraud on Wife.*] — A gift of the property of the community made by the husband in favour of one of the children of the marriage cannot, whatever the advantages which the gift confers upon the child, even to the prejudice of the other children of the marriage, constitute a fraud as against the wife so as to enable her to claim that the gift shall be set aside as a nullity. *Jodoin* v. *Birtz*, Q. R. 22 S. C. 443.

Plea of — *Exception to Form.*]—Community between husband and wife, who are sued for damages, although it is a ground of defence upon the merits, may be pleaded by an exception to the form if it constitutes a good defence. *Shank* v. *Bourassa*, 4 Q. P. R. 287.

Rights of Wife—*Pleading—Demurrer.*]—A wife common as to property has no right of action to reclaim rights which belong to the community. 2. The proper procedure to have an action dismissed as regards her, is by demurrer and not by exception to the form. *Desrouard* v. *Fortier*, 5 Q. P. R. 250.

IV. Divorce.

Adultery of Husband — *Laches—Custody of Children.*]—The petitioner and respondent were married in 1886, and there were two children of the marriage. The respondent left Nova Scotia in 1889. He committed adultery before leaving Nova Scotia, but the petitioner did not become aware of it until shortly before instituting these proceedings:—Held, that the petitioner was not guilty of any laches; and a decree for the dissolution of the marriage must pass with costs; the petitioner to have the custody of the children. *Fraser* v. *Fraser*, 21 Occ. N. 356.

Adultery of Husband—*Laches — Custody of Children — Alimony—Costs.*]—The parties were married in 1876, and had several children. The respondent committed acts of adultery in 1891, and proceedings were brought against him under the Bastardy Act, but were unsuccessful. The petitioner was aware of the proceedings, but the Judge Ordinary found that the respondent persuaded the petitioner at the time that he was innocent. She continued to live with him until 1899, when, in consequence of his cruelty, she left him, taking her children with her. She thereupon instituted proceedings for the dissolution of the marriage, alleging cruelty and

adultery at various times during the preceding ten years:—Held, that the petitioner was not guilty of laches; and there must be a dissolution of the marriage on the ground of adultery; the petitioner to have the custody of the children, and the respondent to have access to them on terms to be settled; the sum to be paid by the respondent for alimony and for maintenance of the children to be settled by the Registrar; the petitioner to have the costs of the petition and action. *Baker* v. *Baker*, 21 Occ. N. 357.

Adultery of Wife — *Previous Separation.*]—Held, that where a husband separates from his wife on account of her intemperance, but makes no provision for her, thereby leaving her without any means of support, he is not entitled to a divorce on the ground of adultery committed by her after the separation. *Forrest* v. *Forrest and Morton*, 21 Occ. N. 219, 8 B. C. R. 19.

Ecclesiastical Decree—*Effect of—Civil Consequences — Community — Alimony — Custody of Child—Maintenance—Costs of Action.*]—In spite of an ecclesiastical decree declaring a marriage invalid on account of a relationship in the fourth degree between the contracting parties, in respect of which there has been no dispensation, the civil consequences of the marriage continue until a judgment of a civil Court declares it void. Therefore, pending a suit by the husband against the wife to have the marriage declared void, the husband and wife continue to be regarded as such in their civil relations, the community stipulated for in the marriage contract continues to exist and the husband continues to be obliged to support his wife. 2. A child being born of such marriage after the canonical decree and after the husband and wife have ceased to live together, and such child being only a few months old, the wife, who naturally has the guardianship and care of the child, has a right, without being appointed guardian, to obtain from the husband, pending the suit, a proper provision for the child. 3. the wife has also the right to obtain from the husband alimony for herself pending the suit. 4. She has also the right to obtain from the husband, head of the community stipulated for in the marriage contract, a provision for her costs of a defence in good faith to the action. It is for the plaintiff, as head of the community, to defray all the expenses of the action both on his own part and on the part of the defence; such expenses are a charge upon the community. *Levesque* v. *Ouellet*, Q. R. 22 S. C. 181.

Effect of Divorce not Actually Declared Void.]—A woman who has obtained a divorce and has re-married, has no status as the widow of her first husband upon his death, so long as her divorce has not been declared void. *Fitz-Allan* v. *Ricutord*, 6 Q. P. R. 111.

Foreign Divorce—*Criminal Conversation—Alienation of Affections—Damages.*]—The plaintiff's wife separated from him with, as was found on the evidence, his consent, and after some years obtained a divorce from him not valid according to the law of this province. She then went through the ceremony of marriage with the defendant, and lived with him as his wife for some years before this action, which was brought to recover damages for criminal conversation and alienation of affections. The latter branch was abandoned at the trial, but on the former the jury allowed $5,000 damages, and judgment was entered for this sum:—Held, MacMahon, J., dissenting, that, notwithstanding the separation and the divorce, the action lay, but that the damages were grossly excessive, and on this ground, and on the ground of improper reception of evidence, a new trial was granted. Per MacMahon, J. The separation and subsequent conduct amounted to an absolute abandonment of his wife by the plaintiff and were a bar to the action. Judgment of Anglin, J., 3 O. W. R. 561, reversed. *Milloy* v. *Wellington*, 24 Occ. N. 318, 3 O. W. R. 37, 561, 4 O. W. R. 82; 6 O. W. R. 437, *C. v. D.*, 8 O. L. R. 308.

Foreign Divorce—*Invalidity—Service on Wife.*]—In a suit to declare void a marriage contracted by a woman who had obtained in the United States of America a divorce from her first husband, upon the ground that such divorce is void, that question cannot be decided upon an exception to the form alleging that the service of process was illegal and that the woman should have been served as the wife of the first husband. *Stephens* v. *Miller*, 5 Q. P. R. 397.

V. Liability of One for Contracts and Torts of the Other.

Contract of Wife for Husband—*Invalidity—Firm Name—Presumption.*]—When a wife, separate as to property, who has, by request of her husband, registered a declaration to the effect that she is carrying on business under a certain firm name, contracts obligations for her husband under such firm name, such obligations are absolutely void, according to Art. 1301, C. C. 2. The facts that she has derived no personal advantage from the business carried on under such firm name, and that the business has chiefly served to pay the debts of her husband, make a strong presumption that she has carried it on for her husband, and that she has contracted for him. 3. She cannot engage her property for the purpose of guaranteeing the obligations of her husband. *Honan* v. *Duckett*, Q. R. 19 S. C. 418.

Debts of Husband—*Contract of Wife to Pay—Invalidity—Stranger.*]—A contract by a married woman séparée de biens, to pay the debts of her husband, is void, even where the wife declares to the creditor that she is borrowing to pay her own debts, which the lender believes. Such a contract is an absolute nullity, and the nullity of it may be invoked by a third party, the holder of an immovable mortgaged to guarantee such obligation. Judgment of Court of Review, Q. R. 13 S. C. 129, reversed. *Globenski* v. *Boucher*, Q. R. 10 K. B. 318, 321.

Debts of Husband Before Dissolution of Community—*Obligation by Wife—Nullity — Public Policy.*]—Judgment of the Superior Court in review, 6 Rev. Jur. 13, affirming judgment in Q. R. 15 S. C. 445, affirmed for the reasons given in the Courts below. *Bastien* v. *Filiatrault*, 31 S. C. R. 129.

Debts of Wife—*Costs—Application by Husband for Custody of Children.*]—Where a wife leaves her husband without justification, she is not entitled against him to her costs of unsuccessfully resisting his application by habeas corpus for the custody of the children of the marriage. *In re McPhalen*, 10 B. C. R. 40.

Debts of Wife Before Marriage—*Married Women's Property Act — Property Acquired from Wife — Evidence — Deductions.*]—The Married Woman's Property Act, R. S. N. S. 1900 c. 112, s. 25, makes a husband liable for the debts of his wife contracted by her before marriage "to the extent of all property whatsoever belonging to the wife which he has acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him" in respect to any such debts, etc. In an action against the defendant R. for goods supplied to his wife before marriage, evidence was given by the plaintiff's solicitor to shew that on the examination of the wife before a commissioner, the defendant R. was present and stated, among other things, that he had received from his wife three promissory notes, for amounts and due at dates which he mentioned:—Held, that the evidence was not admissible, the best evidence being that taken down by the commissioner, and which he was required to return to the Court. 2. That there was nothing in the evidence to bring the notes referred to within the language "property belonging to the wife" which the defendant had "acquired or become entitled to" through the wife, or to discharge the burden resting upon the plaintiff to shew acquisition or title by or in the husband.—Semble, where money was received and payments made by the husband, that the plaintiff would have to shew a balance remaining in his hands, and that he could not put in one side of the transaction without the other. *Bauld* v. *Reid*, 36 N. S. Reps. 127.

Goods Ordered Through Wife—*Acknowledgment—Domicil — Change.*]—Assuming that the defendant and wife were separated as to property, the fact that the household linen goods in question were purchased on the credit of the husband and for him, although charged in an existing account against the wife, was sufficiently established by proof of his knowledge of the transaction throughout, his personal visit to the vendor, his furnishing a sketch of his own family crest to be embroidered on the linen, by his promise to pay for the goods on arrival, and by a letter to the vendor's attorneys in which he stated that he had authorized the insurance of the goods at his own expense, and further said, "I do not see why I should be called upon to pay him (the vendor) until I have received the goods and checked them off before a linen expert, etc." 2. Change of domicil from Montreal to New York is not legally established by the fact that a person born in Montreal, and having his domicil there, went to New York and married there, and subsequently lived in New York State for a time with his mother-in-law, and at a hotel, and then in a furnished house in New Jersey. There must be actual residence in the place selected, coupled with the intention of the person to make it the seat of his principal establishment: Art. 80, C. C. *Calcutt* v. *Tiffin*, Q. R. 23 S. C. 175.

Tort of Both—*Slander—Action against Both—Liability of Husband—Business Carried on by Both.*]—The wife of the defendant managed and worked his cheese factory. With the object of taking away customers from the plaintiff, who was in the same business, she stated that he gave bad measure, and did so in the presence of her husband, who made the same statement. The plaintiff brought, on account of these statements, an action for damages against the husband and wife, but without conclusion against the latter:—Held, that the husband is responsible for the acts of his wife during the tacit execution of the duties he has intrusted her with, and therefore for the damages which she has caused by uttering injurious words against some person, even if no special conclusions have been taken against her by the action. *Dubuc* v. *Trottier*, Q. R. 19 S. C. 202.

Tort of Husband—*Keeping Vicious Dog —Separate Property of Wife.*]—A wife, separate as to property, is liable for damages caused by a vicious dog belonging to her husband, and harboured at the common domicil which is her private property, particularly when it is proved that the dog was so harboured not only without any objection or protest on her part, but with her full consent and approval, notwithstanding that she had full knowledge of the dangerous character of the dog. *Hugron* v. *Statton*, Q. R. 18 S. C. 200.

Torts of Wife—*Community—Participation—Defamation.*]—A husband in general is not responsible for the torts or quasi-torts committed by his wife, nor is the community responsible for them. 2. There is no exception to this rule except when the husband has acted as his wife's accomplice or has participated in the tort or quasi-tort by having aided, ordered, or authorized her. 3. In this case (slander), the husband having ordered his wife to be silent and to go into the house as soon as he understood what she was saying, there was no fault or complicity on his part, and therefore, no responsibility of the husband or of the community for the wrong committed by the wife. *Fortier* v. *Demers*, Q. R. 21 S. C. 543.

VI. Marriage Contract.

After-acquired Property — *Donatio Mortis Causa—Separation — Replevin—Parties.*]—A marriage contract stipulated that "all the furniture which should be brought at any time into the dwelling-house of the future husband and wife, by either one of them, should belong to the future wife." A séparation de corps having been adjudged between the husband and wife, the wife, accompanied by her father, went to the house of the husband, and removed the furniture, which she alleged belonged to her by virtue of the clause above quoted, and this furniture was transferred to the house of her father, where she lived. The husband replevied the furniture in an action brought against the father and daughter:—Held, that the clause quoted constituted a gift of future property, mortis causa, and, therefore, the furniture remained the property of the husband until his death. That, in the circumstances, the husband was right in bringing his action against both his wife and her father. *Goyette* v. *Leclerc*, Q. R. 23 S. C. 542.

After-acquired Property—*Contestation of Opposition—Donatio Mortis Causa.*]—A gift to the wife of all the household furniture in the dwelling-house of the husband and wife is a gift of property present and future, which is not a gift mortis causâ, but which takes effect at any time, and there is nothing illegal or immoral about it. 2. It may be alleged in answer to the contestation of an opposition, based upon such a gift, that certain of the effects were bought by the husband after the marriage for his wife to replace like effects which had been sold, this answer being an explanation of an allegation of the opposition raised by the contestation. *Allan* v. *Trihey*, 5 Q. P. R. 298, Q. R. 24 S. C. 12.

Ante-nuptial Contract—*Specific Performance—Will — "Voluntarily"—Executor—Costs.*]—A woman, in consideration of a man marrying her, promised him that she would make him her sole heir: he married her, and after marriage, in acknowledgment of the ante-nuptial contract, she signed a writing stating 'I voluntarily promised . . before and after marriage that I would make him my sole heir . . by virtue of this contract he is my sole heir.' She died having (after the acknowledgment) disposed of her estate by will to the exclusion of her husband:—Held, that the ante-nuptial agreement was a binding contract on the part of the woman to leave by will her property to her husband, and should be specifically performed; and that "voluntarily" in the acknowledgment meant "of her own free will." —Held, also, on the facts, that the executor named in the will acted reasonably in defending the action and resisting the appeal, and was therefore entitled to charge the estate for his costs. *Raser* v. *McQuade*, 11 B. C. R. 161.

Community—*Stipulation for Usufruct of Survivor—Registration.*]—A contract of marriage provided that there should be universal community, and also stipulated a donation to the surviving consort of the usufruct during life, of all property existing at the dissolution of the community by the death of the consort dying first. Nothing existed in the community, at the date of its dissolution, that would not have formed part of it by mere operation of law:—Held, that the stipulation, in such marriage contract, of usufruct in favour of the surviving consort, although described as a donation, is not a donation but a marriage covenant, and is not subject to the formality of registration. Art. 1411, C. C. *Huot* v. *Bienvenu*, Q. R. 21 S. C. 341.

Construction—"*Meubles et Effets Mobiliers*"—*Money in Bank.*]—Unless the context clearly indicates the contrary, the words "meubles et effets mobiliers" in a marriage contract comprise money deposited in a bank. *Sabourin* v. *Montreal City and District Savings Bank*, Q. R. 21 S. C. 391.

Donation a Cause de Mort—*Creditors of Husband.*]—A gift to the wife in a marriage contract, "of all the furniture and furnishings which the expected husband will have in his dwelling at the time of his death," is a gift of goods in the future, and, therefore, made à cause de mort. This grant takes effect only on the death of the husband, and in his lifetime the wife has no right to the goods granted; she has no title to prevent the seizure and sale thereof at the suit of the creditors of the husband. *Dorval* v. *Préfontaine*, Q. R. 14 K .B. 80.

Donation of Chattels—*Time of Taking Effect—Death of Husband—Rights of Creditors in Lifetime.*]—A clause in a marriage contract providing that, "In consideration of the honest and sincere affection which the intended husband bears towards the intended wife, he makes a donation to her of all his furniture, furnishings, and movable effects to be actually found in his dwelling house, and also of all such furniture, furnishings, and movable effects which the intended husband may in the future have in his dwelling house," does not amount to a gift in favour of the donee taking effect in the lifetime of the donor, but should be considered a gift "à cause de mort," which would take effect only at the death of the husband, and, as a consequence, the goods thus given, becoming the property of the wife only at the death of the husband, can be seized and sold to satisfy a judgment against the latter. *Préfontaine* v. *Dorval*, Q. R. 26 S. C. 301.

Douaire Prefix Une Fois Paye et Sans Retour—*Civil Code—Interest of Wife—Interest of Children.*]—A clause in a marriage contract, made before the coming into force of the Civil Code, by which the husband gives his wife the sum of $4,000, douaire préfix une fois payé et sans retour, interpreted according to the law prior to the Code, does not import a departure from the well established principle underlying dower, of usufruct in the wife and property in the children; and therefore the children have a vested proprietary interest in the dower and become entitled to claim it on the death of the parents. *Birks* v. *Kirkpatrick*, Q. R. 27 S. C. 51.

Gift During Coverture—Seizure by execution creditor. *Shuttleworth* v. *McGillivray*, 2 O. W. R. 250, 5 O. L. R. 536.

Gift to Wife—*Contemplation of Death—Creditors.*]—A clause in a marriage contract, stipulating that all household effects and furniture which shall at any time be brought into the conjugal domicil by either of the consorts shall belong to the wife, is neither a gift of present property, nor a gift of future property made in contemplation of death permissible in a marriage contract, but purports to be a gift of future property inter vivos, and is illegal and of no effect. Moreover, such stipulation is void inasmuch as it would enable the husband to confer benefits upon his wife during the marriage, contrary to the terms of Art. 1265, C. C. The husband has, therefore, a right, notwithstanding such clause, to oppose the seizure, by a judgment creditor of his wife, of articles of furniture acquired by him after the marriage and brought into the common domicil. Judgment in Q. R. 16 S. C. 273 reversed. *Desrochers* v. *Roy*, Q. R. 18 S. C. 70.

Gift to Wife—*Expenditure in Purchase of Land—Deed — Notice — Registration—Rights of Mortgagee—Rights of Children of Marriage.*]—The husband by the marriage contract promised to expend, within five years, $7,000, which he gave to his wife (separate as to property), in the pur-

chase of an immovable in the name of the wife, but in which she should have only the usufruct, and the children the property. After the marriage, the wife, with the authorization of her husband, bought an immovable in her own name. There was nothing either in the deed of sale, nor in any other writing, which shewed that this purchase was made with the money of the husband, or with the sum given in the marriage contract; on the contrary, everything shewed that it was the wife who was purchasing for herself and with her own money, and so the matter appeared at the registry office. Afterwards the wife borrowed money from the plaintiff, and, with the authorization of her husband, hypothecated the immovable as her absolute property to the plaintiff. The plaintiff having caused the immovable to be seized under his execution against the wife, her children claimed it by virtue of the marriage contract, and they proved orally that the intention of the husband and wife, at the time of the purchase, was to make it in order to conform to the contract of marriage, and that the husband had himself furnished the purchase money in fulfilment of the contract:—Held, that the claim of the children could not, upon such testimony, prevail against the plaintiff; that, in order to prevail against him, the deed of sale or some other registered deed should have mentioned that the purchase was made with the sum given by the husband to the wife; that the plaintiff, in consequence, had the right to cause the whole of the immovable to be sold as the property of the wife. *Gaudreau* v. *Tetu*, Q. R. 20 S. C. 402.

Gift to Wife—*Future Payment—Insolvency of Husband—Ranking on Estate—Registration—Creditors—Loan by Wife.*]—In a marriage contract the giving by the future husband to his future wife of a sum of money which she "shall have and take, when it shall please her, sur les plus clairs et apparent biens of the future husband," is lawful when such gift has been made without fraud, when the husband was not insolvent at the time of the contract, and when the debt of the creditor contesting the gift did not exist at such time, and the wife can claim such sum at the time of the subsequent insolvency of the husband and rank therefor with the other creditors of the husband upon the estate. 2. The marriage contract may be set up in opposition to the subsequent creditors of the husband, if it has been registered at the place where the husband and wife had their domicil at the time it was entered into, even when it has not been registered until later at the place where the bankruptcy has been declared. 3. A contract of loan between husband and wife is valid, and the wife can claim the sum lent against the estate of the husband equally with the other creditors. *In re Denis and Kent*, Q. R. 18 S. C. 436.

Gift to Wife—*Insolvency of Husband—Dower—Renunciation of—Hypothec—Registration.*]—A gift in a marriage contract by the intending husband to his intended wife, of the furniture and household effects garnishing the common domicil, is deemed to be by gratuitous title, and is invalid as against a creditor of the husband, donor, who was insolvent at the time of the marriage. 2. Dower, whether customary or conventional, is not a gift but a debt, and is by onerous title. This rule applies to conventional dower even when it exceeds the customary dower which it replaces. 3. Renunciations to dower are to be very strictly construed in favour of the wife; and even where, as in the present case, the marriage contract contains what purports to be a renunciation to dower, whether customary or prefix, the stipulation of a life rent payable to the wife, which rent is expressly stated to be in lieu of dower, is in effect a stipulation of conventional dower, and is governed by the same rules which govern dower. Such stipulation cannot, therefore be set aside by a creditor without proving knowledge by the wife of her husband's insolvency at the date of the marriage. 4. The wife has no legal hypothec to secure the payment of conventional dower, and the registration of a mere notice, as provided for legal hypothec, without description of the property affected, does not charge the husband's property with a hypothec in favour of the wife. *Turgeon* v. *Shannon*, Q. R. 20 S. C. 135.

Universal Community—*Don Mutuel—Registration.*]—A marriage contract contained a clause whereby the contracting parties made to each other a mutual gift of all the property which might belong to the one who should die first, "en jouir en usufruit sa vie durant à sa caution juratoire et gardant viduité." The only property affected belonged to the community:—Held, that the donation was within Art. 1411, C. C., and did not require registration, as the clause was divisible, and the stipulation as to universal community merely a marriage covenant, and not subject to the rules and formalities applicable to gifts. Judgments in Q. R. 21 S. C. 341 and 12 K. B. 44, affirmed. *Huot* v. *Bienvenu*, 33 S. C. R. 370.

VII. Matrimonial Offences.

Adultery of Wife—*Mourning.*]—The mourning equipment of the wife is part of her portion as survivor, and a wife who has been adjudged guilty of adultery cannot recover the value of such mourning (deuil) from the heirs of her husband. *Bradley* v. *Ménard*, Q. R. 18 S. C. 382.

Alienation of Husband's Affections—*Action for — Summary Dismissal.*]—The plaintiff sued another woman for alienating her husband's affections, committing adultery with him, and inducing him to leave the plaintiff and go to a foreign country, whereby she was deprived of his support and services and of the statutory right to proceed against him for non-support:—Held, following Lellis v. Lambert, 24 A. R. 653, that the action would not lie; and a summary order was made under Rules 259-261 striking out the statement of claim as disclosing no reasonable cause of action, and dismissing the action. *Lawry* v. *Tuckett-Lawry*, 2 O. L. R. 162.

Criminal Conversation — *Damages—Limitation of Actions.*]—The Statute of Limitations is not a bar to an action for criminal conversation where the adulterous intercourse between the defendant and the plaintiff's wife has continued to a period

within six years from the time the action is brought:—Quære, Does the statute only begin to run when the adulterous intercourse ceases, or is the plaintiff only entitled to damages for intercourse within six years preceding the action? Judgment in 27 A. R. 703, 21 Occ. N. 19, affirmed. *Bailey* v. *King*, 21 Occ. N. 399, 31 S. C. R. 338.

VIII. Separate Estate of Wife.

Action by Wife against Husband—*Promissory Note—Indorsement—Contract.*]—In 1882 the respondent made a promissory note for $10,000 in favour of J. L., payable on demand. This note was indorsed by the payee to her sister, the maker's wife. In 1899 an action was brought on the note by the indorsee against her husband, the maker, which, at the trial was dismissed on the ground that the Married Women's Property Act did not authorize such an action: 19 Occ. N. 326. On appeal to the Court en banc the Judges were equally divided in opinion, and the judgment at the trial stood affirmed: 20 Occ. N. 136, 32 N. S. Reps. 1. By R. S. N. S., 5th ser., c. 94, a married woman in Nova Scotia holds her separate personal property, not reduced into possession by her husband, as if she were a feme sole, and the Act of 1898, c. 22, gives her the same civil remedies against every person, including her husband, as an unmarried woman has:—Held, reversing the judgment, that the note sued on was personal property of the wife not reduced into possession, and the action could be maintained under the above Acts by the wife against her husband. *Michaels* v. *Michaels*, 20 Occ. N. 450, 30 S. C. R. 547.

Administration by Wife — *Agent's Commission.*]—Although a wife, separée de biens, can by herself do all acts and make all contracts which concern the administration of her property, she cannot, without the authority of her husband, validly contract to give a commission to an agent who shall effect a sale of her immovable property, such a contract not being an act of administration. *Bourdon* v. *Bourdeau*, Q. R. 18 S. C. 136.

Chattels — *Domicil—Married Women's Property Ordinance, N. W. T.—Construction—Constitutional Law—N. W. T. Act.*]—Whether a husband and his wife are living together or apart, her domicil in legal contemplation follows his. Where, therefore, a man domiciled in the Territories married in Ontario a woman domiciled there, and thereafter they resided in the Territories, it was held, that as to furniture belonging to the wife brought by her to the Territories, the question whether it passed to the husband jure mariti or was the wife's separate property, depended upon the law of the Territories.—Ordinance No. 16 of 1889, enacted: "A married woman shall in respect of her personal property, have all the rights and be subject to all the liabilities of a feme sole, and may alienate and by will or otherwise deal with personal property as if she were unmarried:"—Held, that this Ordinance referred only to such property of a married woman as was covered by the provisions of the N. W. T. Act, R. S. C. 1886, c. 50, ss. 36-40. *Conger* v. *Kennedy*. 2 Terr. L. R. 186; reversed 28 S. C. R. 397.

Contract—*Pleading—Proof of Separate Estate.*]—In an action against a married woman on a contract, it is not necessary under the Married Women's Property Act of 1895 (N. B.) to allege on the record, or prove on the trial as a fact, that either at the time the contract was made, or at the time the action was commenced, she had or was possessed of separate property. *Johnson* v. *Jack, Johnson* v. *Bank of Nova Scotia*, 34 N. B. Reps. 492.

Estate of Deceased Wife—Liability for funeral expenses—Married Woman's Property Acts—Duty of husband—Indemnity. *Re Sea* (B.C.), 1 W. L. R. 460.

Judgment against Married Woman — *Payable out of Separate Estate — Proceeds of Insurance Policy on Life of Husband—Trust in Favour of Wife.*]—The defendant judgment debtor was named as sole beneficiary in the contract of insurance upon the life of her husband, and sec. 159 of the Insurance Act, R. S. O. 1897 ch. 103, in such cases enacts that "such contract shall (subject to the right of the assured to apportion or alter as hereinafter enacted) create a trust in favour of the said beneficiary or beneficiaries, according to the intent so expressed or declared; and, so long as any object of the trust remains, the money payable under the contract shall not be subject to the control of the assured," etc.:—Held, the effect of this section was to create a statutory trust of the money payable under the policy in favour of the wife without restraint upon anticipation, but subject to be defeated upon the happening of either of two contingencies, the wife predeceasing her husband, or the revocation of her appointment as beneficiary and appointment of a child or children in her place as beneficiary under s. 160 of the Insurance Act. Neither of these contingencies happened, and upon the death of the husband, the absolute right to the money became vested in the wife. Her original interest in the trust was separate property within the contemplation of the Married Women's Property Act, and it necessarily follows that the fruits of the trust must also be regarded as separate property, and as such liable to satisfy the judgment obtained by plaintiffs. *Doull* v. *Doelle*, 4 O. W. R. 525, 5 O. W. R. 238, 253, 413, 6 O. W. R. 39, 10 O. L. R. 411.

Land Acquired by Wife — Separate property—Seizure of crops by execution creditor of husband—Work done by husband on land. *Harvey* v. *Silzer* (N.W.T.), 1 W. L. R. 360.

Married Woman's Property Act (B. C.)—Summary application for delivery up of title deeds—Land Registry Act Amendment Act (B.C.), 1905, s. 46. *Re Mellor* (B.C.), 2 W. L. R. 17.

Mortgage by Wife to Secure Loan to Husband—*Nullity—Consequent Nullity of Security—Principal and Surety—Status of Surety to Invoke Nullity.*]—A hypothec given by a married woman upon personal property to secure the payment of a loan made to her husband, in order to enable the latter to make a composition with his creditors, among whom is the lender, is null and void, being in contravention of art. 1301, C. C. 2.

Such nullity being absolute and d'ordre public, involves the nullity of everything which is attached to it; and in this case, the security given to guarantee the obligation of the wife is a subsidiary obligation, depending upon the existence of the principal obligation, and consequently the nullity of the principal obligation necessarily involves the nullity of the security. 3. An obligation prohibited by law is not a natural obligation, and it cannot be the subject of security. 4. Such nullity, being d'ordre public, is inherent in the debt; it is an infirmity in the debt which the surety may invoke as well as the wife herself. *Sutherland* v. *Bérard*, Q. R. 13 K. B. 128.

Mortgage for Benefit of Husband—*Burden of Proof.*]—By the true construction of art. 1301 of the Civil Code of Lower Canada, a wife's mortgage of her separate property is void, both as to the debt contracted and as to the disposition, if it is in any way for her husband's purposes. Ignorance on the part of the lender that the money was borrowed for the husband's purposes is of no avail, and the burden is on him to prove that it was not so borrowed. Judgment in Trust and Loan Co. v. Kerouack, Q. R. 12 K. B. 281, affirmed. *Trust and Loan Co. of Canada* v. *Gauthier*, [1904] A. C. 94.

Obligations Undertaken for Husband—*Promissory Notes—Burden of Proof—Presumption.*]—Although the obligation of the wife who is separate as to property, when she binds herself with her husband, is not null if the obligation be for her own business and profit, the burden of proof is on the creditor to establish that it was for her business and profit, and in the absence of such proof the presumption is that she bound herself for her husband. 2. The wife separate as to property will not be condemned on promissory notes signed by her, which were either renewals of notes made and signed by her husband alone, or which were given for goods furnished on the husband's order, and charged to him in the books of the creditor. *McClatchie* v. *Gilbert*, Q. R. 24 S. C. 387.

Personal Property — *Jus Disponendi—Matrimonial Domicil—Conflict of Laws.*]—The law of the matrimonial domicil regulates the rights of the husband and wife as to the movable property of either of them:—Held, therefore, where the matrimonial domicil was Ontario, that personal property which by the law of Ontario was the separate property of the wife, remained such on the removal of the parties to the Territories; and furthermore was subject to the provisions of the Ordinances of the Territorial Legislature, subsequently passed, relating to the personal property of married women. *Brooks* v. *Brooks*, 2 Terr. L. R. 289.

Rents and Profits — *Sale of Land — Necessity for Concurrence of Husband.*]—A married woman married before the commencement of the Married Women's Property Act, 58 V. c. 24, is entitled under s. 4 (1) to the rents and profits of her real estate during her life, but may not, without the concurrence of her husband, dispose of her real estate so as to deprive the husband of his tenancy by the curtesy. *Debury* v. *Debury*, 21 Occ. N. 510. 2 N. B. Eq. Reps. 278.

Sale of—*Payment of Husband's Debt—Nullity — Reimbursement of Purchaser.*]—A married woman, separate as to property, may sell one of her immovables to pay the debt of her husband—in this case to secure the liberation of her husband then under arrest at the suit of one of his creditors—and such sale does not fall under the prohibition of art. 1301, C. C. 2. In any event, even if the wife could assert the nullity of the sale, she could succeed in the action only upon offering to reimburse the purchaser the amount which he has paid her, over and above the price of sale, to extinguish her personal debt. *De Kerouack* v. *Gauthier*, Q. R. 20 S. C. 320.

Separate Business — *Consent of Husband—Certificate—Place of Doing Business.*]—Under the provisions of R. S. N. S., 5th ser., c. 94, s. 53, when a married woman does, or proposes to do, business on her separate account, in addition to filing her husband's consent thereto, she is to record a certificate in writing setting forth her name and that of her husband, the nature of the business, and the place where it is, or is proposed, to be carried on, and giving, "if practicable," the street and the number on the street; and where the nature of the business, or the place where it is carried on, is changed, a new certificate shall be filed accordingly. The plaintiff, who carried on business as a grocer in a city, under a license from her husband, enabling her to carry on such business, filed a certificate giving the particulars required by the Act, except as to the street and the number on the street, as to which it was set out that it was not practicable to do so, as the premises had not yet been selected. Goods claimed by the plaintiff as her separate property having been levied upon by the defendant, as sheriff of the county, under a writ of execution for the husband's debt:—Held, that it was incumbent upon the plaintiff to select the premises before filing her certificate, the provision being intended to apply not only to towns having streets named and numbered, but to towns which had not streets so named and numbered:—Held, also, that the words "the place" meant the place in the city, town, or municipality where it was proposed to do the business, and that where the place was changed a new certificate must be recorded. *Pearce* v. *Archibald*, 34 N. S. Reps. 543.

Sheriff's Sale — *Purchase by Husband—Folle Enchère.*] — A husband, séparé en biens, may validly purchase at a sheriff's sale an immovable belonging to his wife; and, if he fails to pay the price, the usual proceedings for resale may be taken against him. *Buchanan* v. *O'Brien*, Q. R. 18 S. C. 343.

IX. Separation.

Abandonment of One Claim — *Proceeding with the Other — Allegations Required—Notice.*]—In an action for separation from bed and board and as to property the plaintiff may abandon her claim for separation from bed and board and proceed with that for separation of goods only, provided always that the allegations in the action and the conclusions to be drawn therefrom be

stated in a manner to justify the latter claim, and that the notice required, in cases of separation of goods, to be given in the newspapers, has been given. *Rielle* v. *Dubreuil*, 7 Q. P. R. 66.

Action for — *Evidence of Parties.*]—In an action for séparation de corps the husband and wife may be heard as witnesses, even in support of the action. *Talbot* v. *Guilmartin*, Q. R. 10 K. B. 564.

Action for — *Misnomer of Wife—Wife Separate as to Property—Marriage Contract—Exclusion from Community—Exception to Form.*]—A husband sued for separation from bed and board cannot object that all the prenomens of his wife are not set out, especially where the marriage contract and extract from the marriage register are filed, and where she uses the prenomen by which she is known, and which is mentioned in her petition pour ester en justice. 2. The fact that a woman, suing for separation from bed and board, is described in the writ as separate as to property, whilst in the contract of marriage (which she has not alleged) exclusion from community is stipulated for, is not a ground for exception to the form. *Roy* v. *Quesnel*, 7 Q. P. R. 136.

Action for — *Particulars.*]—A wife suing for a separation from her husband will be ordered to give particulars shewing when and how her husband has seriously injured her, and in what way he has rendered an existence in answer impossible and insupportable by her; indicating in what circumstances or with what person he has held slanderous conversations charged against him, and in what circumstances he refused to answer when she spoke to him. *Melançon* v. *Bédard*, 4 Q. P. R. 147.

Action for—*Trial—Reconciliation—Preliminary Hearing.*]—Where, in an action for séparation de corps, the parties have, with the assent of the Court, divided the hearing to allow one of the parties, who alleges a reconciliation, to prove the facts constituting it, reserving the right to prove the other facts alleged by the parties, after adjudication upon the reconciliation, the opposite party will not be permitted to reopen the hearing to prove facts having nothing to do with the reconciliation before adjudication by the Court upon this first question. *Christin* v. *Lafontaine*, 5 Q. P. R. 198.

Alimentary Allowance—*Authorization of Wife.*]—A wife who is not authorized to leave the conjugal domicil cannot demand an alimentary allowance, in the course of an action for séparation de corps. *Protain* v. *Prevost*, 5 Q. P. R. 103.

Alimentary Allowance — *Rights of Wife against Relatives — Past Debts.*]—A wife, common as to property, abandoned by her husband, who is absent in a foreign country, against whom she has begun an action for separation of the person, which is actually pending, may, her poverty being shewn, and with the authorization of a Judge, claim against a relative or connection who is bound to provide her with support, an alimentary allowance for herself and her children. 2. A wife who, before an action in which she claims an alimentary allowance, has contracted debts in respect of the means of livelihood, may claim an alimentary allowance in respect of the past in order to pay such debts. *Girard* v. *Vincent*, Q. R. 21 S. C. 206.

Conservatory Attachment — *Affidavit for.*]—A wife commune en biens who sues for a separation de corps, to obtain a conservatory attachment to which the law entitles her, ought to set out in her affidavit the facts which would entitle her to a saisie-arrêt before judgment or to a conservatory attachment. *Morgeau* v. *Trudeau*, 7 Q. P. R. 70.

Conservatory Attachment — *Affidavit for.*]—In an action for separation from bed and board, an affidavit of the wife, who is separate as to property, that without the benefit of a conservatory attachment she will lose her recourse in respect of alimony and of the donations made by the marriage contract, is insufficient, and such seizure will be quashed on petition. *Gratton* v. *Desormiers*, 7 Q. P. R. 86.

Evidence — *Facts Anterior to Reconciliation.*]—Under arts. 196 and 197 of the Civil Code, the plaintiff in an action for separation from bed and board is not entitled to adduce evidence regarding facts anterior to the last reconciliation between the consorts, without first having proved some fact which, if not of sufficient gravity alone to warrant a separation, should at least strongly support the demand therefor. *Courteau* v. *Skelly*, Q. R. 20 S. C. 216.

Grounds — *Insanity.*] — The fact that the husband is insane and unable to receive or provide for his wife is not a ground for separation from bed and board. *Deneen* v. *McLeod*, 5 Q. P. R. 391.

Intervention by Creditor of Husband —*Jurisdiction in Vacation.*]—The filing of an intervention by a creditor of the husband in an action for separation as to property is equivalent to an appearance of the defendant, and ousts the Court of jurisdiction to try and adjudicate upon the same in vacation. *Goldstein* v. *Schwartz*, 7 Q. P. R. 221.

Judgment — *Execution—Third Persons —Wife taking Lease—Authorization.*]—The non-execution of a judgment for séparation de biens does not deprive it of effect except against third persons, and does not prevent third persons from invoking it against the wife who has obtained it. 2. A married woman, séparée de biens, who keeps a boarding house, may, without the authorization of her husband or of the Court, take a lease of a house to serve as a boarding house. *Parizeau* v. *Huot*, Q. R. 19 S. C. 379.

Judgment for Separation de Corps— *Effect as to Dissolution of Community—Default of Execution—Right to Allege.*]—The separation of property which follows upon a séparation de corps, is without effect if it has not been executed in the manner provided by art. 1098, C. P.; and the inefficiency of a judgment to dissolve the community may be pleaded as well by the husband and wife as by their creditors. *Lafleur* v. *Morin*, Q. R. 21 S. C. 483.

Judgment not Executed—*Effect of as to Strangers—Contract of Wife—Estoppel—Action—Non-authorization.*]—The nullity of a judgment en séparation de biens, not executed, is absolute; and third parties even cannot succeed by virtue of the fact that the wife, in a contract made between her and them, described herself as judicially separated as to property. 2. Default of authorization of a wife commune en biens makes service of process upon her absolutely void; such nullity is a matter of public policy and should be taken notice of by the Court in a case where the wife does not avail herself of it. Per Langelier, J.—An action brought against a wife, commune en biens, who has falsely represented herself in the contract upon which the action is based as séparée de biens, and has not pleaded the nullity of the service by way of exception to the form, will be dismissed, but without costs. *Leclaire* v. *Robert*, 3 Q. P. R. 549.

Lunatic Husband — *Authorization of Wife to Proceed against Curator.*] — The plaintiff, common as to property with her husband, alleged that they had been married in 1882, and had been living apart since the year 1884, and that since that time she had supported herself by her own work; that he had recently been interdicted for insanity; and that his curator had obtained a judgment for $3,500 damages for personal injuries suffered by the husband before the date of interdiction. She asked that she be authorized to ester en justice, in an action against the curator in his quality, for separation de corps et de biens from her husband:—Held, that the inability of a husband interdicted for insanity to receive or provide for his wife is not a ground to support an action by the wife for separation from bed and board, and no legal grounds were alleged for a judicial authorization of the wife to bring such action against the husband's curator. *Deneen* v. *McLeod*, Q. R. 21 S. C. 54.

Maladministration of Husband.]—Where the dissipation of the husband or his maladministration of the revenues of his wife's property renders it impossible to provide for the needs of his wife and children, or even make it seem probable that it will become impossible if his management continues, there is ground for decreeing séparation de biens, although the corpus of the wife's estate is not really in peril. *Kavanagh* v. *McCrory*, 3 Q. P. R. 45.

Pleading — *Misconduct — Alimony — Custody of Children.*]—In an action by the wife for separation from bed and board, the plaintiff also asked for an alimentary allowance and the care of children; the husband pleaded admitting some of the acts alleged in the declaration, but denied the motive alleged, and asserted that the acts in question were caused by the misconduct of the plaintiff herself:—Held, that, although the plaintiff's misconduct might not be an answer to the claim for separation, yet it would affect her right to the care of the children and to an alimentary allowance; and a demurrer to the plea of misconduct was overruled. *Courteau* v. *Skelly*, Q. R. 20 S. C. 215.

Providing Residence for Wife—*Conjugal Domicil.*]—In an action for separation, personal and as to property, brought by a wife against her husband, the Judge may, according to circumstances, in place of allotting to the wife a provisional residence outside the conjugal domicil, authorize her to remain in such domicil, and order the husband to leave it. *Hébert* v. *Michaud*, 4 Q. P. R. 297.

Provisional Alimentary Allowance—*Vacation.*]—A Judge has no jurisdiction in vacation to order the payment of a provisional alimentary allowance in an action for séparation de corps. *Currie* v. *Cunin*, 5 Q. P. R. 56.

Reconciliation — *Subsequent Cruelty—Pleading.*]—A mere general allegation as to deceit or force in regard to a reconciliation which took place between consorts, or as to subsequent ill-usage, is not sufficient to justify proceedings in separation from bed and board within a few days of the reconciliation. *Beauchamp* v. *Leduc*, 7 Q. P. R. 91.

Reference — *Powers of Referee—Report—Community of Property—Will—Intention—Provision that Wife shall not Benefit — Provision against Seizure and Attachment—Public Policy.*]—A referee, appointed by the Court with the object of determining the wife's share in the property (if any such property existed) as belonging to the community of property between her husband and herself, in a case arising as a sequel to a judgment of separation from bed and board, for adjudication upon an application for confirmation of his report, ought to limit himself to giving in his report a complete and detailed statement of all the property belonging to the husband and wife, without taking upon himself to decide whether such property is included in the community of property or not, this being a question for the Judge alone to decide on the presentation of the report for confirmation. Where a report of a referee stated that certain property should be excluded from the community, and judgment was given directing the referee to amend his report by inserting therein a complete and detailed list of this property so that it might form part of the community property, such judgment does not constitute chose jugée when the report so amended is presented afresh to the Court for final adjudication and confirmation. In ascertaining the intention of a testator on the interpretation of a will, regard should be had to the particular circumstances which may have influenced him, and to the impression by which he sought to convey his meaning. The following clause in a will, "I wish it to be well and clearly understood that . . . the said movable and immovable properties may not in any manner be liable for the support and maintenance of N. T. S., divorced wife of the said D. A. C., my son," is not contrary to public policy or good morals, as having the effect of protecting a husband from providing for the necessities of his wife while he is provided with maintenance and the other necessaries of life, the words "support and maintenance" aforesaid being interpreted in a wider sense than would be those of "alimentary allowance." Property thus devised or bequeathed to the husband ought to be considered as property de communauté. A clause in a will, "I wish it to be well and clearly understood that the property, movable and immovable, real and personal, hereby devised.

is so devised under the express condition that said property, movable and immovable, real and personal, cannot be liable nor seized nor sold for debts now contracted and to be contracted," makes the income of the property devised as free from seizure or attachment as the property itself, although the testator did not add that they were made "à titre d'aliments." *Stewart* v. *Cairns*, Q. R. 27 S. C. 1.

Renunciation of Community—*Formalities—Authorization.*] — The wife's renunciation of the community, in an action en séparation de biens, should be made at the record office or before a notary, and a renunciation made before a commissioner of the Superior Court is void and of no effect. 2. A wife authorized by a Judge to sue her husband en séparation de biens, does not need a fresh authorization to renounce the community. *Trudeau* v. *Labossière*, 4 Q. P. R. 46.

Renunciation of Community—*Registration — Absence de Droits et Reprises.*]— The neglect to register the wife's renunciation of community, upon a judicial separation of property, does not affect the validity of the judgment for separation. 2. In order that the absence of rights and remedies of the wife against the husband may exempt her from causing the judgment for separation to be executed, it is not sufficient that such judgment does not grant any rights and remedies to the wife, but it is necessary that the absence of such rights and remedies should be stated by the referee's report or by a declaration of the wife. *Maillous* v. *Drolet*, Q. R. 18 S. C. 567.

Right of Husband to Aliment.]—A merchant sued for séparation de corps, may claim from his wife an alimentary pension if the latter has been put in possession of the business from which the former obtained his means of subsistence. *Joly* v. *Garneau*, 5 Q. P. R. 137.

X. Separation of Property.

Administration of Wife's Property by Husband—*Warrant of Administration — Alienation by Husband — Replevin by Wife.*]—A wife, separate as to property, may replevy her goods without the authorization of her husband. 2. A warrant of administration given by a wife, separate as to property, to her husband, does not give him the right to alienate the goods. 3. The husband, although he may be, in certain cases, the administrator of the property of his wife, separate as to property, has no right to alienate them without an express warrant. *Beaulac* v. *Lupien*, Q. R. 23 S. C. 88.

Execution of Judgment—*Renunciation of Community—Registration — Creditors of Husband.*] — A judgment for separation of property is sufficiently executed by the declaration of the wife, given effect to by the judgment, that she has no rights or remedies to exercise against her husband, but the separation of property takes effect against third persons only from the time of the judgment, and the wife can only, as against them, set up her renunciation of the community from the time of the registration of such renunciation. Therefore, a contract made by a married woman, before the execution of the separation of property and the registration of her renunciation, is made for the benefit of the community, and sums due by virtue of such contract may be attached by the creditors of the husband. *Bérard* v. *Magnan*, Q. R. 22 S. C. 217.

Pleading — *Particulars — Judgment — Estoppel.*]—Community of property between husband and wife is the general rule under the law of the province of Quebec, and separation of property the exception. Therefore, a party setting up a judicial separation of property must indicate in his pleading where and when the judgment for separation was rendered, and this under the penalty of being afterwards estopped from setting up such judgment. *Gravel* v. *Cardinal*, 5 Q. P. R. 165.

XI. Transactions between Husband and Wife.

Debt — *Interest — Prescription.*]—Notwithstanding art. 2233, C. C., the prescription of five years (arts. 2250, 2267, C. C.), applies to the interest upon a debt between husband and wife. *Picard* v. *L'Hôpital Général de Québec*, Q. R. 26 S. C. 159.

Execution against Husband—*Business Carried on in Wife's Name—Simulation.*]—The opposant, the wife of the defendant, had registered a notice that she was carrying on business as a decorative artist (which was the defendant's business) under the firm name of F. E. M. & Co., and in this capacity she maintained an opposition to a seizure of goods at the place where the business was carried on. It was proved that at the time of the registration the opposant had no money and that she had since acquired none by her own work, and that the goods seized had been bought with the moneys earned by the work of the defendant, who carried on the business under a power of attorney from his wife:— Held, that the alleged firm was simply a prête-nom for the defendant, who was the true owner of the goods seized, and that the opposition should be dismissed. *Décary* v. *Meloche*, Q. R. 21 S. C. 486.

Execution against Husband — *Opposition by Wife—Usufruct — Marriage Contract — Subsequently Acquired Goods—Evidence.*]—A wife, being the usufructuary of the furniture of a house, has a right to make an opposition to the sale of the furniture where it is demanded by the creditors of the husband. 2. This usufruct ceases, however, with the disappearance of the goods, and does not extend to furniture bought in renewal of that which was subject to the usufruct and has been worn out by use. 3. An opposition to the sale of a piano, which the opposant alleges was given to her, will be dismissed if the evidence shews that the piano was bought by the husband of the opposant, who gave her in payment therefor an old piano, and that the opposant lent to her husband the money necessary to pay the difference in price. 4. It is for the opposant, who

alleges that she has bought goods of which she claims the possession, to prove that the money which went to pay for such goods was her own; if she has mixed money which came to her from her relatives with that coming from her husband, she cannot maintain that the goods are not the property of her husband. *Walker* v. *Massey*, 5 Q. P. R. 369.

Gift from Husband — *Change of Possession—Execution Creditor—Seizure in Conjugal domicil.*]—Interpleader issue. The defendant purchased certain pictures, and, bringing them home, handed them to his wife, telling her he gave them to her. She had one framed in a frame given her by her mother; and all three were hung up in the house occupied by her and her husband. Some six or seven years afterwards an execution creditor of the defendant caused the sheriff to levy on these pictures:—Held, that since the Married Woman's Property Act, 1884, R. S. O. 1897 c. 163, s. 3, a married woman is under no disability as to receiving and holding personal as well as real property by direct gift or transfer from her husband; and in this case the subsequent possession of the pictures was the wife's, although the house was occupied by her husband and herself:—Held, also, that the effect of s.-s. 4 of s. 5 of R. S. O. 1897 c. 163, whereby it is enacted that a married woman married since 4th March, 1889, may hold her property free from the debts or control of her husband, "but this sub-section shall not extend to any property received by a married woman from her husband during coverture," is not to make property received by the wife from the husband during marriage liable to the husband's debts. This sub-section must be read in connection with s. 3, s.-s. 1, and a wife is placed precisely in the position of a feme sole with regard to property transferred to her by her husband during coverture; and therefore she can hold the property against his creditors unless the transfer is made for the purpose of defeating them; and there was no evidence of such purpose here. *Shuttleworth* v. *McGillivray*, 23 Occ. N. 153, 5 O. L. R. 536, 2 O. W. R. 250.

Loan Inter se—*Bona Fides—Prohibition of Art. 1265, C.C.—Husband Acting as Agent of Wife—Rights and Remedies.*]—The prohibition of art. 1265, C. C., against a husband or wife during the marriage advantaging the other by an act inter vivos forbids every transaction whereby one advantages or enriches the other to his or her own detriment, or to the decrease of his or her estate, but it does not hinder one from borrowing money from the other in good faith, and a loan so made imports a valid contract to repay the sum borrowed. 2. The fact that one of them has lent money to the other, in the absence of evidence indicating fraud cannot taint the transaction with fraud as having been made in contravention of the prohibition of art. 1265. 3. The law does not forbid the husband to act gratuitously as the agent of his wife, separate as to property, in the purchase and sale by her of immovables or in the management of her immovables, and purchases so made, when they are true and actual, and do not withdraw anything from the property of the husband to his detriment or that of his creditors, do not come under the prohibition of art. 1265. 4. If the husband or wife has illegally benefited the other during the marriage, what has been so given may be recovered; if it is an immovable that has been given, it may be retaken; but when it is money, the husband or wife and his or her heirs and assigns have against the other, or his or her heirs, only an action for restitution of the sum given. *Dery* v. *Paradis*, 21 Occ. N. 47, Q. R. 10 K. B. 227.

Loan or Gift—*Statute of Limitations—Executors and Administrators—Right of Retainer—Devolution of Estates Act.*]—In 1876 Mary Starr advanced by way of loan or gift to her husband the purchase money of certain land, which was accordingly conveyed to him. On his death in 1893 he devised the land to Mary Starr and one of his sons in equal shares. In 1901 she obtained an order for partition or sale of so much of the land as had not been theretofore sold, and a sale of such residue of the land being made, she filed a claim upon the proceeds as a creditor for the amount originally advanced by her to purchase the land as above mentioned:—Held, that, even assuming that such money had been advanced by her by way of loan, her claim was barred by the Statute of Limitations. There is no reason why the Statute of Limitations should not be applied to a claim by a wife against her husband to recover a loan from him, in the same way as if she was not his wife:—Held, also, that, though she was executrix under the will of her husband, she had no longer any right of retainer in respect of her alleged debt, inasmuch as by her own acts, that is, first by registering no claim within the twelve months allowed for this purpose, and then treating the property as vested in the defendants, the heirs of her co-devisee, who had previously died, she had put the assets out of her own possession and control. *In re Starr, Starr* v. *Starr*, 21 Occ. N. 592, 2 O. L. R. 762.

Loan to Wife — *Benefit of Husband—Hypothecation of Wife's Property — Void Contract—Duty of Lender to see to Application.*]—Where a loan is obtained by a married woman separated as to property from her husband, with hypothecation of her real estate, it is sufficient to shew that the money, although handed to her in the form of a cheque payable to her order, was not used by her, but was given to her husband, in order to bring the contract within the prohibition of art. 1301, C. C. 2. The law does not require that the person from whom a wife obtains a loan should know that it is for the benefit and use of her husband. It is for the lender to exercise proper caution, and to see to the due employment of the money for the purposes of the wife. Even in the case of a deception by the wife, as to the use to which the money is to be applied, the contract of loan is nevertheless null. *Trust and Loan Co.* v. *Kerouack*, Q. R. 12 K. B. 281.

Loan to Wife — *Benefit of Husband — Security by Sale of Land with Right of Redemption — Void Contract — Knowledge of Lender.*]—A loan contracted by a wife separate as to property—the security for the loan being given in the form of a sale with right of redemption of her immovable property, instead of in the form of a hypothecation—is null and void as contrary to the prohibition contained in art. 1301, C. C., where the proceeds of such loan are to be used, with the

knowledge of the lender, for the exclusive benefit of the husband. Judgment in Q. R. 20 S. C. 320 reversed. *Kerouack* v. *Gauthier*, Q. R. 12 K. B. 295.

Promissory Note — *Obligation by Wife with Husband.*]—A promissory note made by a wife to the order of her husband, and indorsed by him, is not, in the absence of any evidence that the note was signed by the wife for her husband, a contravention of art. 1301, C. C., as constituting an obligation contracted by the wife with her husband. *Dupuis* v. *McTavish*, Q. R. 21 S. C. 455.

Prospective Gift of Money by Husband to Wife — *Attachment by Judgment Creditor of Wife.*]—It is essential to a gift inter vivos that the donor should actually divest himself of his ownership in the thing given; and the following clause in a marriage contract does not constitute such gift:—"En considération dudit futur mariage ledit futur époux fait don à ladite future épouse d'une somme de $800 courant, à prendre sur ses biens les plus apparents, et avant tout autre créancier." And such sum cannot be attached in the hands of the husband under a writ of saisie-arrêt issued by a creditor, upon a judgment against the wife. *Pagé* v. *Beauchamp*, Q. R. 20 S. C. 220.

Purchase of Land—*Gift—Presumption—Surrender of Leases — Merger — Lien.*] — Freehold property and leaseholds, the reversion in which was vested in the plaintiff's wife by devisee under her father's will, were purchased by the plaintiff in 1893, while acting as manager of her landed estates, with his own money. The freehold property was conveyed by the vendor to the plaintiff's wife by his directions, and the surrender of leases was to the plaintiff and wife. Under the law at that date a husband was entitled to the rents and profits of his wife's real estate. By s. 4 (1) of the Married Women's Property Act, 1895 (N.B.), real estate belonging to a married woman, not acquired from her husband, is held and may be disposed of by her as a feme sole:—Held, that the presumption that a purchase by a husband in the name of his wife is intended to be a gift to her was not rebutted by the evidence in the case. 2. That the wife could not alienate the freehold estates so acquired from her husband, at least during his lifetime. 3. That on the purchase of the leases the estate under them merged in the freehold of the wife, and that she could dispose of the whole estate without the husband's consent, and free of any equity in him for repayment of the purchase money or money expended by him in making repairs to the property. *De Bury* v. *De Bury*, 22 Occ. N. 184, 2 N. B. Eq. Reps. 348, 36 N. B. Reps. 57.

XII. Other Cases.

Abandonment of Wife — *Replevin of Household Goods.*]—In a saisie-revendication the plaintiff will not be put in possession of the goods seized when it appears that they are in the possession of the intervenant, his wife, whom he has abandoned, and that the place where the effects are is the domicil of the husband and wife, where the intervenant lives with her children. *Beauchamp* v. *Beauchamp*, 5 Q. P. R. 307.

Action by Husband against Wife.]—In an action by a husband against his wife for a declaration that certain real and personal property claimed by both parties, belonged to him, and for an injunction to restrain the wife from disposing of the same: Held, that a husband can sue his wife in respect of both real and personal property as if she were a feme sole. Semble, the law in the Territories is practically the same as that in England as to suits between husband and wife, except that in the Territories one may sue the other in respect of torts, while in England this is not so. *England* v. *England*, 5 Terr. L. R. 204.

Affidavit.]—A wife may swear to the affidavit required by art. 208, C. P., in a proceeding taken in the name of her husband. *Godburt* v. *McPeak*, Q. R. 20 S. C. 294, 4 Q. P. R. 190.

Conveyance before Marriage — *Fraud on Marital Rights—Testamentary Dispositions—Wills Act.*]—The plaintiff was engaged to be married to J. C. A. in November, 1900. The marriage took place on the 4th December, 1901. The husband died on the 26th January, 1902. In August, 1901, the deceased secretly executed a conveyance of all his real estate to the defendant, and this conveyance was not recorded until a few days before the marriage. Late in November, 1901, the deceased also assigned his securities to the defendant. The plaintiff had no knowledge of these conveyances at the time of the marriage, and only learned definitely about them after her husband's death. She thereupon brought an action to have the instruments set aside, (1) as having been made in fraud of her marital rights, and (2) as not having complied with the provisions of the Wills Act. The trial Judge found that the transfers were made with the distinct object of preventing the plaintiff from enjoying any portion of her husband's estate after his death, and that the deceased wilfully concealed from his intended wife before and after their marriage the fact that he had stripped himself of his property. The Judge decided, however, that the instruments were not testamentary, and that the plaintiff was not entitled to the relief claimed: — Held, that conversations with the deceased were admissible, not to derogate from the transfers, but to shew the design of the deceased. Under English law the wife is not entitled to relief against conveyances made in fraud of her marital rights, though the rule is different in the United States. There was nothing to indicate that the operation of the instruments was to be suspended until the grantor's death. *Archibald* v. *Archibald*, 23 Occ. N. 121.

Creditor of Husband taking Security from Wife — Independent advice — Onus. *Vanluven* v. *Scott*, 3 O. W. R. 11.

Deed to Wife — *Non-authorization of Husband—Petitory Action—Prescription.*] — Quære: Is a deed of sale of lands in Quebec to a married woman, without the authorization of her husband, sufficient to support a petitory action? Would such a deed be null for defect of form and insufficient, under art. 2254, C. C., to serve as the ground for a prescription by ten years' possession? *Chalifour* v. *Parent*, 21 Occ. N. 332, 31 S. C. R. 224.

Infant Wife—*Guardian—Rights of Husband.*]—Unless upon grounds adjudged to be

valid, the husband of a minor emancipated by marriage should be named her guardian ad litem. 2. The right of a husband to the guardianship of his infant wife is a consequence of the respective duties of the spouses and their intimate relations. Such reasons cease to exist when, for example, the spouses are separated, and the wife is preparing to begin an action for séparation de corps. In such a case th husband loses all right to the guardianship of his wife. *Ex p. Pauzé*, 3 Q. P. R. 570.

Joint Liability — Alternative liability — Election—Estoppel—Evidence—Leave to supply on appeal—Costs. *Matthews* v. *Weller*, 3 O. W. R. 316.

Liability of Husband for Torts of Wife.] — Held, affirming the judgment of Street, J., that a husband is still liable for the torts of his wife if the marriage took place before the 1st July, 1884. The provisions of the Married Women's Property Act, 1884, 47 V. c. 19 (O.), applicable to persons married before that date, do not relieve him from liability. Earle v. Kingscate, [1900] 2 Ch. 585, applied and followed. Amer v. Rogers, 31 C. P. 195, overruled. Lee v. Hopkins, 20 O. R. 566, approved. *Travis* v. *Hales*, 24 Occ. N. 12, 6 O. L. R. 574, 2 O. W. R. 309, 1037.

Marriage Settlement — *Gift—Registration—Time—Creditors—Action to Set Aside Transaction—Parties.*]—A gift of property by husband to wife by way of marriage settlement must be registered. 2. The registration of a gift after the time allowed cannot be set up against creditors who have become such in the interval. 3. Several creditors may join together in an action to set aside a transaction as fraudulent. *McDougall Co.* v. *Boisvert*, Q. R. 24 S. C. 162.

Protection Order — *Affidavit — Information and Belief—Denial.*] — Application for protection order under s. 17 of the Married Women's Property Act, by a married woman. The petition was verified by affidavit "to the best of my knowledge and belief." All the allegations in the petition were denied by an affidavit of the husband. The application was dismissed with costs. *Cochrane* v. *Cochrane*, 21 Occ. N. 87.

Sale of Goods—*Authority of Wife to Sell Husband's Goods—Re-purchase by Husband—Acquiescence.*]—A husband, sued for the price of a stove, will not be allowed to set up in his defence that the stove always belonged to him and that the sale which his wife assumed to make of it in order to obtain drink was void, unless he can prove that he could not have prevented the sale. 2. The fact that the husband offered a certain sum of money for the re-purchase of the stove shews acquiescence in the sale made by his wife. *Beaulieu* v. *Paquet*, 6 Q. P. R. 68.

Wife Pledging Credit of Husband — *Necessaries—Admissions—Evidence.*] — An admission of a sale of goods for more than $50 by a merchant to one who is not a merchant, cannot be proved by witnesses, if it is not proved that the goods were delivered in whole or in part. 2. In the absence of a special mandate to his wife, a husband is not responsible for purchases made by her unless they are for things necessary for his family, such as provisions, clothes, etc. 3. Even when goods so purchased by the wife for the needs of the family are in question, the husband is not bound by the admissions of his wife as to the purchase, unless such admissions have been made in the course of the purchase. *Pichette* v. *Morrissette*, Q. R. 25 S. C. 46.

ICE.

Navigable Waters—*Trespass on Private Waters.*]—An ice company, in harvesting ice from navigable waters at a distance from the shore, may use any reasonable means of conveying it to their ice-houses, and for that purpose may cut a channel through private water lots through which to float the ice. Judgment in 26 A. R. 411, 19 Occ. N. 268, reversed, and that in 29 O. R. 247, 18 Occ. N. 178, restored; Strong, C.J., and Taschereau, J., dissenting. *Macdonald* v. *Lake Simcoe Ice and Cold Storage Co.*, 21 Occ. N. 221, 31 S. C. R. 130.

ILLEGAL ARREST.

See JUSTICE OF THE PEACE.

ILLEGAL DISTRESS.

See CRIMINAL LAW—LANDLORD AND TENANT.

ILLEGAL FISHING.

See CRIMINAL LAW.

ILLEGAL VOTING.

See CRIMINAL LAW.

ILLEGALITY.

See CONTRACT—PAYMENT.

IMMIGRATION AGENT, B.C.

Exclusion of Immigrants Afflicted with Disease—"Passengers"—Application to citizens of Canada returning from abroad. *Re Chin Chee* (B.C.), 2 W. L. R. 237.

IMMORALITY.

See EVIDENCE—INFANT—INSURANCE.

IMPORTATION OF GOODS.

See SALE OF GOODS.

IMPORTING ALIEN LABOURERS.

See CRIMINAL LAW.

IMPRISONMENT.

See ARREST—CONTEMPT OF COURT—CRIMINAL LAW—JUDGMENT DEBTOR.

IMPROVEMENTS.

Allowance for—Mistake—Title—Use and occupation—Interest—Parties. *Chandler* v. *Gibson*, 2 O. W. R. 843, 3 O. W. R. 414.

Lien for—*Purchase Money — Occupation Rent—Mistake of Title.*]—Under the circumstances of this case, the defendants having taken possession of land under an agreement to purchase in fee, with covenants for good title free from incumbrances, from the plaintiff, who claimed under a devise which was construed to be of a life estate only, the defendants were declared to have a lien on the land for lasting improvements made and purchase moneys paid after being charged with a fair occupation rent. *Young* v. *Denike*, 22 Occ. N. 27, 2 O. L. R. 723.

See ASSESSMENT AND TAXES — LANDLORD AND TENANT—MINES AND MINERALS—MORTGAGE—VENDOR AND PURCHASER—WILL.

IMPROVIDENCE.

See CONTRACT.

INCEST.

See CRIMINAL LAW.

INCOME.

See ASSESSMENT AND TAXES.

INCUMBRANCES.

See EXECUTION.

INDECENCY.

See PUBLIC MORALS.

INDECENT ACT.

See CRIMINAL LAW.

INDECENT ASSAULT.

See EVIDENCE.

INDEMNITY.

Appeal by Third Parties in Name of Defendants—Security—Bond—Covenant — Form—Construction of order—Amount of indemnity—Costs. *Desceonto Iron Co.* v. *Rathbun Co. of Deseronto*, 3 O. W. R. 697, 4 O. W. R. 44, 6 O. W. R. 688.

Contract — Construction of works for municipal corporation—Liability for injuries to persons—Provisions of contract — Agreement with another contractor — Want of privity — Costs of defending action — Third party. *Gaby* v. *City of Toronto*, 1 O. W. R. 440, 606, 635, 711.

Enforcement of Mortgage—Judgment—Damages—Expenses—Loss by sale of goods by sheriff—Costs—Travelling expenses — Interpleader order. *Boulton* v. *Boulton*, 2 O. W. R. 884, 5 O. W. R. 177.

Right to—Claim for damages — Third party notice—Appearance — Objection on return of summons for directions. *McFee* v. *Young* (N.W.T.), 1 W. L. R. 383.

INDEPENDENT CONTRACTOR.

See MUNICIPAL CORPORATIONS—NEGLIGENCE.

INDIAN.

Claim for Restitution of Moneys to Trust Fund—*Exchequer Court Act, s. 16 (d)—Discretion of Superintendent-General—Jurisdiction of Exchequer Court to Interfere—Crown as Trustee—Effect of Treaties.*]—A claim against the Crown based upon s. 111 of the British North America Act, 1867, and upon Acts of the legislature of the province of Canada and of the Parliament of Canada, is a claim "arising under any law of Canada," within the meaning of clause (d) of s. 16 of the Exchequer Court Act. Yule v. The Queen, 6 Ex. C. R. 123, 30 S. C. R. 35, referred to. 2. Where the Court has no jurisdiction to grant relief in an action, it has no authority to make a declaration binding the rights of the parties. This rule should be strictly followed in all cases where the jurisdiction of the Court depends upon statute and not upon common law. Barraclough v. Brown, [1897] A. C. 623, referred to. 3. It does not follow that because the Crown is a trustee the Court has jurisdiction to enforce the trust or to make any declaration as to the rights of the parties interested. That authority, if it exists, must be found in the statutes which give the Court jurisdiction. The real

question in such a case is not whether the Crown may or may not be a trustee, but whether the Court has jurisdiction with respect to the execution of the trust. 4. While under the provisions of certain treaties and of certain statutes of the legislature of the province of Canada and of the Parliament of Canada, the Crown stands in the position of trustee for the Indians in respect of certain lands and moneys, such position is not that of an ordinary trustee. The Crown does not personally execute the trust; the Superintendent-General of Indian Affairs having, under the Governor in council, the management and control of such lands and moneys. For the manner in which the affairs of the Indians are administered the Dominion Government and the Superintendent-General are responsible to Parliament, and Parliament alone has authority to review the decision arrived at or the action taken by them. In all such cases the Court has no jurisdiction to review their discretion. Then there is this further difference between the Crown as a trustee and an ordinary trustee, viz., that the Crown is not bound by estoppel, and no laches can be imputed to it: neither does it answer for the negligence of its officers. 5. Under the treaty of the 28th February, 1820, there is nothing to prevent the Crown from making provision for the maintenance of the Mississauga Band of Indians out of any capital moneys arising from the sale or leasing or other disposition of surrendered lands. 6. Under treaty No. 19, made on the 28th October, 1818, the Crown's obligation is to pay the Mississaugas of the Credit a fixed annuity of $2,090. So far as this treaty is concerned, the Crown is not a trustee but a debtor; and the right of the Indians to such annuity cannot be impaired by any departmental adjustment of the Indian funds to which the Indians themselves are not parties. *Henry* v. *The King*, 25 Occ. N. 141, 9 Ex. C. R. 417.

Half-breed — *Indian Act — Band — Repute.*]—The Indian Act, R. S. C. c. 43, defines (s. 2 h) "Indian" as meaning inter alia "any male person of Indian blood reputed to have actually belonged to a particular band:"—Held, (1) against the contention that "of Indian blood" means of full Indian blood or at least of Indian blood ex parte paterna — that a half breed of Indian blood ex parte materna is "of Indian blood," (2) Against the contention that the defendant having been shewn to have actually belonged to a particular band, this disproved, or was insufficient to prove, that he was reputed to belong thereto—that the intention of the Act is to make proof of mere repute sufficient evidence of actual membership in the band, (3) Against the contention that by virtue of s. 11 the mother of the defendant by her marriage to his father, who was a white man, ceased to be an Indian, and that therefore the defendant was not a person of Indian blood—that while the mother lost her character of an Indian by such marriage, except as stated in that section, it did not affect her blood which she transmitted to her son. *Regina* v. *Howson*, 1 Terr. L. R. 492.

Intoxicating Liquor—*Sale—Knowledge of Licensee—Half-breed.*]—Section 94 of the Indian Act (R. S. C. 1886 c. 43) provides that "Every person who sells, exchanges with, barters, supplies or gives to any Indian or non-treaty Indian, any intoxicant shall on summary conviction be liable to imprisonment for a term not exceeding six months:"—Held, following Regina v. Howson, 1 Terr. L. R. 492, that a half-breed who has "taken treaty" is an Indian within the meaning of the Indian Act. A conviction of a person licensed to sell liquor, for the sale of an intoxicant to such half-breed was, however, quashed, because the licensee did not know and had no means of knowing that the half-breed shared in Indian treaty payments. Mens rea must be shewn. *Regina* v. *Mellon*, 22 Occ. N. 343, 5 Terr. L. R. 301.

INDIAN LANDS.

Sale of Timber—*Registration—Notice.*]—The locatee of Indian lands is, except as against the Crown, in the same position as if the land had been granted to him by letters patent, and can assign his interest in the land or in the timber. Actual notice of such an assignment, even though the assignment has not been registered in accordance with the provisions of the Indian Act, is sufficient to prevent a subsequent assignee from obtaining priority. Judgment of Ferguson, J., 6 O. L. R. 370, 2 O. W. R. 738, 23 Occ. N. 287, affirmed. *Bridge* v. *Johnston*, 24 Occ. N. 316, 8 O. L. R. 196, 4 O. W. R. 36.

Sale or Lease—*Invalidity—Relative, not Absolute.*]—The nullity of sales of leases of lands forming part of an Indian reserve, declared by 61 V. c. 34, s. 2 (D.), is only a relative nullity, and can be invoked only by the Indians; those who have bargained with them cannot avail themselves of it. *Boucher* v. *Montour*, Q. R. 20 S. C. 291, 4 Q. P. R. 175.

INDICTMENT.

See CRIMINAL LAW—POLICE MAGISTRATE.

INDUSTRIAL DESIGN.

See TRADE NAME, TRADE MARK, AND INDUSTRIAL DESIGN.

INDUSTRIAL HOME.

See STATUTES.

INFANT.

Action—*Bartender — Commerçant — Exception to the Form.*]—A bartender, though he takes the license in his own name, is not a trader (commerçant), and, if a minor, cannot sue, and exception to the form will lie. *Dagenais* v. *Dagenais*, 7 Q. P. R. 32.

Action — *Dismissal — Costs.*] — A minor whose action is dismissed on the ground of his minority may be condemned in costs. *St. Laurent* v. *Fortier*, Q. R. 26 S. C. 453.

Action—*Trustee of Property of—Amendment—Shares Saisies-revendiquées — Jurisdiction to Decide Ownership of, in Possession of Third Person.*] — An action by an infant should be brought in the name of his guardian, and an action brought by a person who alleges himself to be the trustee for the minor of certain property (shares) will be dismissed sur défense en droit. A trustee, suing in that capacity, will not be permitted to amend his writ by substituting himself personally as plaintiff, contrary to the affidavit on which the saisie-revendication has been issued, and after security has been given. There is no jurisdiction to decide the right of ownership and to possession of shares saisies-revendiquées, when at the time of seizure these shares were in the possession of a third person. *Binmore* v. *Sovereign Bank of Canada*, 7 Q. P. R. 171.

Action Against — *Exception to Form — Appointment of Tutor—Stay.*] — An action against a minor will be dismissed on exception to the form, and an application ore tenus to suspend proceedings pending the appointment of a tutor will not be entertained. *Desluriers* v. *Farmer*, 6 Q. P. R. 401.

Action by—*Tutor—Damages — Rights of Father.*]—See *Hades* v. *Edmundson*, 21 Occ. N. 444.

Advancement on Account of Legacy —Executor. *Re Currie*, 1 O. W. R. 9.

Allowance for Education—*Advance on Property Settled in Remainder — Ability of Parents.*]—An infant entitled to an estate in remainder will not be allowed, even upon the advice of a family council, and with the consent of the executors, to borrow upon the property to which he is entitled in remainder, for the purpose of assisting in defraying the expenses of his education, where it appears that the means of those who are bound by law to provide for his education, are sufficient for that purpose. *Ex p. Barron*, 6 Q. P. R. 126.

Bond—*Void or Voidable — Ratification — Breach—Damages—Interest.*]—To secure the plaintiff against loss by reason of his purchase, upon the defendant's representations, of 55 shares of company stock at $10 per share, the defendant gave the plaintiff his bond in the penal sum of $1,100, conditioned to indemnify the plaintiff against any loss or damage he might sustain in reference to the stock, and conditioned also that at any time after the date of the bond the defendant should, at the request of the plaintiff, purchase from the plaintiff or find him a cash purchaser for 11 of the 55 shares at $50 per share, less expenses of sale, not to exceed ten per centum. The defendant was an infant when he executed the bond:—Held, that the bond was not void ab initio; that it was only voidable; and, upon the evidence, that it was adopted and ratified by the defendant after he had attained full age. 2. That the shares held by the plaintiff not being of any value, the plaintiff's damage by reason of the breach of the bond was $495, the price of the 11 shares, less ten per centum. 3. That the recovery was not a debt or liquidated demand, and the plaintiff was not entitled to interest, the amount not having been ascertained until judgment. *Beam* v. *Beatty*, 22 Occ. N. 58, 3 O. L. R. 345, 1 O. W. R. 54. See the next case.

Bond—*Void or Voidable—Ratification.*]—The bond with a penalty of an infant to indemnify against loss or damage in respect of shares in a company purchased on the faith of representations made by the infant, is void, and not merely voidable, and cannot be adopted and ratified by the obligor after he has attained his majority. Judgment of Ferguson, J., 3 O. L. R. 345, 22 Occ. N. 58, reversed. *Beam* v. *Beatty*, 22 Occ. N. 381, 4 O. L. R. 554, 1 O. W. R. 616.

Curator—*Appointment—Family Council.*]—Where a family council has been duly summoned, to advise as to the appointment of a curator to an emancipated minor, to assist her in a suit about to be instituted against her, and the council refuses to tender any advice to the Judge as to the appointment, the Court is bound to appoint a curator, notwithstanding the absence of such advice. *Ex p. Wood*, Q. R. 24 S. C. 277, 6 Q. P. R. 70.

Custody—*Habeas Corpus—Foreign Domicil of Applicant—Decree of Foreign Court.*]—In the case of a minor of tender years, unauthorized removal from legal custody is equivalent to confinement and restraint. The Courts will entertain a petition for habeas corpus by a non-domiciled person against persons detaining his child within the jurisdiction, where by the decree of a foreign Court of competent jurisdiction the guardianship and possession of the child have been given to the petitioner, and the Court is otherwise satisfied that the measure is for the future welfare of the child. *In re Lorenz and Lorenz*, 7 Q. P. R. 186.

Custody — *Habeas Corpus — Interests of Child—Choice of Home.*]—The interests of an infant of tender years should be the only guide to a Judge in passing upon the question of custody on a habeas corpus, and it is not necessary to allege in the petition the choice of the infant as to a home. *Bleau* v. *Petit*, 6 Q. P. R. 353.

Custody—*Rights of Father—Habeas Corpus.*]—A writ of habeas corpus will not be maintained to permit a father, being without means, to get back his daughter, 14 years of age, who is living with her grandfather, and desires to continue to live with him. *Robert* v. *Véronneau*, 5 Q. P. R. 426.

Custody of — Father or mother. *Re Smith*, 1 O. W. R. 55.

Custody of—Father or mother—Action for alimony — Access by father. *Re Gibson*, 1 O. W. R. 58.

Custody of Illegitimate Child — — *Rights of Mother — Judicial Discretion — Abandonment of Child — Agreement.*]—Application by the mother for the custody of an illegitimate child, a boy 12 years of age. The mother, who was only 17 when the child was born, was unable to support him, and arranged with S. to take the child, and he had been with S. ever since. At the time she gave the child to S. she executed a document which set forth that she "doth hereby give, grant, release, and abandon unto

the said party of the second part forever her said male child and all her right and title as the mother of the said child to the custody, control, and possession of said child from henceforth." S. on his part agreed that he would maintain, care for, and educate the child:—Held, that the application should be refused. The interest of the child would be better served by leaving him with S. than by handing him over to his mother. The right of the mother to the custody of the child cannot be regarded as an absolute one, and the Court has the full authority to consider the best interests of the child: Regina v. Nash, 10 Q. B. D. 454; Barnardo v. McHugh, [1891] A. C. 388. The agreement the mother made with S. to take over the child to him was not one that could be legally enforced against her, even if she had been of age when she executed it: Andrews v. Salt, L. R. 8 Ch. 622. *In re Slater*, 23 Occ. N. 337, 14 Man. L. R. 523.

Custody of — Parent—Other relatives—Evidence. *Re Gillem*, 1 O. W. R. 37.

Custody — Petition of parents—Dismissal — Special circumstances—Direction for sealing up papers. *Re Pinkney*, 1 O. W. R. 694, 715, 2 O. W. R. 141.

Custody — Right of father—Agreement with relative — Costs. *Re Ogle*, 2 O. W. R. 954.

Custody — Right of father — Agreement with relative—Interests of child — Habeas corpus — Application — Costs. *Re Cornyn*, 2 O. W. R. 1156.

Examination for Discovery — *Discretion of Examiner — Capacity of Infant.*] — An infant suing by a next friend may in the absence of special incapacity, be examined for discovery. Arnold v. Playter, 14 P. R. 339, approved. An order for the examination of an infant for discovery should not give to the examiner a discretion to determine the capacity of the infant; the proper manner of raising any question as to the capacity of the infant is by motion to set aside the appointment, or, if there is no time for that, then upon the motion to commit for non-attendance, so that the question of capacity may be considered by the Court itself. *Fleet* v. *Coulter*, 23 Occ. N. 43, 4 O. L. R. 714, 1 O. W. R. 775.

Gift of Property Subject to Charge *Tutor of Infants — Retrocession of Donor—Hypothecation — Invalidity—Rights of Creditor.*]—R. gave his property to his son on condition that he would pay the donor's then existing debts. The donee died shortly afterwards, leaving a widow and two children (minors). The widow and children went to the United States to live. A tutor ad hoc was appointed to the children, and he retroceded the property to the donor, who borrowed $500 from the plaintiff, hypothecating the property as security. The widow of the donee remarried, and she and her husband took possession of the property as tutors of the children. The donor subsequently died, and the plaintiff sued the donee's children as represented by their tutors, to recover the $500 with interest:—Held, that the retrocession of the property of the minors to the donor and its hypothecation by him were illegal. 2. The donee's minor children were not liable to the plaintiff for the repayment of his loan to the donor. 3. The payment of the $500 to the donor did not enrich the minors, but simply operated a change in their creditor. 4. The plaintiff's remedy was an action against the representatives of the donor, and an attachment in the hands of the defendants, as the tutors of the children, of what they might owe to the donor, who paid debts for which they were liable. *Beaumont* v. *Lamonde*, Q. R. 23 S. C. 129.

Guardian—*Removal — Grounds.*]—If on any ground, a tutor can be deprived, even temporarily, of the guardianship of his wards, it will only be for grave reasons. *Fitz Allan* v. *Reiutord*, 5 Q. P. R. 387.

Habeas Corpus — *Confinement in Industrial School. — Jurisdiction—Recorder — Mayor.*]—Habeas corpus will lie to set at liberty an infant detained in an industrial school, when the sentence of confinement pronounced by the recorder has not been requested by the mayor, as required by Art. 3140, R. S. Q. *Avon* v. *Les Dames de l'Asile du Bon Pasteur*, 7 Q. P. R. 207.

Lease — *Repudiation at Majority—Partition — Parties—Tenant in Common—Mesne Profits — Damages.*]—The plaintiff, while an infant, joined with an adult brother and sister in a lease to the defendants of a park property, of which all three were tenants in common, for a period of ten years. The defendant pulled down some old buildings, put up pavilions, made roads and paths, turned it into a pleasure ground, ran a branch of their electric railway into it, and brought crowds of people there. During the term the plaintiff came of age, and at once repudiated the lease, refusing to be bound by it, and effected a partition with the other two tenants in common of the land, to which the defendants were not parties. In an action to recover possession of the plaintiff's part of the land under the partition; for a declaration that the partition was binding, or for a new partition between him and the company; for a declaration that the lease was not binding on him, and that he had been excluded from possession; and for mesne profits and damages:—Held, that the partition made could not be declared binding on the company, who were not parties to it:—Held, also, that the brother and sister were not necessary parties to any new partition between the plaintiff and the company:—Held, also, on the evidence, that the company's conduct in the use of the park was practically an exclusion of the plaintiff from any use he might make of it, and that he was entitled to recover mesne profits from the time he became of age, and damages; and a partition was ordered between him and the company for the residue of the term. Judgment of Meredith, C.J., 1 O. W. R. 25, reversed. *Monro* v. *Toronto R. W. Co.*, 23 Occ. N. 231, 4 O. L. R. 36, 1 O. W. R. 316, 313, 2 O. W. R. 207, 3 O. W. R. 14, 299, 4 O. W. R. 392.

Legacy — ...ment into Court—Surrogate guardian. ... *Laughlin*, 2 O. W. R. 1140.

Liability to Indemnity—Next Friend — Improvident Litigation — Ratification. *Macnee* v. *Rose*, 1 O. W. R. 173.

Maintenance — *Absence of Express Provision for—Infants Entitled to Share in Residue in Addition to Specific Legacies — Setting apart Sum to Answer Legacies — Quantum of Allowance for Maintenance — Whole Interest or Part.*]—Legacies of $4,000 were given to each of the testator's infant sons, Mowat and Ross McIntyre, to carry interest from the death of the testator for the purposes of their maintenance, and in directing the retention and setting apart by the executors of $8,000 to provide for the payment of $4,000 each to the infants when they attain the age of 25 years, and 10 per cent. of the residue of the testator's estate, Street, J.:—Held, 3 O. W. R. 258, 7 O. L. R. 548, that the legacies carried interest from the testator's death for the purpose of maintenance. There was no express provision for the maintenance of the two infants during their minority. But the appellants contend that the other devises and bequests in favour of the infants contained in the will are a sufficient provision for their maintenance:—Held, the rule is that when a legacy is given to a minor by a parent or by a person in loco parentis, payable at a future period, if no other provision is made for maintenance, interest will be allowed for that purpose, even though by the terms of the will the legacy is contingent on the legatee living to the period mentioned for payment of the legacy. The gift of an immediate share in the residue indicates a fund or source from which maintenance was derivable, but not in such form as to preclude recourse for maintenance to the interest upon the legacies. But it should be taken into consideration in dealing with the allowance to be made for maintenance out of the interest of the legacies, having regard to their shares of the residue and the income derivable therefrom, they are entitled to have recourse to interest on their legacies, but only to that extent. It follows that the order was proper at the time it was made, and that the whole sum of $8,000 must be set apart to provide maintenance, if necessary. But that sum was manifestly arrived at without reference to the income from the infants' shares in the residue; and the question of the proper amount to be allowed, having regard to such shares and the time when they were ascertained, should be now settled by the Master unless otherwise agreed upon. *Re McIntyre, McIntyre* v. *Lonodon and Western Trust Co.*, 5 O. W. R. 137, 6 O. L. R. 408.

Married Woman — *Party to Action—Authorization — Husband — Curator.*]—An infant, being a married woman, may appear in Court in a personal action (et mobilière), without other assistance and authorization than that of her husband, made a party for that purpose, and has no need of the assistance of a curator. *Galerneau* v. *Bertrand*, Q. R. 20 S. C. 283.

Mortgage—*Voidable Contract—Repudiation of—What Amounts to—Infants' Contracts Act.*]—Held, that a mortgage executed by an infant before the passing of the Infants' Contracts Act is not void but voidable, and if the infant wishes to avoid it he must expressly repudiate it within a reasonable time after coming of age. R., in 1896, being then an infant, executed a mortgage in favour of S., the plaintiff. R. came of age on the 27th January, 1900, and at that time, on account of default having been made in the payment of the loan, S. was proceeding to sell under power of sale in the mortgage. R.'s solicitors on the 13th February, 1900, wrote S., saying that no valid mortgage had ever been executed by R., and threatening proceedings to protect their client's interest, and on the 2nd March they began an action on behalf of R. against S. for a declaration that the mortgage was null and void and an injunction restraining the sale. On cross-examination on an affidavit made by R. in support of a motion for an interim injunction he said in substance that the reason he did not pay was because he couldn't, and that he had never repudiated his contract, and in October, 1900, he discontinued his action. On the 2nd November, 1900, S. commenced his foreclosure action, and in defence R. pleaded infancy:—Held, that the solicitor's letter and the writ in Russel v. Saunders did not constitute a repudiation, as they were qualified by R.'s statement that he did not intend to repudiate. *Saunders* v. *Russell*, 23 Occ. N. 56, 9 B. C. R. 321.

Next Friend—Amendment—Costs—Solicitor. *Henderson* v. *Button*, 2 O. W. R. 653.

Next Friend—*Father Out of Jurisdiction—Security for Costs—New Next Friend.*]—Motion by defendants to stay the action until the plaintiff should name a next friend in the jurisdiction or give security for costs. The plaintiff sued by his father as next friend; both resided in the Province of Quebec, as appeared by indorsement on the writ of summons:—Held, defendants entitled to their order. The next friend of an infant plaintiff stands in the same position as any other litigant. Any indulgence is given to the infant and not to the next friend.—If, for any reason, the infant's father does not wish to give security, and no other person can be found in the jurisdiction willing to act, then, as was said in Taylor v. Wood, 14 P. R. at p. 456, the Court has power to appoint the official guardian to act as next friend in the case of commendable litigation. The only thing that looks the other way is the remark of Meredith, J., in Scott v. Niagara Navigation Co., 15 P. R. at p. 455. That, however, does not seem intended to be a positive expression of opinion on the point now under consideration. . . . The order should go that some other next friend be appointed resident in Ontario, unless the father gives the usual security for costs. *McBain* v. *Waterloo Manufacturing Co.*, 4 O. W. R. 147, 25 Occ. N. 45, 8 O. L. R. 620.

Partition or Sale of Lands—Rights of guardian—Discretion of Court—Interest of infants—Lease of lands—Proper conditions and restrictions. *Badge* v. *Badge*, 3 O. W. R. 230.

Tutor—*Appointment of — Pleading—Exception.*]—In an action brought by a tutor, ès-qualité, the fact that the plaintiff has not been regularly appointed tutor to the minor whom he assumes to represent, must not necessarily be pleaded by exception to the form, but may be set up in a plea to the merits. *Dini* v. *Canadian Construction Co.*, 5 Q. P. R. 447.

Tutor—*Removal — Grounds—Insolvency—Immorality — Action — Interim Order—*

Costs.]—1. Insolvency is not a sufficient ground for the removal of a father from the office of tutor to his minor children, more especially where it is not established that his insolvency is the result of misconduct, dishonesty, or incapacity. 2. A person cannot be deprived of the tutorship of his children on the ground of immorality unless it be notorious, that is to say, the acts with which the tutor is reproached must be known to a large number of persons, and be the subject of common talk. However opposed to the principles of morality the conduct of a tutor may be, he cannot be removed from office so long as the knowledge of his conduct is restricted to his private circle. 3. During the pendency of an action to remove a tutor from the tutorship of his children, he is entitled to retain the administration of the person and property of the minors, and he can only be dispossessed thereof by an order made by the Court under the provisions of Art. 289, C. C.—4. Where the subrogate tutor is in good faith in bringing an action for the removal of the tutor, he will not, if successful, be condemned personally to costs. *St. Pierre* v. *Tucker*, Q. R. 18 S. C. 451.

Tutor ad Hoc—*Place of Appointment.*]—If an infant has interests opposed to those of his tutor, a tutor ad hoc may be appointed in the district in which the property of the infant is situated, and in which the original tutor was appointed, and this may be done although the tutor and the infant have gone to live elsewhere. *Frappier* v. *Birabin*, 6 Q. P. R. 102.

Tutor of—*Removal — Procedure—Necessity for Action.*]—A demand for the removal of the tutor of an infant can only be made by action in the ordinary form, commencing with a writ of summons in the name of the sovereign. *Ex p. McNicol*, Q. R. 21 S. C. 170.

INFECTIOUS DISEASES.

See PUBLIC HEALTH ACT.

INFORMATION.

See ARREST—COSTS—CRIMINAL LAW—JUSTICE OF THE PEACE—MUNICIPAL CORPORATIONS—POLICE MAGISTRATE.

INFORMATION OF INTRUSION.

See CROWN.

INJUNCTION.

Assignment for Benefit of Creditors —*Prejudice of Creditor — Varying Order — Title of Cause.*]—Where an ex parte injunction order restrained a trader, who had obtained goods from the plaintiffs under an agreement that the property therein was to remain in them, with liberty to them to take possession, from, inter alia, making an assignment for the general benefit of his creditors, it was ordered to be varied in that respect. It is not a ground for setting aside the service of an ex parte injunction order that the order is not intituled in the cause, where the defendant has not been misled. *Gault Brothers Co.* v. *Morrell*, 25 Occ. N. 89, 3 N. B. Eq. 123.

Attorney-General — *Public Rights — Coal Mines Regulation Act—Employment of Aliens.*]—Held, on a motion by the Attorney-General for an injunction to restrain a colliery company from employing Chinamen below ground in contravention of Rule 34, s. 82, of the Coal Mines Regulation Act (amended), that the matter was not one affecting the public or likely to affect the public to such an extent as to call for the granting of an injunction. *Attorney-General for British Columbia* v. *Wellington Colliery Co.*, 10 B. C. R. 397.

Chattel Mortgage—Sale of goods—Misrepresentations—Breach of warranty. *Rogers* v. *Lavin*, 5 O. W. R. 492.

Contract — *Enforcing Obligations of—Penalty.*]—In a case where the parties are bound by a contract, an interlocutory injunction may be granted only for the purpose of ordering that a party obligated by the contract shall do exactly what he is under obligation to do by the contract, and refrain from doing that which he is thereby forbidden to do.—Therefore, if an actor has agreed not to sign, during the year following the expiration of his engagement to play upon another stage, under penalty of a forfeiture, there is no ground for granting an interlocutory injunction restraining him from acting upon another stage after he has signed an engagement contrary to his promise. *La Société Anonyme des Théatres* v. *Lombard*, 7 Q. P. R. 262.

Contract—*Stipulation as to Damages—Agreement in Restraint of Trade.*]—An interlocutory injunction will not be granted when the parties by a clause of the agreement between them have stipulated that a certain amount of damages will be payable in case of violation thereof. An agreement not to do business, unreasonable as to space, restrictive of trade, and of personal liberty, is null and void in law, and cannot be legally enforced. *Hamilton Powder Co.* v. *Johnson*, 7 Q. P. R. 236.

Debtor Disposing of Property—*Status of Creditor—Verdict for Damages—Fraud.*]—The plaintiff in an action of tort who has recovered a verdict, the entry whereon of judgment has been stayed, is not a creditor of the defendant, much less a judgment creditor, and is not entitled to have the defendant enjoined from disposing of his property, even where the plaintiff shews upon affidavit the intent of the defendant to defraud the plaintiff and to leave the country with the proceeds of the sale of property. *Burdett* v. *Fader*, 24 Occ. N. 14, 127, 6 O. L. R. 532, 7 O. L. R. 72, 3 O. W. R. 289.

Disposition of Property — Status of plaintiff—Creditor—Verdict for damages—Judgment stayed. *Burdett* v. *Fader*, 2 O. W. R. 942, 6 O. L. R. 532.

Executors—*Shares in Hands of—Restraining Transfer of.*]—An interlocutory injunction will be granted to prevent testamentary executors domiciled out of the province from transferring certain shares, at a time when a seizure of the same shares under a judgment against the testator, as well as an attachment against the executors, has just been set aside. *Bowie* v. *Crawford*, 7 Q. P. R. 1.

Expropriation of Land—Compensation —Tenant for years. *Campbell* v. *Hamilton Cataract and Power Co.*, 5 O. W. R. 60.

Interim Injunction — Absence of irreparable injury — Dissolution — Convenience —University federation. *University of Trinity College* v. *Macklem*, 2 O. W. R. 809.

Interim Injunction—*Breach of Contract to Sell Goods to Plaintiff Only—Remedy in Damages.*]—A contract recited that the plaintiff, in conjunction with others, was forming a company to be incorporated, and that the plaintiff was desirous of purchasing bricks for the benefit of the proposed company, and set out the intention of the plaintiff to assign all his interest in the contract to the company upon its incorporation, and stipulated that, upon such assignment, the company should be substituted for the plaintiff in the contract, and the evidence shewed that the defendants did not intend to enter into such an agreement for the benefit of the plaintiff and his associates personally, but that the formation of the company and its interest in the proposed purchases were material parts of the arrangements. The statement of claim in each case alleged that, relying upon the contract and upon the supply of bricks under it, the plaintiff, together with others, entered into a number of building contracts requiring the use of bricks, that the plaintiff would require for the purposes of his business during the present year all the bricks called for by the said contract, that the plaintiff and the company were tendering for and expected to obtain a large number of other building contracts requiring bricks, that the plaintiff expected to sell bricks to other builders at a profit, and that, unless the defendants supplied the bricks called for by the contract, it would be impossible for the plaintiff to get bricks in time to carry out these contracts, or to complete the works in the manner and within the time mentioned in said contracts. The evidence adduced supported these statements in the main, but did not shew that the contracts referred to had been made for the benefit or on behalf of the company or that the company had acquired any interest or incurred any liability in respect of them; — Held, that the plaintiff should, under the circumstances, be left to his claim for damages, if any, arising from the alleged breach of the contract, and that interim injunctions should be dissolved. *Cass* v. *Couture, Cass* v. *McCutcheon*, 23 Occ. N. 249, 14 Man. L. R. 458.

Interim Injunction—Completion of Elevator — Delivery of possession—Rights of parties. *Jamieson* v. *MacKenzie, Mann, & Co.*, 1 O. W. R. 555.

Interim Injunction — *Condition—Security — Time.*]—Where a party has obtained an interlocutory injunction on condition of furnishing security, the Court may by a subsequent judgment fix a time within which security must be furnished under penalty of the dissolution of the injunction granted. *Moore* v. *Bullock*, 5 Q. P. R. 464.

Interim Injunction — *Cutting Timber on Disputed Land — Finding by Jury in Replevin Action.*]—An ex parte injunction to restrain the defendants from cutting timber and removing timber already cut, on lands, the title to which was claimed by the plaintiff and defendants by possession, was dissolved where a jury in an action of replevin by the plaintiff to recover timber cut by the defendants on the land, had found in their favour, though a motion for a new trial was undisposed of. *Wood* v. *Leblanc*, 23 Occ. N. 157, 2 N. B. Eq. Reps. 427.

Interim Injunction — Dealing with shares — Dissolving. *Wright* v. *Rowan*, 2 O. W. R. 120.

Interim Injunction— *Dissolution before Hearing — Assessment of Damages.*] — Where an ex parte injunction was dissolved before the hearing of the suit which was for a declaration of title to land, the Court postponed assessing the defendant's damages upon the plaintiff's undertaking given on obtaining the injunction, to the hearing of the suit. *McLellan* v. *Turner*, 23 Occ. N. 268.

Interim Injunction — Newspaper—Advertisement — Trade union — Preponderance of convenience. *Dixon* v. *Globe Printing Co.*, 2 O. W. R. 726.

Interim Injunction — *Railway — Expropriation—Crossing Line of Another Company — Appeal — Questions for Trial.*]— On the application of the plaintiffs, who alleged inter alia that the defendants' railway was not commenced within two years, that no map or plan and profile of the whole line of railway had been prepared and deposited in the department of the Minister of Railways, and that the work being done by the defendants was not authorized and was not being prosecuted in good faith under their charter, but was really for the benefit of the Great Northern Railway Company, so that it might extend its railway system, which lies south of the international boundary, into British Columbia, injunctions were granted restraining until the trial of the action the defendants from continuing in possession and proceeding with the expropriation of the land of the plaintiff hotel company, and also from taking any proceedings towards effecting the proposed crossing of the right of way of the plaintiff railway company. Motions to dissolve the injunctions were refused. The full Court (Irving, J., dissenting) dismissed an appeal on the ground that there were several points of importance which should be decided at the trial. *Yale Hotel Co.* v. *Vancouver, Victoria and Eastern R. W. and Navigation Co., Grand Forks and Kettle River R. W. Co.* v. *Vancouver, Victoria and Eastern R. W. and Navigation Co.*, 9 B. C. R. 66.

Interim Injunction — *Refusal—Discretion — Appeal.*]—Although the Court of King's Bench sitting in appeal has power to overrule the discretion exercised by the Court of first instance in refusing a petition for an interim injunction, it is a power which will be used only in an extreme case, where

the right of the petitioner is clear and unmistakable, and where there has been manifest error in refusing his application. *South Shore R. W. Co.* v. *Grand Trunk R. W. Co.*, Q. R. 12 K. B. 28.

Interim Injunction — *Rule as to Granting—Facts in Dispute — Partnership — Receiver.*]—On a motion for an interlocutory injunction to restrain defendant from disposing of assets of an alleged partnership between him and the plaintiff to carry on a business previously conducted by the defendant, and for a receiver, the plaintiff alleged that books of account were opened up, and a bank account kept, in the firm's name; that bill heads with the name of the firm, and names of the plaintiff and defendant thereon, were used, and a circular under the firm's name distributed by the defendant, announcing that the plaintiff was associated in the business. The defendant denied that a partnership was formed, and alleged that it was contingent upon the plaintiff paying into the business a sum of money equal to the value of the defendant's stock-in-trade on hand; that this had never been done; that the plaintiff was employed at a weekly salary; and that the bill heads were ordered by the plaintiff without authority, and their use only permitted after his assurance that he would shortly purchase an interest in the business. These allegations were denied by the plaintiff:—Held, that the motion should be granted. On a motion for an interlocutory injunction, the Court should be satisfied that there is a serious question to be determined, and that under the facts there is a probability that the plaintiff will be held entitled to relief. *Burden* v. *Howard*, 2 N. B. Eq. Reps. 461.

Interim Injunction — *Threatened Injury to Property — Discretion—Affidavits in Reply — Non-disclosure of Material Facts—Offer — Costs.*]—1. When evidence is given to the satisfaction of the Judge that there is a strong probability of injury to the plaintiffs' building by the continuance of blasting operations for the loosening of frozen earth on adjoining land, it is proper, on motion to continue an ex parte injunction, to grant an interlocutory injunction restraining the contractor until the hearing of the action from carrying on such blasting in such a manner as to injure the plaintiffs' building, although there is no proof that any actual injury to such building has already resulted. Fletcher v. Bealey, 28 Ch. D. 688, and Attorney-General v. Manchester, [1893] 2 Ch. 87, followed. 2. There is a discretion in the Judge on the hearing of such a motion to allow affidavits in reply which contain statements going merely to strengthen the original case; and, when an opportunity is given to the defence to answer the affidavits in reply, the full Court on appeal will not interfere with such discretion. Peacock v. Harper, 7 Ch. D. 648, followed. 3. The non-disclosure of material facts on the application for an ex parte injunction for a limited time, although a ground for discharging it, will not necessarily disentitle the plaintiffs to succeed on a motion to continue the expiring injunction when both sides present their cases fully, and the Court is not bound to specifically discharge the interim injunction or to award costs to the defendants. 4. An offer or suggestion on the part of the plaintiffs, before commencing the action, to accept a bond to secure them against damages caused by the operations complained of, even if distinctly proved, would not necessarily preclude them from claiming an injunction afterwards, though it would be a fact to be taken into consideration in determining whether a remedy by action for damages would not be adequate. Wood v. Sutcliffe, 2 Sim. N. S. 168, distinguished. 5. Costs of appeal were ordered to be paid by the appellant in any event. *Miller* v. *Campbell*, 23 Occ. N. 233, 14 Man. L. R. 437.

Interim Order — *Costs — Municipal Corporation — Illegal Purchase of Land.*] — The council of a city having by resolution proposed to enter into a contract of purchase of certain land to be paid for in five yearly instalments, notwithstanding the provisions of s. 396 of the Municipal Act, R. S. M. c. 100, this action was brought by a ratepayer and a motion made for an injunction to prevent the proposed purchase. After several adjournments of the motion, and before it finally came on for hearing, a new arrangement was entered into so far varying the original proposition that the injunction was not pressed for on that argument, and the only question for decision was as to the disposition of the costs: — Held, following Hoole v. Great Western R. W. Co., L. R. 3 Ch. 262, that a suit or an injunction was proper in such a case, and that the defendants should pay the costs. It is not necessary that such a suit should be brought in the name of the Attorney-General. Smith v. Township of Raleigh, 3 O. R. 405, and Wallace v. Township of Orangeville, 5 O. R. 37, followed. *Shrimpton* v. *City of Winnipeg*, 30 Occ. N. 248, 13 Man. L. R. 211.

Interim Order—*Dissolution for Default of Security.*]—An interlocutory injunction, subject to the giving of security within a certain delay, will be dissolved on motion if such security is not given. *Moon* v. *Bullock*, 6 Q. P. R. 59.

Interim Order — *Issue before Writ of Summons — Restraining Adoption of Municipal By-law.*]—It is not necessary that a writ of summons should be issued before an interlocutory injunction is applied for; it is sufficient if it issues after the injunction order has been signed, for the two may be served at the same time. Quære, whether an interlocutory injunction may be issued against a municipal corporation to restrain it from preceding to adopt a by-law. *Wilder* v. *City of Quebec*, Q. R. 25 S. C. 128.

Interim Order — *Municipal By-law — Enforcement.*]—An interlocutory injunction will be granted to restrain the enforcement of municipal by-laws which are seriously contested in a cause actually pending in Court. *Jodoin* v. *Village of Belœil*, 6 Q. P. R. 430.

Interim Order — Municipal corporation — Contract — Comparative convenience. *Slater* v. *Town of Niagara Falls*, 4 O. W. R. 242.

Interim Order — User of right of way — Balance of convenience. *Hopkins* v. *Anderson*, 4 O. W. R. 118.

Interim Order — *Possession of Land—Claim of Lien.*]—An interlocutory injunction will not be granted, in the course of an action, in order to put the plaintiff in possession of property on which the defendant is about to erect buildings for the plaintiff, if the possession of the land, as to which the defendant alleges a right of retention, is one of the objects of the litigation. *Canada Radiator Co.* v. *Société Anonyme de Construction*, 6 Q. P. R. 354.

Interim Order made Ex Parte — *Enforcing Obedience to — Contempt of Court.*]—An injunction order made ex parte by a local Judge must be obeyed until set aside, and if disobeyed the defendant will be committed for contempt of Court. *Leberry* v. *Braden*, 7 B. C. R. 403.

Landlord and Tenant — *Repairs by Landlord — Interference with Tenant's Occupancy.*]—A landlord, who, during the term of the tenancy, makes considerable repairs to the property leased, which interfere with the occupancy of the tenant, may be restrained by an interlocutory injunction. *Haycock* v. *Pacaud*, 7 Q. P. R. 249.

Landlord and Tenant — *Stopping of Work Commenced by Landlord — City By-law — Suspension of Injunction.*]—Where works are commenced by a proprietor on premises leased, and subsequently stopped by injunction at the lessee's request, the injunction may be suspended if it is proved that the city, in virtue of its by-laws, would be obliged to terminate the work itself, if it remained unfinished. *Haycock* v. *Pacaud*, 7 Q. P. R. 270.

Moneys Withdrawn from Business —Deposit by stranger—Claim of right — Restraint on alienation pending action. *Beaird* v. *Carter*, 3 O. W. R. 70.

Municipal Corporation — Action against, by ratepayer—Locus standi—Census enumeration — License commissioners — Parties. *Humphries* v. *Village of Arthur*, 3 O. W. R. 153.

Obstruction of River — *Removal — Dismissal of Suit — Costs — Assessment of Damages — Remedy at Law.*]—The plaintiff was prevented from driving his lumber down a tributary of the Saint John river by the closing of the passage by a pier and boom erected by the defendant in connection with his saw mill, and by logs of the defendant. The defendant was the owner of both sides of the river. The suit was for a mandatory injunction to compel the removal of the pier, booms, and logs so as to open up and to keep open a passage for the plaintiff's lumber, and for an assessment of damages. The bill was filed and motion heard on the 23rd May, two days before the passage had been opened: —Held, that the injunction in respect of future obstruction should be refused, and the plaintiff left to recover his damages, if any, in an action at law, but that the bill should be dismissed without costs; the plaintiff to have costs of obtaining and serving an interim injunction obtained in the matter. *Watson* v. *Patterson*, 23 Occ. N. 268.

Parties — *Action — Practice.*]—1. Injunction proceedings can be taken against parties to a suit only. 2. Such suit may be instituted simultaneously with the application for the injunction. 3. The service of a petition of notice of any kind, without a writ, does not suffice to constitute the person upon whom such service is made a party to a suit. *Paradis* v. *Paradis*, Q. R. 19 S. C. 375.

Receiver — *Balance of Convenience — Company.*]—An application to continue until trial an interim injunction granted ex parte, and to appoint a permanent receiver, was dismissed, where the plaintiff's right of action was not entirely free from doubt, and it appeared that the injury that would be occasioned to the defendants by the granting of the injunction and the appointment of a receiver, if the plaintiff ultimately failed, would be very great, while that which would result to the plaintiff by its refusal, if he ultimately succeeded, would be comparatively small. Application of this principle to an incorporated company. *Reynolds* v. *Urquhart*, 5 Terr. L. R. 413.

Repetition of Slander — *Public Entertainment — Imputation of Murder.*]—Injunction granted until the trial to restrain the defendants, who professed to be mind-readers, from pretending to give information at their public entertainments as to the cause of the death of the plaintiff's husband, intimating as they had done at such entertainments, that he met with his death at the hands of a supposed friend, and thereby suggesting the idea that his late partner and the plaintiff were concerned in the matter. Monson v. Tussand, [1894] 1 Q. B. 671, referred to. *Quirk* v. *Dudley*, 22 Occ. N. 388, 4 O. L. R. 532, 1 O. W. R. 637.

Return of — *Acceleration.*]—Unless in extraordinary circumstances a motion for the return of a writ of injunction before the day fixed will not be granted. *Tétrault* v. *Corporation of Wickham*, 6 Q. P. R. 157.

Right to — *Contract — Municipal Corporations—Street Railways—Performance of Work — Irreparable Injury — Malice.*]—1. Where one of two parties to a contract is doing a thing which, by the terms of the contract, he has specially reserved the right to do, the other party to the contract is not entitled to an injunction to restrain the doing of the thing, on the ground that the work is proceeding in a way which inflicts more damage than would be caused if another method, more expensive, had been adopted. So, in the present case, the defendants, who had granted certain powers to the plaintiffs, but had reserved the right to take possession of the streets when necessary for road operations, were not bound to adopt a more lengthy and expensive though less injurious method of performing the work. 2. In order to obtain an injunction in such circumstances, where there has been no invasion of a legal or equitable right, it must be established that irreparable injury will be caused if an injunction be not granted. 3. A temporary interruption of traffic and an injurious method of removing the rails, causing a damage in the nature of a pecuniary loss, do not constitute an irreparable injury. 4. Although difficulties had existed between the parties, and the defendant might have derived satisfaction from the thought that the

exercise of their rights would cause the plaintiffs damage, yet malice alone does not open any right of action, where, as here, there was a real intention to accomplish the work, and the defendants were acting within their right. *Montreal Park and Island R. W. Co.* v. *Town of St. Louis*, Q. R. 17 S. C. 545.

Sale of Goods—*Condition — Breach.*]—An interlocutory injunction will be granted to enforce an agreement whereby the respondent purchased certain goods at a specified price, which agreement he deliberately violated. *Ozone Co.* v. *Lyons*, 7 Q. P. R. 65.

Sale of Property — *Rescission of Contract — Misrepresentation.*]—Where a party contracts to purchase property and pays an instalment and afterwards repudiates the contract and sues for rescission, the Court has no jurisdiction to restrain by interim injunction the vendor, who accepted the repudiation and re-took his property, from dealing with it as he sees fit. *Christie* v. *Fraser*, 24 Occ. N. 257, 10 B. C. R. 291.

Security — *Alteration in Terms —Jurisdiction of Judge — Proceedings before another Judge.*]—A Judge who has granted an interlocutory injunction in the terms of Art. 957, C.P., remains seised of the motion until the security preliminary to its enforcement is furnished. He may, consequently, suspend its operation, hear the parties anew, allow the matter to be contested, and revoke the order. Proceedings taken before one Judge may be continued before another. *Wampole* v. *Lyons*, Q. R. 14 K. B. 53.

Special Remedy.]—A writ of injunction will not be granted when the law provides a special remedy for the grievances complained of. *Beauregard* v. *Corporation of Roxton Falls*, 6 Q. P. R. 155.

Stay of Proceedings — *Security for Costs.*] — An order for security for costs made pursuant to Rule 1199, and issued according to Form 95, has the effect of staying all further proceedings until security is given; and while such an order stands, it is not competent for the plaintiff to proceed with a pending motion for an injunction against the defendant who has obtained the stay, but such motion should be enlarged till the security is perfected. *Weekes* v. *Underfeed Stoker Co. of America*, 21 Occ. N. 24, 19 P. R. 299.

Substantial Damage — *Mandatory Injunction.*]—Where a trespass is being continued, and substantial damage is being caused, the Court will generally interfere to restrain the further commission of the trespass, and may grant a mandatory injunction. *Smith* v. *Public Parks Board of Portage La Prairie*, 1 Man. L. R. 249, 1 W. L. R. 237.

Undertaking as to Damages—*Order for Assessment.*]—Claims for small damages by some defendants ordered to be included in an order for assessment of damages by other defendants under an undertaking given on obtaining an interlocutory injunction, where they arose from the restraint of acts which the injunction was obtained to prevent the doing of. *Wood* v. *Leblanc*, 25 Occ. N. 90, 3 N. B. Eq. 116.

Undertaking to Speed Trial — Breach of. *Clarry* v. *Brodie*, 1 O. W. R. 387.

When Granted—*Irreparable Wrong — Remedy in Damages — Landlord and Tenant.*]—There is no ground for the issue of a writ of injunction except when the wrong caused to the party claiming it is serious and irreparable and when such party has no other remedy in law to obtain reparation. 2. The lessee of part of a building, who complains that the owner in altering another part of the building troubles him in his enjoyment, has a remedy in damages against him, as well in virtue of the relationship of landlord and tenant as of the relationship between neighbours, and in consequence he has no right to a writ of injunction. *Poulos* v. *Scroggie*, 6 Q. P. R. 1.

INNKEEPER.

Fire Escape Act — *Neglect to Comply with — Injury to Guest — Rescue of Another —Volenti non fit Injuria — Contributory Negligence — Jury.*]—Where a guest in a burning hotel is injured in consequence of the proprietor having failed to provide the means of fire escape required by the Fire Escape Act, an action for damages will lie against the proprietor, notwithstanding that a penalty is imposed for breach of the statutory duty. Groves v. Lord Wimborne, [1898] 2 Q. B. 402, applied. The defence arising from the maxim volenti non fit injuria (the guest being aware of the lack of means of fire escape and having made no objection) is not applicable where the injury arises from a breach of a statutory duty. Baddeley v. Earl Granville, 19 Q. B. D. 423, applied. The fact that the guest delayed his exit in order to rescue a fellow-guest and thereby lost his own chance of getting out safely, is not as a matter of law "contributory negligence;" whether the plaintiff did anything which a person of ordinary care and skill would not have done in the circumstances, or omitted to do anything which a person of ordinary care and skill would have done, and thereby contributed to the accident, was for the jury to decide. *Love* v. *New Fairview Corporation*, 24 Occ. N. 259, 10 B. C. R. 330.

Lien — *Detention of Goods—Strangers.*]—An innkeeper has, by virtue of Art. 1816a, C. C., a right of retention only in respect of the goods belonging to his guest, and not in respect of goods belonging to third persons whom his guest has brought into the inn. *Taylor* v. *O'Brien*, Q. R. 24 S. C. 407.

Lien — *Expenses and Advances—Commercial Traveller — Samples of Employer —Pledge.*]—The lien which the law gives an innkeeper on the goods of his lodgers is to be interpreted strictly, and the Judge cannot enlarge it even for equitable causes. An innkeeper cannot hold the goods of guests as security for medical expenses and advances of money made by him to his guest to enable him to continue his journey. A commercial traveller cannot pledge his employer's samples as security for his personal debt. *Gilmour* v. *Snow*, Q. R. 27 S. C. 39.

Loss of Guest's Property—*Deposit of—Traveller — Negligence—Damages.*]—A per-

son who prolongs his stay at a hotel and remains for a month or more, is a traveller within the meaning of Art. 1233 (4), C.C., and can prove by witnesses that he left his luggage in the hotel. He can do this also by clause 1 of the same article, because a hotel keeper is a tradesman (commercant), and the deposit of luggage a matter relating to trade. A hotelkeeper who places the luggage of a traveller in a baggage room, which is not under lock and key and open and accessible to every one at all times, is guilty of negligence within the second exception of Art. 1815, C.C. The loss of luggage, in these circumstances, renders him liable not only for the $200 mentioned in that article, but for the full value. Judgment in Greene v. Windsor Hotel Co., Q. R. 26 S. C. 97, affirmed. *Windsor Hotel Co.* v. *Greene*, Q. R. 14 K. B. 56.

Loss of Guest's Property—*Negligence —Contributory Negligence.*]—On the plaintiff's arrival at Winnipeg, he delivered some luggage to the driver of a transfer company, to be taken to the defendants' hotel, to which the plaintiff walked, and at which he registered and was assigned a room, to which he took his valise. The driver brought the luggage to the hotel and left it in the hall with other luggage, but in a place not visible from the office, and informed the clerk in the office that he had done so. The hotel was crowded, the city was unusually full of visitors, persons going to and from the hotel bar passed the place where the parcels were, and it was not in a safe place for unwatched luggage to be left in. The plaintiff noticed his parcels there about 11 o'clock the same night, but did not remove them or draw the attention of the hotel servants to them. The next day he noticed that the parcels were not in the hall, but said nothing about it until the third day after, when he asked for the parcels. They could not then be found, and the presumption was that they had been stolen. Neither the defendants nor any of their servants had paid any attention to the parcels or moved them in any way:—Held, per Richards, J., that the parcels got into the custody of the defendants when the driver who brought them reported to the hotel clerk that he had done so; that the plaintiff was justified in assuming, when he saw the parcels in the hall, that they were being cared for by the defendants, and that, when he missed them the next day, he had a right to suppose that they had been put into the defendants' baggage room; and that he had not been guilty of such negligence as to disentitle him to recover their value from the defendants. Per Perdue, J., that the plaintiff was guilty of such gross negligence, in the circumstances, in not calling the attention of the hotel keepers to his parcels, when he saw them lying in the hall, and taking no steps to have them removed to a safer place, as to relieve defendants from their common law liability as innkeepers. The Court being equally divided, the defendants' appeal from the verdict and judgment of a County Court in favour of the plaintiff was dismissed without costs. *Barrie* v. *Wright*, 15 Man. L. R. 196, 1 W. L. R. 412.

INLAND REVENUE ACT.

See REVENUE.

INQUEST.

See INJUNCTION.

INSCRIPTION.

See NOTICE OF INSCRIPTION—TRIAL.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSPECTION.

See DISCOVERY—MINES AND MINERALS.

INSPECTION OF MINES ACT.

See MASTER AND SERVANT.

INSPECTORS.

See BANKRUPTCY AND INSOLVENCY.

INSURANCE.

I. ACCIDENT, 766.
II. EMPLOYERS' LIABILITY, 770.
III. FIRE, 770.
IV. HAIL, 790.
V. LIFE, 791.
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I. ACCIDENT.

"Accidental" Death—Onus — Finding of jury—Notice and particulars of death — Waiver. *Fowlie* v. *Ocean Accident and Guarantee Co.*, 1 O. W. R. 252, 4 O. L. R. 146.

Application—*Beneficiary not Named in Policy—Right to Proceeds—Accident Policy —Act for Benefit of Wives and Children.*]—Where, through error, and unknown to the insured, the beneficiary mentioned in the application for insurance is not named in the policy, he is, nevertheless, entitled to the benefit of the insurance; Davies and Mills, JJ., dissenting. Per Sedgewick, J.—The New Brunswick Act for securing to wives and children the benefits of life insurance (55 V. c. 25) applies to accident insurance, as well as to life. *Cornwall* v. *Halifax Banking Co.*, 22 Occ. N. 360, 32 S. C. R. 442.

Baggageman — *Conditions in Policy — Hazardous Occupation — Voluntary Exposure to Danger.*]—An accident policy issued to M., who was insured as a baggageman on a rail-

way, contained the following conditions: "If the insured is injured in any occupation or exposure classed by this company as more hazardous than that stated in said application, his insurance shall only be for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard." (There was no classification of "exposure" by the company.) This insurance does not cover death resulting from voluntary exposure to unnecessary danger." M. was killed while coupling cars, a duty generally performed by a brakesman, whose occupation was classed by the company as more hazardous than that of a baggageman:—Held, affirming the judgment of the Court of Appeal, 2 O. L. R. 521, 21 Occ. N. 553, which sustained the judgment for the plaintiff at the trial, 32 O. R. 284, 21 Occ. N. 76, that, as he was only performing an isolated act of coupling cars, the insured was not injured in an occupation classed as more hazardous under the first of the above conditions. Held, also, that as the evidence shewed that the insured was in the habit of coupling cars frequently, and therefore would not consider the operation dangerous, there was no "voluntary exposure to unnecessary danger" within the meaning of the second condition. *McNevin* v. *Canadian Railway Accident Ins. Co.*, 22 Occ. N. 223, 32 S. C. R. 194.

Beneficiary — *Application — Incomplete Gift—Trust—Act to Secure to Wives and Children the Benefit of Life Insurance — Declaration.*]—C. made a written application to an accident insurance company for $2,000 accident insurance, the policy "to be payable in case of death by accident under the provisions thereof to M.," wife of the deceased. The company issued its policy, payable to the representatives or assigns of the assured. M.'s name was not mentioned in the policy, neither was there anything in it to indicate in any way her as a beneficiary. M., as administratrix of C., brought an action on the policy for the recovery of the $2,000. The action was afterwards settled by the company paying the $1,000 now in dispute to the administratrix in discharge of the policy. On an application to pass the administratrix's accounts before the Judge of Probate, it was contended on behalf of the creditors of C. that the administratrix should account for the $1,000 as assets of the estate, and on behalf of M., that she was the sole beneficiary under the policy, and the money formed no part of C.'s estate. It appeared that it was not the practice of the company in a case of this kind, notwithstanding the terms of the application, to issue a policy payable to the beneficiary named therein, but they held themselves bound, in case of death, to pay the amount due to the beneficiary named in the application. It also appeared that C. told M. that the policy was payable to her, and he gave it to her when he took it out. The Judge held that the money paid under the policy belonged to the estate of C. From this decision the administratrix appealed:—Held, that there was no complete gift inter vivos of the policy and fund to M. from her husband; and the intended gift being purely voluntary and incomplete, the Court would not complete it, and there was no trust created and declared in her favour. Apart from 58 V. c. 25, no interest would pass to M., even had she been named in the policy as beneficiary, merely by reason of that fact, and if C. wished such interest to pass he must have left the money to her by will or settled it upon her during his life. The Act 58 V. c. 25, for securing to wives and children the benefit of life insurance, does not apply to accident insurance. The application can not be said to be a declaration under the Act, as under s. 6 the policy must be in existence before there can be a declaration affecting it. *Cornwall* v. *Halifax Banking Co.*, 35 N. B. Reps. 398.

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 such exposure, the act being a voluntary one and its danger being apparent. In the result the judgment of Falconbridge, C.J., 32 O. R. 284, 21 Occ. N. 76, in favour of the insured's representatives, was affirmed. *McNevin* v. *Canadian Railway Accident Ins. Co.*, 21 Occ. N. 553, 2 O. L. R. 521.

Disability — *"Immediately Disable"—Causation or Time—Notice of Accident—Condition Precedent.*]—An accident policy issued to the plaintiff contained a contract that "if accidental injuries shall immediately, continuously, and wholly disable" the assured, the defendants would pay a weekly allowance. The plaintiff was injured by accident within the meaning of the policy, but did not become wholly disabled from the effect of such accident until three months afterwards, when he notified the defendants, the insurers:—Held, that the word "immediately" in the contract had relation to causation and not to time, and that the plaintiff was entitled to recover. Williams v. Preferred Mutual Accident Assn., 91 Ga. 698, and Merrill v. Travellers Ins. Co., 91 Wis. 329, distinguished. The policy also contained a condition that written notice must be immediately given to the company at the office in Montreal, and "that if in any other respect the conditions of this insurance are disregarded all rights hereunder are forfeited to the corporation." Held, that the giving of notice forthwith was not thereby made a condition precedent to the right of recovery on

the policy. *Shera* v. *Ocean Accident and Guarantee Corporation*, 21 Occ. N. 138, 32 O. R. 411.

Information Withheld by Insured — *Previous Insurance—Concellation or Surrender — Facts Material to Risk — Jury — Misdirection.*] — A policy of accident insurance was issued upon an application containing a warranty that the applicant had not withheld any information which was calculated to influence the decision of the directors as to the applicant's eligibility for insurance, and also a warranty that no application ever made by the applicant for accident insurance had been declined, and no accident policy issued to him had been cancelled by any company. The plaintiff had effected previous insurance, which, on a settlement of a disputed claim, was put an end to during its currency with the consent of the plaintiff, but at the request of the company, the unearned premiums being returned:—Held, that the proper question for the jury was whether the withholding of this information was in fact material, and it was misdirection to tell the jury that they were to consider whether the plaintiff believed it material; that the putting an end to the policy with the consent of the plaintiff was a surrender and not a cancellation, and was not a breach of the warranty that no policy issued to him had ever been cancelled. *Smith* v. *Dominion of Canada Accident Ins. Co.*, 36 N. B. Reps. 300.

Married Woman—*Absence of Authorization—Void Contract—Action on, by Husband—Terms of Policy.*]—A contract of insurance against accidents by a married woman, even one who has no community of property with her husband, must be authorized by the husband, and if such authorization is wanting the contract is absolutely void: arts. 177, 183, C. C. 2. Therefore, the husband cannot bring an action founded upon such contract of insurance. 3. In this case the policy of insurance upon which the action was brought, stipulated that the insurance company should pay an indemnity only in case of the assured sustaining bodily injury accidentally and involuntarily while travelling by land or water. The assured was injured in her own house:—Held, that the accident did not fall within the scope of the policy, and therefore there was no right of action. *Transit Ins. Co.* v. *Plamondon*, Q. R. 13 K. B. 223.

Policy—*Construction*—"*Riding*" *in Public Conveyance.*]—A person who is injured while getting into a public conveyance, after he has got upon the step or platform, but before the vehicle has begun to move, is "riding as a passenger on a public conveyance" within the meaning of a clause in an accident insurance policy containing those words. *Powis* v. *Ontario Accident Ins. Co.*, 21 Occ. N. 164, 1 O. L. R. 54.

Proofs of Loss—*Sufficiency of — Waiver — Death by Accident — Finding of Jury — Vagueness of.*]—Proofs of loss were furnished within the time limited by an accident policy, without any objection being then taken to their sufficiency, or further proofs asked for, the refusal to pay being based on the contention that the circumstances surrounding the death of the insured brought it within a clause of the policy providing against liability where the death was by suicide, duelling, &c., or from natural causes; objection to the sufficiency of the proofs having been taken for the first time in the statement of defence delivered a couple of years afterwards: — Held, that the proofs as furnished were sufficient; but, in any event objection to their sufficiency, or the right to call for further proofs, was waived. By the policy, the death was required to be by accidental bodily injury, caused by violent external means; while by s. 152 of the Insurance Act, R. S. O. c. 203, which is to be read with the policy, "accident" is defined as any bodily injury occasioned by external force or agency, and happening without the direct intent of the person injured, or happening as the direct result of his intentional act, such act not amounting to violent or negligent exposure to unnecessary danger. The finding of the jury was that there was no evidence to satisfy them that the deceased came to his death by his own hand, but that he came to his death by external injury unknown to them:—Held, that the finding was too vague to be construed as a finding of accidental death; and a new trial was directed. *Fowlie* v. *Ocean Accident and Guarantee Corporation*, 22 Occ. N. 280, 4 O. L. R. 146. Affirmed 33 S. C. R. 253.

II. Employers' Liability.

Condition of Policy — Breach — Avoidance of policy. *Dominion Paving and Contracting Co.* v. *Employers' Liability Assurance Corpn.*, 5 O. W. R. 400.

See Master and Servant — Principal and Surety.

III. Fire.

Agreement as to Loss—*Refusal to Arbitrate—Adjustment — Conditions of Policy — Waiver—Evidence.*]—By a contract of insurance against fire made between the plaintiff and defendants, it was provided that in case of disaster the amount of the damages should be determined by agreement between the company and the assured, or by arbitration; that the assured should, whenever demanded, produce for examination to any person appointed by the company anything which remained of the insured property damaged or not damaged; that he should also produce for examination to any person appointed by the company anything which remained of the insured property damaged or not damaged; that he should also produce for examination his books, invoices, or other papers, or certified copies if the originals were destroyed; that the company should not be considered to have waived any condition unless the waiver should be clearly expressed in writing and signed by an agent of the company. A fire having partly destroyed the insured property, the manager of the defendants himself visited the place, and the plaintiff having proposed to him to submit the settlement of his indemnity claim to arbitrators, the manager answered that he did not wish to have arbitration, and asked the plaintiff to prepare for him a statement of his loss and send it to him, adding that if it was

satisfactory he would pay it. He told him at the same time that he could clean up the place and continue his business. The plaintiff prepared a statement, and, at the request of the manager, made his claim in writing. The manager submitted this claim to adjusters, and they went to the premises of the plaintiff to make an examination of his losses, but the plaintiff refused to shew them the damaged goods, which were for the most part still in his possession, saying that everything had been cleaned up and that no further statement of the damages could be made. The defendants then refused to pay, but did not allege that the account of the plaintiff was too large; and that the contract of insurance being in its nature commercial, oral evidence was admissible to prove the facts; and to do so was not to let in evidence to contradict a writing or to violate the condition of the policy which required a waiver in writing of the conditions of the contract, for the policy provided for a settlement by agreement, and the plaintiff was able to prove such agreement by witnesses. 2. In view of the refusal of the manager of the defendants to submit the settlement of the claim to arbitrators, and his proposition that the plaintiff should himself prepare a statement of his loss, the plaintiff could not be required to exhibit to the adjusters the damaged goods. *Duffy* v. *St. Laurent Fire Assurance Co.*, Q. R. 23 S. C. 181.

Application—Diagram of building—Omission from—Agent. *Ball* v. *Farmers' Central Mutual Fire Ins. Co.*, 1 O. W. R. 168.

Application — *Untrue Statement — Materiality—Statutory Condition.*]—In an application for insurance against fire, to the question "Have you ever had any property destroyed by fire?" the applicant answered, yes. "Give date of fire, and, if insured, name of company interested." "1892. National and London and Lancashire." The evidence shewed that there was a fire on the applicant's property in 1882, and two fires in 1892, and the insurance granted on this application was on property which replaced that destroyed by the latter fires:—Held, reversing the judgment in 35 N. S. Reps. 488, that the above questions were material to the risk, and the answers untrue. The first statutory condition, therefore, precluded recovery on the policy. *Western Assurance Co.* v. *Harrison*, 33 S. C. R. 473.

Apportionment of Loss — Concurrent policy. *Davidson* v. *Insurance Co. of North America*, 2 O. W. R. 621.

Apprehension of Incendiary Danger — *Application Filed in by Local Agent — Untrue Answer.*]—An application for insurance on the contents of a barn contained the question, "Is there any incendiary danger threatened or apprehended," to which the answer was, "No." The plaintiff, who had not previously carried any insurance, stated that he effected the insurance, having learned that the owner of the barn had placed a high insurance on it, as well as on the adjacent dwelling-house. This was told by the plaintiff to the company's agent, who filled in the application and the answers to the questions. The application was then signed by the applicant, who was not an illiterate man, but he did not read over the application, and was not told that the question had been answered in the negative:—Held, that the plaintiff was bound by the answer to the question, as inserted in the application, it being material to the risk, and that it was untrue, for the reasonable inference was that the apprehension of incendiary danger as a fact existed. Graham v. Ontario Mutual Ins. Co., 14 O. R. 358, and Chatillon v. Canadian Mutual Fire Ins. Co., 27 C. P. 450, considered and commented on. Quære, whether the inquiry raised by the question was not as to the apprehension of the applicant of incendiary danger, and not whether, as a fact, any incendiary danger was to be apprehended. *Knisley* v. *British America Assurance Co.*, 21 Occ. N. 117, 32 O. R. 376.

Assignment of Policy — *Formalities — Notice to Insurers—Admission—Representation of Value of Goods Insured—Fraud—Undisclosed Insurance—Proof of Claim—Time—Waiver.*]—A transfer of a contract of insurance, by a private writing made in duplicate, signed by the transferor and transferee in the presence of two witnesses, is good and valid. 2. The admission of the debtor that he received a duplicate of such transfer is a sufficient signification (1571, C. C.). 3. An estimate by the insured in round figures of the value of the stock, at the time of the application, should not be considered a ground of nullity, unless it contains such an exaggeration as creates a suspicion of fraudulent intention. 4. The fact that an interim receipt had issued for an insurance in another company, which insurance was afterwards declined by that company, does not establish a plea of undisclosed insurance. 5. The time limit for furnishing statement of loss is waived by a letter from the company to the insured, dated after the expiration of the delay, and enclosing a blank form of policy in order that the insured might know exactly what it was necessary that he should do. *Western Assurance Co.* v. *Garland*, Q. R. 12 K. B. 530.

Cancellation—*Notice — Statutory Conditions.*]—The insured sent to the company his policy with an indorsed surrender clause executed, and a letter asking that the insurance be terminated and the unearned proportion of the premium repaid. Owing to its misdirection by the insured, the letter was delayed in the post office and did not reach the company till the morning after the insured property had been destroyed by fire:—Held, that the letter did not take effect from the time of its being posted, but only from the time of its receipt, and that the relationship of the parties had been so changed by the occurrence of the fire before its receipt that the attempted surrender did not operate, and therefore the company were liable for the loss. Judgment in 22 Occ. N. 258, 4 O. L. R. 123, 1 O. W. R. 411, affirmed. *Skillings* v. *Royal Ins. Co.*, 23 Occ. N. 294, 2 O. W. R. 123, 761, 6 O. L. R. 401.

Cancellation of Policies — Proposal — Acceptance—Return of premiums. *Armstrong* v. *Lancashire Ins. Co.*, 2 O. W. R. 599, 3 O. L. R. 395.

Condition — *Certificate of Magistrates — Waiver—Proofs of Loss.*]—A policy of fire insurance contained a condition requiring the assured, in case of loss, to procure a certifi-

cate as to the matters contained in the statement of loss under the hands of two magistrates most contiguous to the place of the fire. A further condition provided that no condition should be deemed to have been waived unless the waiver was expressed in writing indorsed on the policy:—Held, per Tuck, C.J., Hanington, Barker, and Gregory, JJ., that the production of the certificate of the magistrates most contiguous to the place of fire was a condition precedent to the assured's right to recover. Per Landry and McLeod, JJ., that the magistrate most contiguous qualified to act is the most contiguous within the meaning of the condition, though not the nearest in point of distance to the place of the fire. Per Curiam, that if there could be a waiver under the condition without indorsement on the policy, the acceptance of the proof of loss by the company, without objection, was not a waiver. *LeBlanc v. Commercial Union Ins. Co.*, 35 N. B. Reps. 665.

Conditions—*Limitation of Risk—Amount of Loss—Arbitration.*]—1. Where it is a condition of the policy that the total insurance on each item of the property insured shall not exceed two-thirds of the cash value of such item, and that notice shall be given of all previous insurance effected by the insured on the same property, and it appears that the insurance exceeds two-thirds of the cash value, and that other insurance, on two items, to the amount of $100, exists without having been declared to the company, the policy is void. 2. The condition that, in case of a loss by fire, the amount of the damages shall be determined by arbitrators, and that no action shall be brought until the amount of the loss is so determined is a legal condition. *Pharand v. Lancashire Ins. Co.*, Q. R. 18 S. C. 35.

Conditions—*Prior Insurance — Abandonment — Subsequent Insurance — Interim Receipt—Estoppel.*]—B., having a policy of insurance for $2,000 in the M. Co., wrote to D., a sub-agent of the R. Co., that he was going to abandon that insurance, and insure in the R. Co. for about $3,000. B. gave D. his note for $51 and paid him $25 in cash, and D. sent B. the usual interim receipt of the R. Co., promising the subsequent issue of a policy which was to be subject to the conditions indorsed on the receipt. One of these provided that the policy should be void if there was any prior insurance, unless the consent of the company were indorsed. D. discounted the note and in due course accounted to the R. Co. for the full amount of the premium. The goods insured were destroyed by fire before the maturity of the note, which B. paid at maturity. No formal application for the insurance was signed by B., but a policy was made out before the fire and sent to D., who did not, however, deliver it to B. In actions brought upon the two policies by the assignees of B.:—Held, that B.'s statement that he was going to abandon the insurance in the M. Co. was not merely an expression of intention, but was a term or condition that affected the very existence of the proposed insurance in the R. Co., which was not to become effective until that condition was fulfilled, and, as B. never did so abandon, there never was any effective insurance on his goods in the R. Co.: and therefore the M. Co. could not set up the conditional contract of insurance in the R. Co. as a breach of the statutory condition against a subsequent insurance. Commercial Union Assce. Co. v. Temple, 29 S. C. R. 206, and Western Assce. Co. v. Temple, 31 S. C. R. 373, followed. *Whitla v. Royal Ins. Co., Whitla v. Manitoba Assce. Co.*, 22 Occ. N. 69, 72, 266, 14 Man. L. R. 90.

Conditions—*Prior Insurance—Subsequent Insurance—Substitution of Policies—Implied Assent—Adjustment of Loss — Waiver.*] — In an application for insurance, particulars of prior insurance in two other companies of $4,000 in each company were given, but in the policy in question prior insurance for only $4,000 was assented to, neither company being named. The defendants pleaded as a breach of the statutory conditions non-disclosure of prior insurance for $4,000 in one of the two companies:—Held, that the plea must be read strictly and without amendment, and that so read the assent in the policy to insurance of $4,000 might be treated as an assent to the prior insurance complained of in the plea; and semble, that, had the defendants not intended to assent to the prior insurance of $8,000, they would have been bound under the second statutory condition to point out in writing the particulars wherein the policy differed from the application. Held, also, that to a subsequent insurance for $4,000, in another company, in substitution for a prior insurance to that amount in one of the two companies mentioned in the application, the assent of the defendants was not necessary. Assent, express or implied, to subsequent insurance is sufficient even if given after the loss has occurred. In this case such assent was held to be sufficiently shewn by the defendants joining in the adjustment of the loss and allowing the insured to accept from the subsequent insurers their proportion of the loss as so adjusted. *Mutchmor v. Waterloo Mutual Fire Ins. Co.*, 22 Occ. N. 406, 4 O. L. R. 606, 1 O. W. R. 667.

Conditions — *Sale and Unconditional Owner — Mortgagor — Other Insurance — Estoppel.*]—A policy of fire insurance contained a condition that if the insured were not the sole and unconditional owner of the property, the policy should be void. At the time the policy was issued there was a mortgage on the property for a small amount, the existence of which was not disclosed to the insurance company by the plaintiff, who insured as owner:—Held, that the mortgage did not avoid the policy under the condition. Another condition of the policy was that it should become void if the assured had or should obtain any other insurance on the property. While the policy was in force, the insured's son, without his knowledge, applied to another insurance company for a policy on the same property, but, before he was notified of the acceptance of his application, the property was destroyed by fire:—Held, following Commercial Union Assurance Co. v. Temple, 29 S. C. R. 206, that the policy was not avoided:—Held, also, that the plaintiff was not, under the circumstances arising at the trial, estopped by his admission in the declaration from claiming that there was no other insurance. *Temple v. Western Assurance Co.*, 21 Occ. N. 427, 31 S. C. R. 373.

Conditions — *Subsequent Insurance — Destruction of Property Insured—Sole Owner—Mortgagor—Pleading.*]—A policy of insurance against fire contained the following

condition: "If the assured have or shall hereafter obtain any other policy or agreement for insurance, whether valid or not, on the property above mentioned, or any part thereof, . . . this policy shall become void, unless consent in writing by the company be indorsed hereon:"—Held, following Commercial Union Assce. Co. v. Temple, 29 S. C. R. 206, that where additional insurance was applied for, but not accepted until after the property was destroyed by fire, the condition had no application. A mortgagor is the "sole and unconditional owner" of property within the meaning of a condition in a policy of insurance against fire stipulating that the policy shall become void if the assured is not the sole and unconditional owner of the property insured. The policy also contained a condition that it should become void if any building intended to be insured stood on grounds not owned in fee simple by the assured. The land upon which the buildings insured stood was subject to a mortgage:—Held, that the defence that the lands were not owned in fee simple by the asured mortgagor was not available under a plea charging that the plaintiff had been guilty of misrepresentation in the application for insurance, in that he stated that the property insured was not mortgaged or otherwise incumbered, whereas, etc., it was mortgaged. *Temple* v. *Western Assce. Co.*, 35 N. B. Reps. 171.

Conditions — *Variation — Requirements of Insurance Act—Imperative Provisions—Exception in Body of Policy—Negativing in Pleading—Proofs of Loss—Interest — Value of Insured Property.*]—In an action upon a fire insurance policy, it appeared that at the time of the loss a portion of the plaintiff's note given for the premium was unpaid, and the defendants relied upon a condition indorsed on the policy that the company should not be liable in such a case. What purported to be the statutory conditions prescribed by the Fire Insurance Policy Act, R. S. M. c. 59, were printed on the back of the policy, and, following these, under the heading "Variations in conditions," were several other conditions, including the one relied on, printed in ink of a different colour, but in type apparently of the same size as that of the statutory conditions from the words found in the statute, and the heading prescribed by s. 4 of the Act was omitted:—Held, that the requirements of the statute were inoperative, and the plaintiff was not bound by the condition on which the defendants relied. Sly v. Ottawa Agricultural Co., 25 C. P. 28, Sands v. Standard Ins. Co., 27 Gr. 167, and Bellagh v. Royal Mutual Fire Ins. Co., 5 A. R. 87, followed. 2. The policy stated in the body of it that the defendants were not responsible for loss by prairie fires:—Held, that this qualification was a condition of the insurance within the meaning of the Act, and should have been set forth in the manner prescribed for non-statutory conditions, which it was not, and in pleading the plaintiff was not bound to negative it. 3. The defendants objected at the trial to the sufficiency of the proofs of claim, but they had not notified the plaintiff in writing that his proof was objected to:—Held, that under s. 2 of the Act, they could not now take advantage of any defect in the proofs. 4. The plaintiff was entitled under 3 & 4 Wm. IV. c. 42, s. 29, to interest on the insurance money, but only from the expiration of thirty days from the time he sent in his corrected and completed proofs of loss. 5. The insured was not precluded from shewing what the real value of the property insured was by the fact that he had, under peculiar circumstances, offered to sell it for less than the amount for which it was insured. *Green* v. *Manitoba Assurance Co.*, 21 Occ. N. 360, 13 Man. L. R. 395.

Conditions—*Waiver—Acts of Officers.*]—A fire insurance company cannot be presumed to have waived a condition precedent to an action on a policy on account of unauthorized acts of its officers. *Hyde* v. *Lefaivre*, 32 S. C. R. 474.

Conditions of Policy — *Double Insurance—Application—Representation and Warranties—Substituted Insurance — Condition Precedent—Lapse—Estoppel.*]—B., desiring to abandon his insurance against fire with the Manitoba Assurance Co., and in lieu thereof, to effect insurance on the same property with the Royal Insurance Co., wrote to the local agent of the latter company stating his intention and asking to have a policy in the "Royal" in substitution for his existing insurance in the "Manitoba." On receiving an application and payment of the premium, the agent issued an interim receipt to B. insuring the property pending issue of a policy, and forwarded the application and the premium, with his report, to his company's head office in Montreal, where the enclosures were received and retained. The interim receipt contained a condition for non-liability in case of prior insurance unless with the company's written assent, but it did not in any way refer to the existing insurance with the Manitoba Assurance Co. Before receipt of a policy from the "Royal," and while the interim receipt was still in force, the property insured was destroyed by fire, and B. had not in the meantime formally abandoned his policy with the Manitoba Assurance Co. The latter policy was conditioned to lapse in case of subsequent additional insurance without the consent of the company. B. filed claims with both companies, which were resisted, and he subsequently assigned his rights to the plaintiffs, by whom actions were brought against both companies:—Held, reversing both judgments appealed from, 14 Man. L. R. 90, 22 Occ. N. 69, 72, 266, that, as the Royal Insurance Company had been informed, through their agent, of the prior insurance by B. when effecting the substituted insurance, they must be assumed to have undertaken the risk, notwithstanding that such prior insurance had not been formally abandoned, and that the Manitoba Assurance Co. were relieved from liability by reason of such substituted insurance being taken without their consent; and both companies did not deprive him or his assignees of the right to recover against the company liable upon the risk. *Whitla* v. *Manitoba Assurance Co.*, *Whitla* v. *Royal Ins. Co.*, 24 Occ. N. 111; *Manitoba Assurance Co.* v. *Whitla*, *Royal Ins. Co.* v. *Whitla*, 34 S. C. R. 191.

Contract — *Authority of Agent — Subagent—Notice of Termination of Authority.*]—Delegatus non potest delegare. Therefore the defendants were held not bound by a policy signed by the general manager and countersigned in the name of one who had been their agent, by one of his clerks, but

without any authorization by him, even though the insured may not have known of the cessation of the agency. The policy contained a stipulation that it should be valid only when countersigned by the duly authorized agent of the company. *Walkerville Match Co.* v. *Scottish Union Co.*, 24 Occ. N. S. 6 O. L. R. 674, 1 O. W. R. 647, 2 O. W. R. 1016.

Contract — *Lex Loci — Lex Fori — Principal and Agent—Payment of Premium —Interim Receipt—Repudiation of Acts of Sub-agent.*]—The lex fori must be presumed to be the law governing a contract, unless the lex loci be proved to be different. The appointment of a local agent of a fire insurance company is one in the nature of a delectus personæ, and he cannot delegate his authority nor bind his principal through the medium of a sub-agent. Summers v. Commercial Union Assurance Co., 6 S. C. R. 19, followed. The local agent of a fire insurance company was authorized to affect interim insurances by issuing interim receipts, countersigned by himself, on the payment of the premiums in cash. He employed a canvasser to solicit insurances, who pretended to effect an insurance on behalf of the company by issuing an interim receipt countersigned by him (the canvasser) as agent for the company, taking a promissory note payable in three months to his own order for the amount of the premium:—Held, that the canvasser could not bind the company by a contract on the terms he assumed to make, as the agent himself had no such authority:—Held, further, that, even if the agent might be said to have power to appoint a sub-agent for the purpose of soliciting insurances, the employment of the canvasser for that purpose did not confer authority to conclude contracts, to sign interim receipts, nor to receive premiums for insurances. *Canadian Fire Insurance Co.* v. *Robinson*, 22 Occ. N. S. 31 S. C. R. 488.

Contract — *"Valid in Canada"—Policy in Company not Licensed in Canada—Premium.*]—A contract to procure fire insurance is some office valid in Canada, means, in some company licensed to do business in Canada, and a premium paid under such a contract may be recovered back, as upon a failure of consideration, if the insurance is effected without the knowledge of the insured in a company not so licensed. *Barrett* v. *Elliott*, 24 Occ. N. 344, 10 B. C. R. 461.

Contract of Re-insurance—*Trade Custom—Conditions—"Rider" to Policy—Limitation of Actions — Commencement of Prescription.*]—A contract of re-insurance consisted of a blank form of policy of fire insurance in ordinary use, with a "rider" attached setting forth the conditions of re-insurance. The policy contained a clause providing that no action should be maintainable thereon unless commenced within twelve months next after the fire. The "rider" provided that the re-insurance should be subject to the same risks, conditions, valuations, privileges, mode of settlement, etc., as the original policy, and that loss, if any, should be payable ten days after presentation of proofs of payment by the company so re-insured:—Held, reversing the judgment appealed from, Girouard and Nesbitt, JJ., dissenting, that there was no incongruity between the limitation of twelve months in the form of the main policy and the condition in the rider-agreement as to claims for re-insurance, and, consequently, that the action for recovery of the amount of the re-insurance was prescribed by the conventional limitation of twelve months from the date of the fire occasioning the loss. *Victoria Montreal Fire Ins. Co.* v. *Home Ins. Co.*, 25 Occ. N. 3, 35 S. C. R. 208.

Failure to State Prior Insurance—*Renewal of Policy—Effect of.*]—Where, at the time of effecting an insurance against fire, there was a prior insurance in force, and no statement thereof was made, either in the application of policy issued thereon, the renewal of such policy, without any such statement being then made—such prior insurance having then expired—does not validate the policy, for the renewal constitutes merely a continuation of the policy, and not a new insurance. *Agricultural Savings and Loan Co.* v. *Liverpool and London and Globe Ins. Co.*, 21 Occ. N. 124, 32 O. R. 369.

Foreign Company not Registered in Ontario — *Cause of Action Cognizable in Ontario—Place of Payment—Ontario Insurance Act, s. 143—Rule 162 (e)—Delivery of Policy to Agent of Assured—Prohibited Contract—Insurance Act, s. 85.*] — Defendants were incorporated under the laws of the State of Delaware, and their home office was at Wilmington, in that State, but the president and secretary reside in Chicago, where the policy was executed. George Wilson & Co., of St. Catharines, applied for this policy through one Nairn, an insurance broker carrying on business in Montreal. According to the evidence of the president of defendants, taken under commission, Nairn was not an agent of defendants, nor had they any agent or officer in Ontario or any part of Canada. By order of a Divisional Court (3 O. W. R. 372) it was directed that defendants should be allowed to enter a conditional appearance and, that plaintiffs "do prove at the trial of this action a cause of action upon which they are entitled to sue the defendants within the province of Ontario. No place of payment was named in the policy. In Clark v. Union Fire Ins. Co., 10 P. R. 313, 6 O. R. 223, it was decided that where no place of payment was mentioned in the policy it must be assumed that the place of payment was where the head office of the company was situated. The evidence bearing upon the delivery of the policy consisted of that of the assured, Wilson, who swore that he received the policy through the mail from Nairn, and the evidence of the president of defendants that the policy was delivered to the assured's agent, Mr. Nairn. The evidence does not disclose whether such delivery was made personally in Chicago or by mail in Montreal:—Held, that the provision in s. 143 of the Ontario Insurance Act, R. S. O. 1897 c. 203, as to committing a policy to the post office "to be delivered or handed over to the assured, his assign or agent in Ontario" contemplates a committing to the post office of the policy by the insurer, addressed to the insured, his assign or agent in Ontario, and does not contemplate circumstances such as those in this case. Further, that the provision in such event that the moneys should be payable at the office of the chief officer or agent in Ontario, shews that the section was intended to apply to companies having an officer or agent in Ontario, and not to a company which has in no way

brought itself or its business within the limits of Ontario. There was no evidence of any request or authority from defendants to Nairn to forward the policy to Wilson, and therefore the plaintiffs have failed to shew that the policy in question was, by or with the authority of defendants, committed to the post office to be delivered or handed over to the assured, his assign or agent in Ontario, and therefore plaintiffs have failed to prove a cause of action upon which they are entitled to sue in Ontario. The address of the insured was not given in the policy, which simply insures "George Wilson & Co." for the term of one year against loss by fire, to the amount of $1,000, to the property therein described, located at St. Catharines, Ontario, Canada, loss, if any, payable to the Quebec Bank; and there was nothing in the evidence to shew that defendants knew that Wilson & Co. resided at St. Catharines. Even if it were intended by defendants that the policy should be delivered to the insured at St. Catharines, within the meaning of s. 143, then the plaintiffs have not proved a cause of action for which they are entitled to sue within Ontario. Action dismissed with costs. *Burson* v. *German Union Insurance Co.*, 6 O. W. R. 21, 10 O. L. R. 238.

Illegal Contract — *Bawdy-house.*] — Insurance upon the furniture in a house of ill-fame is an illegal and immoral contract which the Court will not enforce. *Bruneau* v. *Laliberté*, Q. R. 19 S. C. 425.

Insurable Interest — *Unpaid Vendor.*] —An unpaid vendor who, by agreement with his vendee, has insured the property sold, may recover its full value in case of loss, though his interest may be limited, if, when he effected the insurance, he intended to protect the interest of the vendee as well as his own. The fact that the vendor is not the sole owner need not be stated in the policy nor disclosed to the insurer. Judgment in 26 A. R. 277, 19 Occ. N. 207, reversed, and that in 29 O. R. 394, 18 Occ. N. 176, restored. *Keefer* v. *Phœnix Ins. Co. of Hartford*, 21 Occ. N. 221, 31 S. C. R. 144.

Interim Receipt — Immaterial variation in policy—Prior insurance not assented to—Insurance in plaintiff's name—Mortgagee —Agent—Ratification. *Coleman* v. *Economical Mutual Fire Ins. Co.*, 4 O. W. R. 466, 5 O. W. R. 79.

Interim Receipt — *Agent, Powers of—Premium.*]—On the 21st April, 1900, D. and C. applied for a policy of insurance for $5,000 upon their property, and an interim receipt, signed by one of the company's agents, was given to them on the same day. According to this receipt the property in question was thereby insured for thirty days from the date thereof, unless the policy was sooner delivered, or notice was given that the application was declined by the company; the receipt also provided that any loss payable under the policy should be paid to R., who held a mortgage on the property. The property was destroyed by the great fire of the 26th April, 1900. The company refused to pay the claim thus made, upon the ground that no premium had ever been received, and also upon the ground that the person who signed the receipt was not a duly authorized agent: —Held, that the agent who signed the receipt was at the time a duly recognized agent of the company; and that the company was bound by the receipt, although no premium had actually been paid. *Canadian Fire Ins. Co.* v. *Robinson*, 21 Occ. N. 443.

Interim Receipt — *Estoppel — Statutory Conditions — R. S. O. 1897 c. 203, s. 168.*]—The plaintiffs, through an agent of the defendants, orally applied on the 7th November, 1901, for an insurance for one year, and the defendants accepted the risk for one year at a premium of $33.60, and gave an interim receipt, which, however, provided in terms that the insurance should be for 30 days only. On the 30th November, 1901, the plaintiffs paid a full year's premium to the agent, and believed themselves insured for the whole year. According to his usual course of dealing with the defendants, the agent did not pay over the premium to the latter till the 20th January, 1902, and the defendants accepted it, knowing for what it was paid. They did not, however, issue a policy, and after the fire had occurred repudiated liability, on the ground that they had only insured the plaintiffs for 30 days:—Held, that the defendants were liable, for, if they intended to treat the insurance as terminated at the end of 30 days, it was their plain duty to have so informed the plaintiffs, and returned them a proper proportion of the premium paid; and not having done so they were legally, as well as morally, liable both by virtue of the second statutory condition, R. S. O. 1897 c. 203, s. 168 (2), and also on the ground of estoppel. *Coulter* v. *Equity Fire Ins. Co.*, 24 Occ. N. 88, 7 O. L. R. 180, 3 O. W. R. 194, 4 O. W. R. 383.

Misstatement as to Value of Goods Insured—Circumstances material to risk—False representation—Mistake of agent—Cost of goods. *Eacrett* v. *Perth Mutual Fire Ins. Co.*, *Perth Mutual Fire Ins. Co.* v. *Eacrett*, 2 O. W. R. 1011.

Mortgage — *Covenant to Insure—Loss Payable to Mortgagee—Appraisement—Statutory Condition—Notice.*]—Where a policy of fire insurance, not containing any mortgage or subrogation clause, nor any direct agreement with the mortgagee, is effected by a mortgagor pursuant to a covenant in the mortgage, and by the policy the loss, if any, is made payable to the mortgagee as his interest may appear, an appraisement of the loss under statutory condition 16 of the Insurance Act, R. S. O. 1807 c. 203, s. 168, is, in the absence of fraud or collusion, binding on the mortgagee, although he has not been consulted in or notified of the appraisement. In such a case the mortgagee can sue the insurance company in his own name for the amount due under the policy. Greet v. Citizens Ins. Co., 27 Gr. 121, 5 A. R. 596, followed. *Haslem* v. *Equity Fire Ins. Co.*, 24 Occ. N. 340, 8 O. L. R. 246, 3 O. W. R. 614.

Mortgage — *Machinery — Vendor's Lien —Priorities — Subrogation.*]—Under a contract with the owner of a mill and machinery which was subject to two mortgages, each containing a covenant to insure, the plaintiffs took out the machinery, replacing it with new machinery, reserving a lien for the balance of the price, the lien agreement providing that the mill-owner should insure the machinery for the plaintiffs' benefit. Before any further insurance was effected, the mill and machinery were destroyed by fire:—Held, upon the evidence, Maclennan, J.A., dissenting, that

the second mortgagees had consented to the purchase of the new machinery upon the terms specified, and, as a result of that finding, that the plaintiffs were entitled, subject to the mortgagee's claim, to payment of the insurance money on the machinery, and to be subrogated to the first mortgagee's rights against the land to the extent to which that insurance money was exhausted by him. Judgment in 31 O. R. 142, 19 Occ. N. 389, affirmed. *Goldie and McCulloch Co.* v. *Bank of Hamilton*, 21 Occ. N. 18, 27 A. R. 619.

Mortgagor and Mortgagee—*Release of Equity of Redemption—Cessation of Mortgagor's Interest.*]—H., who had made a mortgage under the Short Forms Act on certain lands to the plaintiff, such mortgage containing a covenant to insure the mortgaged premises, effected thereon an insurance against fire. On the face of the policy was this indorsement: "Loss, if any, payable to (the plaintiff) as his interest may appear under the mortgage." The interest having become in arrear, H. made a deed to the plaintiff, whereby he granted, released, and confirmed unto the plaintiff the said mortgaged lands, without the consent of the insurance company having been obtained therefor. The premises having been subsequently destroyed by fire:—Held, that the plaintiff was not entitled to the insurance moneys, for (1) the fact of the conveyance made by H. to the plaintiff whereby he ceased to have any interest at the time of the fire, was a good answer to the claim; and (2) such conveyance constituted a breach of the fourth statutory condition, which provided against the insured premises being assigned without the insurance company's consent. *Pinhey* v. *Mercantile Fire Ins. Co.*, 21 Occ. N. 526, 2 O. L. R. 296.

Mutual Company—*Assessment—Default—Forfeiture—Notice—Receipt of Arrears.*]—The forfeiture decreed by Art. 5321, R. S. Q., against the assured in a mutual insurance company who has neglected to pay his assessments within six months from their falling due, cannot be enforced by the company until they have given to the assured a notice subsequent to the notice required to make the assessment exigible, notifying him that in default of payment within the time specified he will be foreclosed of his right to indemnify against loss; and more especially so when the company have accepted, after the expiration of the time, payment of premiums in arrear. *Thirot* v. *Mutual Fire Assurance Co. of Montmagny*, Q. R. 10 Q. B. 104.

Mutual Contract—*Alienation of Goods Insured—Conditions.*] — The purchaser of movables insured in a mutual insurance company, cannot, in case of their destruction by fire, have recourse against the company, unless he has complied with all the conditions of s. 5307, R. S. Q. *Mass* v. *Mutual Fire Assurance Co. of Canada*, 6 Q. P. R. 356.

Mutual Contract — *Assessments—Deposit Notes—Lien.*]—To secure payment of the assessments charged upon the deposit notes of members of mutual fire insurance companies, in the counties of the province of Quebec, these companies have a special privilege only on the chattels of the assured; and as to their lands simply an ordinary hypothèque, taking rank after the date of the deposit note, and not a privilege taking rank after the municipal taxes. *Cantwell* v. *Wilks*, Q. R. 26 S. C. 149.

Mutual Contract—*Untrue Representation—Title—Material Statement—Sketch on Policy.*]—In a contract of mutual fire insurance, where the application forms part of the contract, representations in the application as to the title of the insured are to be strictly interpreted, and the rules of ordinary fire insurance do not apply. So, where the insured stated in the application that he was owner of the immovable sought to be insured, whereas his father-in-law was the registered owner, his pretension that he was the real owner, and that his father-in-law was merely his agent in respect of the property, could not avail, and the contract was absolutely null and void. 2. Where the insured has made a material false statement in his application, as to one of the subjects insured, the whole contract is void. 3. An inadvertent misstatement by the insured, in his application, as to the name of the company in which an insurance existed, is immaterial, and will not avoid the contract. 4. The insured is not bound by sketches or additions made by the company's agents on the back of the policy, after he signed the same. *Lambert* v. *La Foncière Compagnie d'Assurance centre le Feu*, Q. R. 25 S. C. 169.

Mutual Plan—*Annual Renewal—Proposal for Increased Premium—Non-acceptance—Condition of Payment in Advance—Delivery of Receipt—Waiver.*]—On the 31st October, 1898, the defendants issued their policy on the mutual plan to the plaintiffs for an insurance of $20,000 upon their property, and on the 31st October, 1899, a further policy for $10,000. The policies provided for insurances for one year and "during such further period or periods for which the assured shall from time to time have paid in advance the renewal premium or premiums required by the company, and for which the company shall have issued a renewal receipt or receipts." The plaintiffs paid the premiums in 1898, 1899, and 1900, but not in advance. On the 28th October, 1901, the executive officer of the defendants wrote to the plaintiffs enclosing renewal receipts and asking the plaintiffs to remit the amounts of the cash premiums. The rates being higher, some correspondence ensued, and on the 16th November, 1901, when a fire took place, the plaintiffs had not paid the cash premiums. The rates being higher, some correspondence ensued, and on the 16th November, 1901, when a fire took place, the plaintiffs had not paid the cash premiums nor signed premium notes. The defendants reinsured their risk as soon as the premiums became payable, and had not cancelled these reinsurances down to the time of the trial:—Held, that no contract existed between the plaintiffs and defendants for an insurance for the year beginning on the 31st October, 1901. Semble, that if the plaintiffs had unqualifiedly accepted the renewal terms, the condition providing for payment in advance of the cash premium would have been waived; for the intention of the defendants in delivering the receipt, where the money had not in fact been paid, was to keep the policy in force and to give the plaintiffs credit for

the amount. *Doherty* v. *Millers and Manufacturers Insurance Co.*, 22 Occ. N. 295, 4 O. L. R. 303, 1 O. W. R. 457. Affirmed on ground that there had been no renewal of contract of insurance, 2 O. W. R. 211, 6 O. L. R. 78.

Oral Application—*Authority of Agents—Ownership of Goods Insured—Insurable Interest—Lessees—Notice to Agents—Policy Differing from Application—Statutory Condition 10—Estoppel from Application—Statutory Condition 2—Reformation of Policy.*]—Appeal by defendants from judgment of Teetzel, J., in favour of plaintiffs in action to recover $2,500, the amount of loss which plaintiffs sustained by the destruction by fire of certain machinery which was on their premises at the time when the fire occurred, and against the loss by fire of which, as plaintiffs alleged, defendants had contracted to indemnify them to the extent of $2,500. The application for the insurance was made on 3rd February, 1903, and was for an insurance for one year: it was oral; one of the application forms of defendants was partly filled up by the agents and signed in the name of plaintiffs, per G. S., which are the initials of a member of the firm of R. Stewart & Son, the agents. This was done without the knowledge, consent, or authority of plaintiffs. In the policy the property insured was stated as being held by assured as owners." The latter statement did not appear in the application form. . . . All the property was destroyed by fire during the currency of the policy, and this action was brought to recover $2,500, the amount insured. The only defence made was, that plaintiffs were not, by reason of the 10th statutory condition, entitled to recover for the loss in respect of the 3 machines, because, as it is pleaded, they were owned by a person other than plaintiffs, and the interest of plaintiffs in them was not stated in or upon the policy:—Held, plaintiffs had an insurable interest in the property at the time of the fire to the extent of at least $2,500, and the 2nd statutory condition: "After application for insurance it shall be deemed that any policy sent to the assured is intended to be in accordance with the terms of the application, unless the company point out in writing the particulars wherein the policy differs from the application," and there was no reason for confining the operation of this condition to a written application. *Davidson* v. *Waterloo Mutual Fire Ins. Co.*, 5 O. W. R. 264, 9 O. L. R. 394.

Oral Contract—*Interim Receipt—Estoppel—Statutory Conditions—R. S. O. 1897 c. 203, s. 168.*]—The plaintiffs, through an agent of the defendants orally applied on the 7th November, 1901, for an insurance for one year, and the defendants accepted the risk for one year at a premium of $33.60, and gave an interim receipt, which, however, provided in terms that the insurance should be for 30 days only. On the 30th November, 1901, the plaintiffs paid a full year's premium to the agent and believed themselves insured the whole year. According to his usual course of dealing with the defendants the agent did not pay over the premium to the latter till the 20th January, 1902, and the defendants accepted it knowing for what it was paid. They did not, however, issue a policy, and after the fire occurred repudiated liability on the ground that they had only insured the plaintiffs for 30 days. Held, defendants liable, for if they intended to treat the insurance as terminated at the end of 30 days it was their duty to have so informed the plaintiffs and returned them a proper portion of the premium paid, and not having done so they were legally, as well as morally liable both by virtue of the second statutory condition, R. S. O. 1897 c. 203, s. 168 (2) and also on the ground of estoppel. *Coulter* v. *Equity Fire Ins. Co.*, 24 Occ. N. 88, 7 O. L. R. 180, 3 O. W. R. 194. Affirmed 25 Occ. N. 30, 4 O. W. R. 383, 9 O. L. R. 35.

Policy—*Application — Misrepresentation—Ownership—Agent.*]—An application for insurance made by the plaintiff contained the following question: "Are you the owner of the land on which the above described building stands?" Before the written answer to this was put down the plaintiff told M., the defendants' agent, that he was not the owner of the land, but that the building stood on the highway. Whereupon M. said: "We will put it down as yours," and, with the consent of the plaintiff, wrote "Yes" as the answer to the question. The application contained this provision also: "If the agent of the company fills up or signs this application, he will in that case be the agent of the applicant and not the agent of the company." The jury found that the house stood on the highway:—Held, in an action on the policy (Tuck, C.J., and VanWart, J., dissenting), that, notwithstanding the foregoing provision, the verbal communication made to M., the agent, must be taken as if made to the company, and, therefore, there was no misrepresentation on the part of the plaintiff. The first condition in the policy was as follows: "If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of this contract, etc." The only reference to the application in the policy was as follows: "Situate on the north side of the Great Road from Dalhousie to Bathurst, in the Parish of Durham, Restigouche County, N. B., as per diagram filed with application." The diagram was on the back of the application, but it was not put there until after the plaintiff had signed it. The presumption was that it was so put there by M., the company's agent:—Held (Tuck, C.J., and VanWart, J., dissenting), that, as the diagram was treated as a separate piece of paper, the words of reference in the policy were not sufficient to incorporate into it the whole application. *La Bell* v. *Norwich Union Fire Ins. Co.*, 34 N. B. Reps. 515. Reversed, *Norwich, etc., Co.* v. *La Bell*, 19 Occ. N. 239, 29 S. C. R. 470.

Policy—*Conditions — Subsequent Insurance—Benefit of Another.*]—The appellant agreed to sell a property to L. with a condition that L. should insure it against fire in favour of the appellant, for $800. L. did so with the respondents, whose policy contained a condition that it should become void if the assured then had, or afterwards obtained, another policy upon the same property. A fire took place, and at the time of it L. had another fire insurance upon the property, without the knowledge or consent of the respondents, but to the knowledge of the

appellant:—Held, that the breach of the condition made the policy void. 2. The statement in the policy that it is in favour of a third person is subject, as regards the latter, to the conditions which the policy contains; the insurer not being subjected to other obligations than those which he has assumed by his contract. *Migner* v. *St. Lawrence Fire Ins. Co.*, Q. R. 10 Q. B. 122.

Policy—*Form of*—"*Co-insurance*" *Clause*—*Statutory Conditions — Variations.*]—A policy of fire insurance issued on the 2nd January, 1896, contained the clause known as the "co-insurance clause" (requiring the insured to keep the property covered by other policies to at least seventy-five per cent. of its value), printed under the heading "variations in conditions," as prescribed by ss. 115 and 116 of R. S. O. 1887 c. 167:—Held, affirming the judgments in 27 A. R. 373, 20 Occ. N. 297, 29 O. R. 695, 18 Occ. N. 361, that, whether or not the alteration introduced into the policy was of the nature of a variation of any particular statutory condition, or in addition to statutory conditions, the clause was neither unjust nor unreasonable, and that it formed part of the contract of insurance to the same extent as the statutory conditions indorsed on the policy would have, if the alteration had been printed therein. *Eckhardt* v. *Lancashire Insurance Co.*, 21 Occ. N. 136, 31 S. C. R. 72.

Policy on Goods—*Partial Loss—Other Insurance—Proportionate Payment—Conditions of Policy — Construction—Overvaluation.*—The insurance was upon goods valued in the application at $15,000. The policy was dated the 11th June, 1902, and the fire occurred on the 12th July following, with a loss of $6,250. The defendants' policy was for $3,000; there was other insurance to the amount of $7,000; and the total value of the goods at the time of the fire was $9,274.62. Statutory condition No. 9 provided that "in the event of any other insurance on the property herein described having been assented to as aforesaid, then this company shall, if such other insurance remains in force, on the happening of any loss or damage, only be liable for the paymeat of a ratable proportion of such loss or damage, without reference to the dates of the different policies." A special condition was indorsed on the policy as follows: "The assured shall not be entitled to recover from this company more than two-thirds of the actual cash value of any building, and in case of further insurance then only the ratable proportion of such two-thirds of the actual cash value, unless more than such two-thirds value, as represented in the application, shall have been insured, in which case the company shall be liable for such proportion of the actual value as the amount insured bears to the value given in the application. In the case of property insured being found, by arbitration or otherwise, to have been overvalued in the application for this policy, the company shall be liable (in the absence of fraud) for such proportion of the actual value as the amount insured bears to the value given in the application:"—Held, that the special condition was inapplicable to the case of a partial loss, and that the plaintiff was entitled to recover from the defendants three-tenths of the amount of his loss, in accordance with statutory condition No. 9. *Eacrett* v. *Gore District Mutual Ins. Co.*, 24 Occ. N. 7, 6 O. L. R. 592, 2 O. W. R. 1009.

Proofs of Loss—Delay—Conditions of Policy—Estoppel—Ownership of Property. *Baker* v. *Royal Ins. Co.*, 1 O. W. R. 294.

Proof of Loss—*Condition—Waiver—Delay—Agent—Adjuster.*]—A condition of the policy required that proof of loss "shall be made by the assured." The son of the assured filled in and signed the statement of loss, under the general authority of a notarial power of attorney:—Held, that this was a sufficient compliance with the condition of the policy. 2. Where the insurer retains the proof of loss, without objection as to its sufficiency, for more than sixty days before action taken, the company will be considered to have waived the condition which requires a delay of sixty days after filing claim before the institution of suit; and the fact that a blank in the statement was filled in, at the request of the company, within the period of sixty days before suit, will not affect the right of action. 3. The condition which requires proof of loss to be furnished within thirty days after the fire may be waived either expressly or impliedly; and the assured is held to be relieved from this condition if the presentation of the claim has been delayed by the company's investigation of the loss, or if the representations of the company's authorized agents have led the assured to understand that compliance with this condition will not be required. 4. While adjusters of fire losses are not, as a general rule, agents of the companies under an authority sufficient to make their statements binding upon the companies for whom they act, yet an adjuster may become a duly authorized agent of the company by the course of procedure in a particular case, e.g., where the adjuster was the only medium of communication after the fire between the company and the assured, and was engaged by the company to look over the proofs, advise as to a settlement, &c. *Western Assce. Co.* v. *Pharand*, Q. R. 11 K. B. 144.

Provincial Company—*Goods out of the Province — Application — Concealment — Transfer of Debt—Notice to Debtor.*]—A company incorporated by the Legislature of Quebec to carry on insurance business in that province may insure, in that province, merchandise which is out of the province. 2. The fact that the assured has not disclosed that he has contracted to keep for a creditor everything that he receives, and to transfer to him the policy of insurance, if desired, does not constitute a concealment which annuls the contract of insurance. 3. Notice of the transfer of a debt should be given in such a way that the debtor shall have no doubt that it is the assignee who is now his creditor, and notice given by means of the delivery of an unauthentic copy of the instrument of transfer is insufficient to vest the claim in the assignee as against the debtor. *Bank of Toronto* v. *St. Lawrence Fire Ins. Co.*, Q. R. 19 S. C. 434.

Re-insurance — Condition — Warranty —Breach—Change material to risk. *Equity Fire Ins. Co.* v. *Merchants Fire Ins. Co.*, 2 O. W. R. 820.

Renewal Premiums — Non-payment—Non-existence of contract — Delivery of receipt—Meaning of. *Doherty* v. *Millers' and Manufacturers' Ins. Co.*, 1 O. W. R. 457, 4 O. L. R. 303.

Renewal—*Prior Insurance—Action—Parties—Mortgage.*]—The renewal, as it is commonly called, of a contract of insurance is not a renewal or extension of the original contract, but a new contract based, as far as applicable, upon the original application and in accordance with the policy issued in pursuance thereof. Where, therefore, at the time of such a new contract by way of renewal, no prior insurance is in force, the insurance is not avoided, although when the original contract was entered into prior insurance was in force, and this fact was not disclosed. Judgment of Rose, J., 32 O. R. 369, ante 124, reversed. Mortgagees to whom by a policy the loss is made payable as their interest may appear, have a right of action upon the policy in their own name against the insurers, and are entitled to enforce payment to the extent of their interest. *Agricultural Savings and Loan Co.* v. *Liverpool and London and Globe Ins. Co.*, 21 Occ. N. 582.

Representation—*Denying Previous Fires—Materiality—Conditions of Policy.*]—One who was insured against fire, who had been burned out three times, in answer to the company's agent said that he had only had one fire:—Held, that this reply was material to the risk and invalidated the policy. 2. That the following clause, "and the said applicant hereby covenants and agrees to and with the company that the foregoing is a just, true, and full exposition of all the facts and circumstances in regard to the condition, situation, and value of the property to be insured, so far as the same are known to the applicant and are material to the risk, and agrees and consents that the same be held to form the basis of the liability of the company, and shall form a part and be a condition of the insurance contract," does not constitute an absolute warranty, but the replies given by the assured amount only to warranties by virtue of this clause in so far as they are material to the risk. *Gillis* v. *Canada Fire Assurance Co.*, Q. R. 26 S. C. 166.

Rights of Hypothecary Creditor—*Default of Owner.*]—An hypothecary creditor has a real right in an insured immovable, which right is an interest capable of insurance. 2. If the insurance of the immovable is made payable to this hypothecary creditor, or is transferred to him, such creditor becomes the true assured; he is not an ordinary transferee of a purely personal claim, but he is the assured just as if he were co-proprietor par indivis of the immovable itself, and as such he retains his rights even when the assignor has lost his by default. *Migner* v. *St. Lawrence Fire Ins. Co.*, Q. R. 17 S. C. 586.

Right to Insurance Moneys—*Hypothecary Claims—Priorities.*]—An hypothecary creditor, whose debtor has undertaken to insure against fire the buildings erected on the hypothecated lands, is not entitled to receive the amount of the insurance (become due by reason of a fire), in preference to one in whose favour the policy has been issued, and who has, against the same debtor, a vendor's claim guaranteed by a first hypothec, and a claim upon written instruments, the amount of which, added to that of the hypothec, is greater than the sum insured. *Davies* v. *Valiquette*, 4 Q. P. R. 106.

Specific Goods — *Substituted Goods—Construction of Policy—Termination of Insurance—Notice — Reinsurance—Breach of Warranty—Limitation of Actions—Statutory Condition—Unjust and Unreasonable Variation.*]—The policy of plaintiffs bears date 24th February, 1899, and was for a term of one year. The property insured was described in it as "120 sacks of green coffee while stored in the 3-storey patent roofed building occupied by the assured situate 37 and 39 Dalhousie street, Brantford, Ontario." The policy was, in pursuance of one of its terms, renewed in each of the years 1900, 1901, and 1902. The loss was made payable to the Bank of British North America. The business of the Snow Drift Co. was that of dealers in coffees, spices, extracts, and other articles. They carried insurance on their general stock for a considerable amount, besides the policy on the green coffee. The reason for effecting the insurance of 4th February, 1899, on the green coffee, was that the Snow Drift Co. had exceeded their line of credit with their bankers, the Bank of British North America, who required security, and the means adopted to give the security was the effecting of this insurance, and providing by the policy that the loss should be payable to the bank. A fire occurred on 18th September, 1902, which resulted in the total destruction of the whole of the company's stock in trade, including the green coffee. . . . The loss on it was $1,321 at the lowest; . . . it is more likely that the loss exceeded $2,000:— Held, such insurance was not for the specific 120 bags of green coffee, but for any 120 similar bags of green coffee. The assured had, on 10th September, 1902, written to the agents at Brantford of plaintiffs in the following terms: "In reference to policy 2958, in amount $2,000, held by the Bank of British North America, on 120 bags of coffee, we wish to cancel this policy and have you give us a new one for $1,000, as there are now only 50 bags of coffee in stock:"—Held, the letter was not such a written notice as the condition relied on refers to. It was only an intimation of the intention of the assured to terminate the insurance if and when there was substituted for it a new policy for $1,000; to that plaintiffs never agreed, and it was never done. . . . It was contended lastly that, as the action was not begun until more than 6 months after the loss occurred, it was barred, and condition 22, as varied by the indorsement on defendants' policy, was relied on in support of that contention:—Held, the variation of the statutory condition 22 which defendants attempted to impose upon the assured, by reducing the time allowed for bringing an action, from 1 year to 6 months, to be both unjust and unreasonable. *Merchants' Fire Ins. Co.* v. *Equity Fire Ins. Co.*, 5 O. W. R. 27, 9 O. L. R. 241.

Standing Timber—*Property along Line of Railway Damaged by Fire from Engines—Property in Foreign Country—Powers of Ontario Insurance Company to Insure—Application of Policy to other Property—Validity of Policy—Statute of Foreign Country—Mistake.*]—"Ottawa Fire Insurance Company, head office, Ottawa, Canada, in consideration of $5,000 insured the Canadian Pacific Railway Company against loss or damage by fire to the amount of $75,000 on all claims for loss or damage caused by locomotives to property located in the State

of Maine, not including that of the assured, —Held, defendants issued a policy upon such property as they could insure in which the plaintiffs had an insurable interest by the effect of a statute of the State of Maine, and that the policy was valid and covered the risk intended to be covered as evidenced by the policy of insurance in question. *Canadian Pacific R. W. Co.* v. *Ottawa Fire Ins. Co.*, 5 O. W. R. 496, 9 O. L. R. 493.

Variations in Statutory Conditions —*Printing of — Conspicuous Type—Compliance with Statute—Existence of Incumbrance—Failure to Disclose—Materiality—Unjust and Unreasonable Variation—Alteration in Risk—Notice to Local Agent—Variation Requiring Notice to Company—Just and Reasonable Variation—Policy Avoided.*] —Indorsed upon a policy were the statutory conditions, with certain variations printed below in red ink. One of the variations was as follows: "Any incumbrance by way of mortgage . . . shall be deemed 'material to be made known to the company,' within the provisions of the first statutory condition:"—Held, defendant company had failed to make out their defence on this branch of the case. By another variation it was provided that "the words 'or its local agent' in the 3rd statutory condition are struck out, and whenever the words 'agent' or 'authorized agent' occur elsewhere in the said statutory conditions, such agent or authorized agent shall be held to mean the company's secretary only:"—Held, this to be a just and reasonable variation. The particular company had between 400 and 500 local agents in all.—Held, when a company had their head office in the province, and had no general agents away from their head office, but local agents having limited duties to perform, it is not unjust or unreasonable in their stipulating that notice of an important change in the character of the risk should be communicated to their head office, particularly as the 23rd statutory condition permits it to be given by the sending of a registered letter to the head office of the company, and the address for the purpose is printed on the back of the policy. The plaintiff made a material alteration in the risk by substituting steam for water power; that she did not give notice in writing to defendants; and she could not recover upon this policy. *Lount* v. *London Mutual Fire Ins. Co.*, 5 O. W. R. 344, 6 O. W. R. 84, 9 O. L. R. 549, 69.

Void Policy — *Renewal — Mortgage Clause.*]—By s. 167 of the Ontario Insurance Act, a mercantile risk can only be insured for one year and may be renewed by a renewal receipt instead of a new policy: —Held, reversing the judgment of the Court of Appeal, 3 O. L. R. 127, 21 Occ. N. 582, and restoring that at the trial, 32 O. R. 369, 21 Occ. N. 124, Girouard, J., dissenting, that the renewal is not a new contract of insurance. Therefore, where the original policy was void for non-disclosure of prior insurance, the renewal was likewise a nullity, though the prior insurance had ceased to exist in the interval. Per Girouard, J., that the renewal was a new contract, which was avoided by nondisclosure of the concealment in the application for the original policy. The mortgage clause attached to a policy of insurance against fire, which provided that "the insurance as to the interest only of the mortgagees therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured," &c., applies only to acts of the mortgagor after the policy comes into operation, and cannot be invoked as against the concealment of material facts by the mortgagor in his application for the policy. Quære, would the mortgage clause entitle the mortgagee to bring an action in his own name alone on the policy? *Agricultural Savings and Loan Co.* v. *Liverpool and London and Globe Insurance Co.*, 23 Occ. N. 133, 33 S. C. R. 94.

IV. Hail.

Mutual Company—*Assessment of Premium Notes—Discount for Prompt Payment.*] —Action to recover the amount of an assessment on a premium note given by the defendant for an insurance against loss by hail. Section 35 of the Mutual Hail Insurance Act, R. S. M. c. 106, under which the plaintiffs were incorporated, provides that the assessments upon premium notes or undertakings shall always be in proportion to the amounts of such notes or undertakings. In making the assessment of five per cent, upon the amount of each policy, the directors added a proviso that all members and policy-holders who should pay the full amount of the assessment on or before the 1st November, 1899, should be entitled to and should receive a discount of 25 per cent. upon the amount of such assessment:—Held, that the plaintiff had no power to allow a discount for, or to impose penalties for default in, prompt payment, and being a mutual company, the directors must strictly observe the requirements of the Act and preserve equality amongst the members in assessing them; and that the effect of the resolution was really to assess 75 per cent. of five per cent. upon those who should pay before a certain date and the full five per cent. upon all others, and that the assessment was therefore void under s. 35 of the Act. *Manitoba Farmers' Mutual Hail Ins. Co.* v. *Lindsay*, 21 Occ. N. 60, 13 Man. L. R. 352.

Mutual Company—*Assessment of Premium Notes—Withdrawal from Membership—Presumption of Continuance of Policy—Impossibility of Performance of Condition.*]—In an action by a company incorporated under the Mutual Hail Insurance Act, R. S. M. c. 106, to recover the amount of an assessment imposed by resolution of the directors upon one of its members for the second crop season after the issue of the policy, it is incumbent on the company to shew that by the terms of the policy the person called on to pay the assessment is still a member of the company, and if no evidence is given to shew what the terms of the policy were in regard to the period covered by it, the action should be dismissed. If a member of such a company is entitled to withdraw from membership upon certain conditions, including the surrender of the policy issued to him, he cannot exercise such right without surrendering the policy, although the loss of it has rendered it impossible for him to perform that condition. Croockewitt v. Fletcher, 1 H. & N. 893, and Cutter v. Powell, 6 T. R. 320, followed. *Manitoba Farmers' Mutual Hail Ins. Co.* v. *Fisher*, 22 Occ. N. 303, 14 Man. L. R. 157

V. LIFE.

Action for Premium—*Plea that Policy not in Accordance with Application—Reply—Willingness to Change.*]—In an action by a life insurance company for a premium, where the defendant pleads that the policy did not comply with his application, the company may, in reply, allege that the policy was a substantial compliance with the application, but they cannot declare and pray acte of their willingness to effect any change that may be required to have the policy conform with the application. *Mutual Life Ins. Co. of Canada* v. *McCool*, 6 Q. P. R. 87.

Action on Policy — *Condition as to Award—Application to Stay Proceedings.*]—In an action on a policy on which was indorsed a condition that, in case any question should arise, "it is a condition of this policy which the assured by the acceptance thereof agrees to abide by, every such difference shall be referred to the arbitration and decision of a neutral person and the decision of the arbitrator shall be final and binding on all parties, and shall be conclusive evidence of the amount payable and it is hereby expressly stipulated and declared that the obtaining of an award by such arbitrator shall be a condition precedent to the liability or obligation of the corporation to pay or satisfy any claim under this policy," etc. "Provided also that compliance with the stipulations indorsed hereon is a condition precedent to the right to recover on this policy," etc.:—Held, that no action lay, nor did the amount payable under the policy become due, until the determination of the arbitrator to be appointed under the agreement to refer contained in the condition; that the plaintiff could not claim under the policy without assenting to its terms; and that the condition was not in contravention of s. 80 of R. S. O. c. 203. Spurrier v. La-Cloche, [1902] A. C. 446, followed. *Nolan* v. *Ocean Accident and Guarantee Corporation*, 23 Occ. N. 187, 5 O. L. R. 544, 1 O. W. R. 77, 2 O. W. R. 98, 272.

Application — *Concealment* — *Accident Policy.*]—M., in answer to a question in an application for insurance on his life, requiring him to state "the amount of insurance you now carry upon your life," gave particulars of all ordinary life policies, but failed to disclose the fact that he had two accident policies, on each of which $10,000 was payable in the event of his death by accident:—Held, that an accident policy is not life insurance within the meaning of the application, although such accident policy contains an undertaking to indemnify the insured in case of death by accident only. *Montreal Coal and Towing Co.* v. *Metropolitan Life Ins. Co.*, Q. R. 24 S. C. 399.

Application — *Issue of Policy — Date — Completed Contract — Due Dates of Premiums.*]—The initialling of an application for insurance by officers of an insurance company, though indicating acceptance of the risk, does not, without communication of the fact to the applicant, constitute any contract with him. If a policy is afterwards prepared, and the applicant informed that it is ready for him, this will constitute an acceptance of the original application; and such policy may be properly antedated as of the date of the application. A provision in the application and policy that the insurance shall not be binding on the company, or the policy go into effect, until payment of the first premium, will not postpone or affect the due dates at which the respective premiums will fall due, so as to make them different from those mentioned in the policy. *Armstrong* v. *Provident Savings Life Assce. Socy.*, 22 Occ. N. 13, 2 O. L. R. 771.

Application—*Withdrawal before Acceptance—Return of Premium — Contract — Interim Receipt.*]—Appeal by defendants from judgment of County Court of Wentworth in favour of plaintiff in an action for the return of a life insurance premium paid by plaintiff to defendants. On 19th May, 1904, plaintiff signed a written application to defendants for an insurance on his life of $10,000, and on the same day paid to the local agent of defendants $51.90 and gave him his (plaintiff's) promissory note for $300, the two sums making up the amount of the first annual premium, for which he received the company's receipt in full, stating: "The insurance will be in force from the date of approval of the application by the medical director. In case the policy should not be issued, the money will be refunded: provided, a completed application for such insurance is made and submitted to the company, at its home office, and that the applicant, if he shall not receive his policy within 30 days from date hereof, shall notify the company." On 1st June, 1904, and before any acceptance by defendants of the offer of plaintiff which was contained in the application, plaintiff gave notice to defendants of the withdrawal of his application, and requested the return of the money he had paid and the promissory note he had given:—Held, that what took place between the parties amounted merely to an offer by plaintiff to defendants of the risk on his life, on the terms mentioned in the application, and the payment by plaintiff of the sum required to pay the first premium to be applied for that purpose if and when the offer of plaintiff should be accepted, and that defendants before the application was withdrawn had neither accepted the risk nor bound themselves to do anything in consideration of what plaintiff had done. Appeal dismissed. *Henderson* v. *State Life Insurance Co.*, 5 O. W. R. 585, 9 O. L. R. 540.

Apportionment of Insurance Moneys—*Revocation by Will — Application of Foreign Law — Lien for Premiums.*]—A contract of life insurance entered into by a company whose head office is in Ontario, the policy having issued from the head office and providing for payment of the insurance money there, is an Ontario contract, and must be interpreted and carried out in accordance with Ontario law, although the assured lived in Manitoba and made application there to a local agent for the insurance, but an assignment of or dealing with the benefits of the policy made by the assured in Manitoba will be governed by the law of this province relating thereto. The deceased, who was a resident in Manitoba, insured his life with a company whose head office was in Ontario, and by the policy the insurance money was appropriated in favour of his wife, but by his will he absolutely revoked this appropriation and directed that the money should become part of his estate and should be paid to his executor. Section 12

of the Life Assurance, R. S. M. c. 88, as re-enacted by 62 & 63 V. c. 17, permits such a revocation and new disposition of the insurance money, but the corresponding statutory provision in Ontario (R. S. O. 1897 c. 203, s. 160) forbids it:—Held, that the law of Manitoba must be applied to the determination of the question as to the right of the assured to make such new disposition, and that the insurance money must be paid to the executor as part of the deceased's estate. Toronto General Trust Co. v. Sewell, 17 O. R. 442, and Lee v. Adby, 17 Q. B. D. 309, followed:—Held, also, that a will is an instrument in writing within the meaning of the Manitoba statute above referred to. The widow was held entitled to a charge in her favour for insurance premiums paid by her to keep the policy in force. *National Trust Co. v. Hughes*, 22 Occ. N. 101, 14 Man. L. R. 41.

Assignment — *Insurance Moneys—Tontine Life Policy — Right of Assignee to Select Cash Surrender Value—Declaration by Insured in Favour of Wife under Insurance Act.*]—On 18th April, 1905, defendant assigned all his right, title, and interest in and to life insurance policy No. 364,467, in the New York Life Insurance Company to his solicitor, to whom he was at that time indebted to the amount of (about) $40. The assignment, thought absolute in form, was on the following conditions: The assignee was to apply to the company for the cash value of the policy, and, if the company consented to pay such cash value, the debt of the defendant to the assignee was to be deducted, and the balance paid to Mrs. Marshall, the wife of defendant. On 30th May, 1905, plaintiff obtained judgment for $75 debt and $19.22 costs against defendant. On the same day notice of the assignment was given by the assignee to the New York Life Insurance Company, and on the same day the assignee made, in writing, what purported to be a selection of the cash value of the policy. On 31st May plaintiff served an attaching order upon the garnishees. On 23rd June the assignee, the garnishees having made no acknowledgment of his selection, revoked in writing his selection of option, which revocation the garnishees declined to recognize. On 29th June, 1905, defendant made a declaration under the Ontario Insurance Act, sec. 159, declaring the policy and the money to be derived therefrom to be for the benefit of his wife, subject to the assignment above mentioned:—Held, 1. That the declaration in favour of defendant's wife was valid. The judgment of his late brother Robertson in Weeks v. Frawley was very strong, and, although this point did not come up directly for decision in that case, the rest of the Court seem to have taken no exception to his remark. The wording of the statute seems clear and plain. The appeal will therefore be dismissed with costs. 2. That the money was not attachable. There was no sum of money or debt due or payable, the time having elapsed and the selection having been made too late. The assignee's revocation was communicated to the garnishees before their acceptance of his selection, and they had no right or power to prevent such revocation. 3. That an assignee holding a life assurance policy as security for a debt would have no right to make a selection of the cash surrender value, thus completely changing the character of the security. *Fisken v. Marshall*, 6 O. W. R. 611, 10 O. L. R. 552.

Assignment of Policy — Insurable interest — Creditor. *Decker v. Cliff*, 1 O. W. R. 354, 419.

Assignment of Policy by Beneficiary Subject to Charge — Death of insured when renewal premium overdue—Right of beneficiary or representative of insured to tender during days of grace—Insurance Act—Conduct of insurers—Dispensing with tender — Estoppel. *Tattersall v. People's Life Ins. Co.*, 6 O. W. R. 756, 11 O. L. R. 326.

Beneficiaries — *Designation of—"Legal Heirs" — Trust—Reservation of Power of Revocation — Declaration—R. S. O. 1897 ch. 159, sub-sec. 1—Construction of — Preferred Beneficiaries — Next of Kin.*]—Appeal by John Arthur Farley from order of Meredith, C.J., 5 O. W. R. 530, 9 O. L. R. 517, declaring Mary Lawson Farley entitled to the proceeds of an insurance policy in the friendly society called "The Royal Templars of Temperance." The policy in question, dated 12th September, 1901, was upon the life of deceased, the father-in-law of Mary Lawson Farley. The insured had, when the policy issued, designated the beneficiaries in these terms:—"Harold E. Peagam, Charles R. S. Dinnick, and William W. Farley, executors, in trust for legal heirs." At that time his son William W. Farley was alive, as was also his grandson John Arthur Farley. No other descendants of Arthur Farley were living in September, 1901. His son William predeceased him; his grandson John Arthur survived. In November, 1903, the insured executed the following memorandum:—"Toronto, November, 1903. "I, Arthur Farley, hereby declare that the money payable under the benefit certificate upon my life issued to me by the Royal Templars of Temperance, of which I am a member, shall be paid to my daughter-in-law Mary Lawson Farley for her own use and benefit. Arthur Farley." The question for determination was the efficacy of this memorandum, the appellant contending that the original designation was that of a preferred beneficiary, within R. S. O. 1897, ch. 203, sec. 159, and as such irrevocable:—Held, at the time when the insured declared that the policy should be payable to his executors "in trust for his heirs," his son William alone answered that description, so far as any person can be said to be the heir of one living. Had he survived the insured the present claimant, John Arthur Farley, would have no status. On the other hand, had both the son William and the grandson John Arthur predeceased the insured, the words "legal heirs" would have described persons incapable of designation as "preferred beneficiaries." The provision of the Insurance Act referred to by the learned Chief Justice, R. S. O. ch. 203, sec. 2, sub.-sec. 36, puts the matter beyond doubt. This sub-section, adopted in 1897, reads as follows: "In insurance of the person the phrase 'legal heirs' or 'lawful heirs' shall mean and include all the lawful surviving children of the assured: or, where the assured died without lawful surviving children and unmarried, it shall mean those persons entitled to take accord-

ing to the Statute of Distribution." Regarding and applying sub.-sec. 36 and reading it with sub.-sec. 35, which distinguishes between children and grandchildren, of an assured dying "without lawful surviving children and unmarried," with the consequence that the phrase "legal heirs" means "those entitled to take under the Statute of Distributions." This precludes any argument that "legal heirs," so interpreted, can be deemed a designation of preferred beneficiaries under sec. 159. The appeal fails and should be dismissed with costs. *Re Farley*, 6 O. W. R. 78, 1 O. L. R. 540.

Beneficiary — *Murder of Assured—Liability of Insurers.*]—The fact that the beneficiary of a policy of life insurance has intended to assassinate, and has in fact assassinated, the assured, in order to obtain payment of the amount of the policy, is not sufficient—at any rate if it is not proved that the assured knew of this intention when he insured his life, nor that the beneficiary was his agent in effecting such insurance—to release the insurer from the obligation to pay the amount of the insurance to the heirs of the assured; the benefit stipulated for in favour of the assassin having been judicially declared void. Judgment in Q. R. 16 S. C. 539, affirmed; Blanchet J., diss. *Standard Life Assurance Co.* v. *Trudeau*, Q. R. 9 Q. B. 499, affirmed. 31 S. C. R. 376.

Beneficiary for Value — *Change of Beneficiary—Will—R. S. O. c. 203, ss. 151, 160.*]—When a policy of insurance is payable to a beneficiary for value, not so named on the face of the policy, who is also one of the preferred class of beneficiaries, the assured cannot by his will transfer the benefit of the insurance to another beneficiary of the preferred class. Such a case is governed by s. 151, and does not fall within s. 160, of the Insurance Act, R. S. O. c. 203. Judgment of Meredith, J., 32 O. R. 206, 20 Occ. N. 386, reversed. *Book* v. *Book*, 21 Occ. N. 111, 1 O. L. R. 86.

Benefit Certificate — Apportionment among children — Will. *Re Marshall*, 5 O. W. R. 404, 395.

Benefit Certificate—Friendly society — Rules — Impairment of contract—Insurance Act — Non-observance of requirements — Setting out rules—Incorporation by reference —Action by administratrix—Suicide — Insanity. *Waller* v. *Independent Order of Foresters*, 5 O. W. R. 16, 421.

Benefit of Wife and Children—*Certificate of Benefit Society—Disposition of Proceeds by Will — Identification of Certificate —Residuary Estate—"Including."*]—Motion by executor under Rule 988 for order determining a question arising under the will of Adam Harkness as to the disposition of life insurance moneys. The testator was the holder of a policy of insurance issued by the Ancient Order of United Workmen, payable to "his order or heirs." After devising certain real estate, the will contained the following clause: "(2) I give the residue of my property, including life insurance, to my wife Harriet Elizabeth, and to my two youngest children, Adam Wier and Andrew Edmund, share and share alike, it being understood that my wife accepts this in lieu of dower," etc. Excluding the insurance money, the estate was not sufficient to pay the testator's debts, and the question was whether the insurance money was available for creditors or went to the widow and two children. Re Chesborough, 30 O. R. 639, applied:—Held, "the residue of my property, including life insurance," although not using the words "policy" or "certificate," makes it as certain and clear as in the Chesborough case what policies or certificates of insurance are meant, namely, any and every policy securing insurance on testator's life in respect to which he had a disposing or an appointing power. Jarman on Wills, 5th ed., p. 1090, defining the meaning of the words "namely" and "including," says: "Namely imports interpretation, that is, indicates what is included in the previous term; but 'including' imports addition, that is, indicates something not included;" and the same definition is given in Stroud's Judicial Dictionary under title "namely." See also Re Duncombe, 3 O. L. R. 510, 1 O. W. R. 153. Order made that the widow and children are entitled to the insurance moneys to the exclusion of the creditors. *In re Harkness*, 4 O. W. R. 533, 25 Occ. N. 43, 8 O. L. R. 720.

Benefit Society—Beneficiaries — Alteration in certificate — Payment into Court—Issue—Plaintiff in. *Re Miller*, 4 O. W. R. 423.

Benefit Society — *Beneficiary—Designation—Alteration—Privileged Class.*] — The designation of a beneficiary in an Ontario contract of insurance can be revoked and the benefit diverted to another only within the limits laid down by the Ontario Insurance Act, R. S. O. 1897, c. 203, s. 151, even though the original designation of the beneficiary be expressly made subject to power of revocation and substitution reversed, and to the by-laws of the insurers, which permit the desired change. Thus, in such a case, the attempted diversion of the benefit from a beneficiary of the privileged class, to a beneficiary not of that class, was held invalid by reason of s.-s. 3 of s. 151. *Lints* v. *Lints*, 23 Occ. N. 242, 6 O. L. R. 100.

Benefit Society — *Beneficiary Certificate —Alteration of Constitution — Retroactivity — Internal Appeals—Domestic Person — Waiver—Cheque — Estoppel.*]—Action on a beneficiary certificate dated the 19th October, 1896, issued by the defendants, who were incorporated under the Benevolent Societies Act, R. S. O. 1877 c. 167, to the plaintiff, conditioned, inter alia, that he should comply with the constitution, rules, or orders governing, "or that might thereafter be enacted by the defendants to govern, the Order and its benefit funds," and by which the defendants agreed that, on the plaintiff attaining the age of 70, which he had done, they would pay out of the total disability fund, "in accordance with the laws governing such fund," sums not exceeding a certain amount: —Held, that the constitution of the defendants having being duly altered in 1900 in respect to a beneficiary claiming on the ground of having attained the age of 70 years, from what it was in 1896, when the plaintiff's certificate was issued, in such a way as to diminish the amount the plaintiff was entitled to, he was nevertheless bound by the alteration, and could only recover in accordance with it:—Held, also, that the plaintiff

was not bound before action to exhaust the intricate series of appeals within the society provided for by the rules, for, under R. S. O. 1897 c. 203, s. 80, every lawful claim against an insurance corporation under an insurance contract shall become legally payable 60 days after proper proofs of loss, and any rules, conditions, or stipulations to the contrary shall, as against the assured, be void:—Held, also, that defendants have waived a requirement of their constitution that the insured should sign an acceptance:—Held, also, that plaintiff was not estopped from insisting that the whole of the benefit was due, by reason of having accepted a cheque expressed to be for the full amount of the first instalment. *Doidge* v. *Royal Templars of Temperance*, 22 Occ. N. 321, 4 O. L. R. 423, 1 O. W. R. 485.

Benefit Society — Beneficiaries—Conditions imposed by will — Notice to society — Payment into Court — Reduced amount — Ascertainment. *Re Parish*, 4 O. W. R. 425.

Benefit Society —*Beneficiary—Supposed Wife — "Dependent"—Effect of Payment into Court.*]—The plaintiff was the wife of Philip Crosby, deceased, having been married in 1860. In 1886 the deceased went through a second ceremony of marriage with the defendant, who did not know that she was marrying a man whose wife was living. In 1900 the deceased made an indorsement on his certificate of insurance in a benevolent society, revoking his former direction as to payment, and directing payment to be made to "Mary Ball, otherwise known as Mary Crosby." The defendant was the holder of the certificate, and claimed the money as a "dependent" of deceased:—Held, that the defendant, having lived with the deceased, believing herself to be his wife, and being supported by him, was, under one of the rules of the society, No. 174, entitled to the fund as a "dependent" of the deceased:—Held, also, that although the society had not stood upon their strict rights, but had paid the money into Court to be dealt with by the Court, that fact did not affect the rights of the parties, which must be determined according to law, and not ex æquo et bono. *Crosby* v. *Ball*, 22 Occ. N. 324, 4 O. L. R. 496, 1 O. W. R. 545.

Benefit Society — *Beneficiary Certificate — Designation of Beneficiaries — Indorsement — Will — Infant Children of Assured.*]—A benefit society issued a beneficiary certificate payable to the wife of the assured at his death; she died, and he then (in 1895) indorsed on the certificate a direction that payment was to be made "to my children as directed by my will." The day before his death (in 1902) the assured made a will by which he directed that the whole of his estate should be divided amongst his children—there being both adult and infant children—in equal shares, but made no reference whatever to the benefit certificate or to the moneys payable thereunder:—Held, that the infant children of the assured were entitled to the whole of the moneys, by virtue of the amendment made to the Insurance Act, R. S. O. 1897 c. 203, s. 151, s.-s. (6), by 1 Edw. VII. c. 21, s. 2, s.-s. (7). *In re Snyder*, 22 Occ. N. 299, 4 O. L. R. 320, 1 O. W. R. 461.

Benefit Society — Beneficiaries—Executors — Payment into Court. *Re Tidey*, 4 O. W. R. 422.

Benefit Society — Certificate — Disposition by will — Identification of certificate —Residuary estate—"Including." *Re Harkness*, 4 O. W. R. 533.

Benefit Society — *Certificate — Legal Heirs Designated by Will — Election.*] — A certificate issued by a benevolent society to a married woman on the 25th October, 1892, provided that the benefit was to be payable to her "legal heirs as designated by her will." She died on the 14th November, 1892, leaving her husband and three children her surviving. By her will, dated the 30th September, 1892, she gave specific properties and legacies to her husband and each of her three children by name, the insurance to her executors "for the purpose of paying thereout all debts due by me," and the residue to her children:—Held, that the bequest of the insurance money to the executors was inoperative; that it was payable to the three children as "legal heirs designated by will;" and that the children were not bound to elect between the benefits specifically given to them and the insurance money. *Griffith* v. *Howes*, 23, Occ. N. 169, 5 O. L. R. 439, 2 O. W. R. 293.

Benefit Society—Certificate payable to "heirs"—Rights of widow—60 V. c. 36, s. 1, s.-s. 40 — Retroactivity. *Re Sons of England Benefit Society and Courtice*, 3 O. W. R. 680.

Benefit Society — *Friendly Society — Registration — Certificate — Beneficiary — Change by Will — Rules — Conflict with Insurance Act.*]—"The Catholic Order of Foresters" were incorporated in the State of Illinois, and had branches in Ontario, and in 1892 became registered as a friendly society in Ontario under the provisions of the Insurance Corporations Act, 1892, and had since kept their registry in force as a friendly society, and had not at any time been registered as an insurance company. A member of one of the Ontario branches was the holder of a certificate of the society, whereby they promised to pay to the defendant, a brother of the holder, $1,000, upon satisfactory proof of his death. The holder was resident in Ontario; the application for the certificates was made in Ontario; and the certificate was delivered in Ontario. The holder made a will whereby he bequeathed the certificate to the wife of one of the plaintiffs, naming the plaintiffs executors: — Held, that the Order were legally entitled to do business in Ontario; that the certificate in question was a "contract of insurance" within the meaning of the Ontario Insurance Act, R. S. O. c. 203; that the rules of the Order, so far as they were inconsistent with the provisions of the Act, were modified and controlled by such provisions; and, therefore, the benefits of the certificate passed, by virtue of the will to the legatee, although the rules of the Order provided that no will should be permitted to control. In re Harrison, 31 O. R. 314, followed. *Gillie* v. *Young*, 21 Occ. N. 165, 1 O. L. R. 368.

Bequest to Infant—Executors of insured — Domicil — Payment into Court. *Re Webb*, 2 O. W. R. 169, 230.

Change of Beneficiary—Incomplete instrument—Designation by will — Validity—Infant—Payment into Court. *Re Murray*, 4 O. W. R. 281.

Change of Beneficiary—*Surrender of Policy—Issue of Paid-up Policy.*]—In 1888 the deceased was insured for $1,000 payable at his death, in favour of his mother as sole beneficiary. In 1894 he assumed to surrender that policy in consideration of $148.62 and a paid-up policy for $500 payable at his death. In the latter policy it was provided that "the sum insured is to be paid to (mother), or in the event of her prior death to (a sister), or, if the assured shall survive the aforesaid beneficiaries, to his legal representatives or assigns." The mother died in 1901, and the assured died in 1903:—Held, that the sister, who had supported the mother for the last four years of her life at the request of the assured, was entitled to the insurance money as against the executors of the latter. *Re Travellers Ins. Co., Kelly v. McBride*, 24 Occ. N. 62, 7 O. L. R. 30, 2 O. W. R. 1107.

Claim under Policy—Time for making—Extension—Insurance Act, s. 148 (2), construction of. *Re Fallis*, 6 O. W. R. 385.

Condition—*Domestic Tribunal — Renunciation of Right to Set-off.*]—It may be stipulated by a policy of insurance that the assured shall not sue the insurance company until he has endeavoured to obtain justice through the officers of the company in the manner provided by its by-laws. But no stipulation will be valid which has for its object directly or indirectly to hinder the insured from having recourse to the Courts or to force him to go before a tribunal, even a voluntary one sitting in a foreign country. 2. A person may by argument renounce the right of set-off, but such renunciation will not be presumed, and must be stipulated for in a clear and precise manner; in case of doubt as to whether there has been renunciation, the set-off must have effect. *Dahme v. Supreme Court of the Order of Foresters*, Q. R. 21 S. C. 439.

Conditions — *Misrepresentation — Non-disclosure—Accident Policies—Warranties — Jury — New Trial.*]—Unless the evidence so strongly predominates against the verdict as to lead to the conclusion that the jury have wilfully disregarded the evidence or failed to understand or appreciate it, a new trial ought not to be granted. On an application for life insurance, the applicant stated, in reply to questions as to insurances on his life then in force, that he carried policies in several life insurance companies named, but did not mention two policies which he had in accident companies insuring him against death or injury from accidents. The question so answered did not specially refer to accident insurance, but the policy provided that the statement in the application should constitute warrants and form part of the contract:—Held, affirming the judgment appealed from, Taschereau, C.J.C., dissenting, that "accident insurance" is not insurance of the character embraced in the term "insurance on life" contained in the application, and, consequently, that the questions had been sufficiently and truthfully answered, according to the natural and ordinary meaning of the words used, and, even if the words used were capable of interpretation as having another or different meaning, then the language was ambiguous and the construction as to its meaning must be against the company by which the questions were framed. Confederation Life Association v. Miller, 14 S. C. R. 330, followed. Mutual Reserve Life Ins. Co. v. Foster, 20 Times L. R. 715, referred to. *Metropolitan Life Ins. Co. v. Montreal Coal and Towing Co.*, 25 Occ. N. 4, 35 S. C. R. 266.

Contract — *Condition—Payment of Premium—Delivery of Policy—Concurrent Death of Assured.*]—The husband of the plaintiff had, on the 24th February, 1900, made to the defendant company, an application for insurance containing the following condition: "The policy applied for, if it is issued, will not come into force until the premium shall have been actually paid to the company and accepted by it, while the person whose life is offered for assurance is alive and in good health." In making this application for insurance the plaintiff's husband paid $4 on account of the premium, and, the medical examination having been satisfactory, the company issued a policy of insurance at New York on the 8th March, 1900, and deposited it in the post office of that city on the 9th March, addressed to its agent at Montreal, to whom the letter containing the policy was delivered upon the 10th March (a Saturday). On the 8th March the plaintiff's husband was seized with an illness, of which he died on the 10th March between half-past nine and ten o'clock in the morning. The plaintiff afterwards offered the balance of the premium to the agent of the company, who refused to give her the policy:—Held, that if, in principle, the acceptance of the proposal for insurance constituted a valid contract of insurance (Art. 2481, C. C.), in this case the acceptance of the proposal was subject to the condition stated, and such condition not having been complied with, no contract of insurance existed. 2. That, in view of the condition, the deposit of the policy in the post office at New York did not constitute a delivery to the deceased. *Girard v. Metropolitan Life Ins. Co.*, Q. R. 20 S. C. 532.

Contract made by Minor — *Plea of Lesion.*]—Action on a promissory note for $686.25 given in payment of the first premium on a policy of life insurance for $25,000. The defendant pleaded that he was a minor when the contract was made; that it was disadvantageous to him, as it absorbed nearly all his annual revenue; and that as soon as his tutor had heard of it he had served a protest on the company on the ground that the contract was injurious to his pupil:—Held, that the defendant had established his plea, and that it was not his interest to have so large an insurance, especially as his health was not good, and the premium took up nearly all of his fixed income. Action dismissed, but without costs, inasmuch as the plaintiffs had been led into error as to the defendant's age, health, and financial circumstances. *Imperial Life Ins. Co. v. Charlebois*, 22 Occ. N. 417.

Days of Grace—*Assignment of Policy by Beneficiary Subject to Charge — Death of Insured when Renewal Premiums Overdue—Right of Beneficiary or Representative of In-*

sured to Tender during—Insurance Act—Conduct of Insurers—Dispensing with Tender—Estoppel.]—Appeal by the defendants from judgment of Idington, J., upon the findings of a jury, in favour of plaintiff, the widow and administratrix of the estate of Richard Tattersall, for the recovery of $3,950.50, with interest and costs, in an action upon a policy of insurance on the life of the deceased. The company defend on the following grounds: (1) Fraudulent representations by Tattersall on application for insurance. (2) Denial that plaintiff was assured that the policy was all right, or misled. (3) Statement that plaintiff was told that premium had not been paid. (4) All liability caused on the death of Tattersall with overdue premium unpaid. (5) On his death, not possible to renew or revive policy by tender because no beneficiary who could make tender under the contract. (6) Tattersall having died in default, and no tender made by any one within 30 days from due date of premium, liability ceased on policy:—Held, as to the matters of fact the jury found in favour of plaintiff's contention, and the evidence was sufficient to support such finding as right and proper. On matters of law it was argued that there was no right to tender after death of assured, and if such right existed, there was no beneficiary in this case to make tender. The last premium of $49.50 fell due on 10th April, 1903, and was not paid. The death was on 22nd April, 1903, intestate, and plaintiff was administratrix. On 15th December, 1902, the wife, in whose favour was the policy, assigned her interest to the husband, subject to the terms of an agreement referred to in the assignment. This was not notified to the insurance company till after the death. The policy was assigned to the husband, in consideration of his granting her an annuity of $1,500, on condition that if he predeceased his wife the said policy and the proceeds thereof should be charged with payment of the said annuity. There had been default also in the last payment of the annuity before the husband's death. Indorsed on the policy are conditions and provisions, of which Nos. 5 and 8 are important:—"5. Thirty days of grace will be allowed for payment of renewal premiums, if the insured be unable to pay them when due. . . ." "8. From any sum payable under the policy the company may deduct any lien that may be standing against the policy and the balance (if any) of the yearly premium for the then current year. . . ." The statute applicable to this policy provided for 30 days of grace during which the payment in default may be made by the assured or by any of the beneficiaries under the contract: R. S. O. 1897 ch. 203, sec. 148 (1). The original section, passed in 1893, provided that this payment might be made "when the event upon the happening of which the insurance money becomes payable has not yet happened:" 56 V. ch. 32, sec. 10, sub.sec. 12 (8). These words, in case of life policy, exclude the right so to renew or revive the contract by after-payment when death has happened to the person insured. But this qualification was expunged by the legislature in the amendment made in 1897, 60 V. ch. 36, sec. 148 (1), the section now in the R. S. O. 1897:—Held, that the facts disclose a case of estoppel against the company, whereby their conduct and statements, as well as the silence (when it was a duty to speak) of the company's agent, operated to mislead the plaintiff and lull her into security during the currency of the days of grace: this on the lines indicated in Sanford v. Accidental Ins. Co. 2 C. B. N. S. at pp. 287, 288. Appeal dismissed with costs. *Tattersall* v. *Peoples Life Ins. Co.*, 5 O. W. R. 307, 6 O. W. R. 284, 756, 9 O. L. R. 611.

Delivery of Policy—*Payment of Premiums.*]—A contract for life insurance is complete on delivery of the policy to the insured and payment of the first premium. Where the insured, being able to read, having ample opportunity to examine the policy, and not being misled by the company as to its terms, nor induced not to read it, neglects to do so, he cannot, after paying the premium, be heard to say that it did not contain the terms of the contract agreed upon. Judgment of the Court of Appeal, 27 A. R. 675, 21 Occ. N. 17, reversed. *Mowat* v. *Provident Savings Life Assurance Society*, 22 Occ. N. 221, 32 S. C. R. 147.

Delivery of Policy — *Payment of Premium—Evidence.*]—The production from the custody of representatives of the insured of a policy of life insurance raises a prima facie presumption that it was duly delivered and the premium paid, but where the consideration of the policy is therein declared to be the payment of the first premium upon the delivery of the policy, parol testimony may be adduced to shew that, as a matter of fact, the premium was not so paid, and that the delivery of the policy to the person therein named as the insured was merely provisional and conditional. The reception of such proof cannot, under the circumstances, be considered as the admission of oral testimony in contradiction of a written instrument, and in the province of Quebec, in commercial matters, such evidence is admissible under the provisions of Art. 1233, C. C. *Mutual Life Assurance Co. of Canada* v. *Giruère*, 22 Occ. N. 276, 32 S. C. R. 348.

Delivery of Policy—*Time—Operation of Conditions — Incontestability.*]—An application for life insurance, dated 16th September, 1894, and made part of the contract, provided that the issue and delivery of a policy in the usual form should be the only acceptance thereof, and that the place of contract for all purposes should be the head office at Toronto. The policy issued provided that it should not be in force until the first premium had been paid and accepted and the receipt delivered to the insured, and the attesting clause stated that it was delivered at Toronto on the 27th September, 1894. The insured lived in British Columbia. The policy and receipt were mailed at Toronto on the 27th September, 1894, to the company's agent at Winnipeg, and forwarded by him on the 1st October to the insured, who could not have received it before the 7th October. The insured died on the 30th September, 1897. The policy provided that, after being in force for three years, it should be indisputable. The insured violated a condition that would have avoided the policy but for this clause:—Held, that the policy and receipt were delivered and the contract of insurance completed on 27th September, 1894, and was indisputable three days before the

insured died. The provision as to indisputability covered a breach of condition made during the three years. *North American Life Assurance Co.* v. *Elson*, 33 S. C. R. 383; *Elson* v. *North American Life Assurance Co.*, 9 B. C. R. 474.

Deposit with Provincial Treasurer—*Withdrawal — Action—Petition.*] — In order to withdraw a sum of money deposited with the Treasurer of the Province, representing the amount of a life insurance policy, an action must be brought; a petition is not sufficient. *Ex p. Lacombe*, 6 Q. P. R. 301.

Disposition of Proceeds of Policy—Friendly society — Claimants—Two wives both living—"Dependent" — Judgment ex equo et bono. *Crosby* v. *Ball*, 4 O. L. R. 496, 1 O. W. R. 545.

Extra Premium for Special Risk—*Non-exposure—Return of Extra Premium—Rules of Construction Applicable to Contract—Military Service.*]—Policies on the lives of members of the fourth contingent for the war in South Africa were issued and accepted on condition of payment, in each case, of an extra annual premium, "whenever and as long as the occupation of the assured shall be that of soldier in the army of Great Britain in time of war." Each policy also provided that the assured has hereby consented to engage in military service in South Africa in the army of Great Britain, any restriction in the policy contract notwithstanding." The restrictions were against engaging in naval or military service without a permit and travelling or residing in any part of the torrid zone. The contingent arrived in South Africa after hostilities ceased. An action was brought against the company for return of the extra premium, on the ground that the insured had never been soldiers of the army of Great Britain in time of war: — Held, that the special premiums had not been earned by the company, in view of the fact that the assured had not been exposed to the risks of war in South Africa, and that, therefore, the plaintiff was entitled to recover back the amount thereof. 2. In an action to recover from an insurance company it is sufficient to allege the contract, the payment of the premiums, and that the risk provided against did not occur,—without asking for the rescission of a contract which the law treats as a nullity, in providing that, if the risk does not or cannot arise, the insurer has no right to claim the unpaid premiums or to keep them, if they have been paid; Art. 2469, C. C. 3. The meaning or the intent in an insurance contract is to be obtained first from the language employed, and if, by the settled rules of construction, the intent is not clear from the language itself, then resort is had to the circumstances existing at the time the contract was entered into, in order to solve the difficulty and dispel any obscurity. 4. If the terms of the policy are capable of two interpretations equally reasonable, the construction which is most favourable to the insured must be adopted. As the company prepares the contract, and the insured is not consulted with regard to the form thereof, doubts with reference to its meaning must be solved against the company. 5. The clause prohibiting military service in time of war referred to above, means active service in the field as a soldier, and the clause allowing the men to engage in military service in South Africa—where it was known that a state of war existed at the time—permitting them to join the army of Great Britain, indicates that the men were to be insured against the risks and perils of war, and not against the ordinary dangers of a journey to South Africa, which were provided for in the first agreement. 6. The condition in the second clause limiting expressly the contemplated service to South Africa, cannot be extended so as to mean also the journey to South Africa, as this interpretation would be contrary to the terms used by the contracting parties. *Provident Savings Life Assurance Society of New York* v. *Bellew*, Q. R. 14 K. B. 8.

First Premium—*Promissory Note—Condition Avoiding Policy.*]—On the 20th April, 1900, G. applied to the defendants for life insurance; the defendants accepted the risk and issued and delivered their policy to G. in May. The premium was $40, payable half-yearly in advance. On account of the first half year's premiums G. paid $5 in cash and gave his promissory note for $15.38 at two months. Nothing further was paid, and the note was overdue in the defendants' hands when G. died on the 7th August, 1900. The application (forming part of the contract) contained a clause by which G. agreed that if a note given for the first premium or any part thereof should not be paid when due, the policy would cease to be in force without any notice or action on the part of the company. This provision was not set out in full or at all on the face or back of the policy, as required by R. S. C. c. 124, s. 27:—Held, that the cash and note were accepted as payment of the first premium, and the statute not being complied with, the policy was in force at the time of the death. *Greenwood* v. *Home Life Ins. Co.*, 21 Occ. N. 90.

Foreign Company—*Heir of Beneficiary—Proof of Heirship—Action—Tender—Payment into Court—Costs.*]—A foreign company is not presumed to know the law of succession of this province, and, before suing such a company upon a benefit certificate, the plaintiff ought to make known legally to the company and state upon competent authority his position as legitimate heir of the beneficiary, by obtaining from a Judge of the Superior Court letters of verification such as are provided for by arts. 1411 et seq., C. P. 2. In an action taken without these formalities, offers of the amount due to whatever person has the right to it, and a deposit in Court of the amount, will be declared good and valid, and the action will be dismissed without costs up to the plea in which the company declares that it submits its rights to the Court, and with costs subsequent to such plea. *Roy* v. *Supreme Council Catholic Benevolent Legion*, 4 Q. P. R. 277.

Forfeiture of Policy—Non-payment of premium—Agent—Notice—Waiver. *Edwards* v. *Imperial Life Assce. Co. of Canada*, 6 O. W. R. 170.

Infant en Ventre Sa Mere—Period of distribution—Trustee Relief Act. *Re Lethbridge*, 1 O. W. R. 553.

Insolvent Company — *Claim of Policy Holder — Ascertainment of Amount.*] — The amount for which the holder of an unmatured policy, payable at the death of the insured, is

to rank against an insolvent life assurance company, in liquidation under the Ontario Insurance Act, is the difference, if any, at the date of the commencement of the winding-up between the present value of the sum assured at the decease of the life assured and the present value of a life annuity of an amount equal to the future premiums which would become payable during the estimated duration of such life. *In re Merchants' Life Association of Toronto—Vernon's Cases*, 21 Occ. N. 232, 1 O. L. R. 256.

Insolvent Foreign Company — Deposit —Surplus—Interest. *Re Covenant Mutual Life Assn. of Illinois*, 1 O. W. R. 392.

Lien for Moneys Advanced to Pay Premium—*Evidence—Written memorandum —Filing—Conservatory Attachment.*] — A party claiming a lien on the proceeds of a life insurance policy for moneys advanced for the payment of the premiums thereon must allege that the loans were evidenced by a writing of which a duplicate was filed with the insurance company and noted by the company on the duplicate retained by the lender, as provided by R. S. Q., s. 5603, and subsequent refusal to give such writing does not create a right of conservatory seizure. *Smith* v. *Smith*, 7 Q. P. R. 229.

Medical Examination — *Misstatements and Concealments—Materiality—Breach of Warranty—Cancellation of Policy.*]—In the plaintiff's application to the defendants for a policy of life insurance he warranted, amongst other things, that the answers in the medical examination, which formed part thereof, were full, complete, and true, and without any suppression of facts so far as such answers were material to the contract of insurance to be based thereon. In the examination the plaintiff stated that he had not consulted or been attended by a physician for six years prior thereto, whereas he had consulted four physicians within four months immediately before the examination. He also stated that he had not had any illness, except a slight attack of "la grippe," for three years next before his examination, whereas he had been ill for two months immediately before his examination, and had consulted two doctors, who had told him that he was suffering from, at any rate, anæmia. The plaintiff also concealed several symptoms of phthisis or tuberculosis from the examining doctor, which he afterwards admitted to him that he had at the time of the examination. He also warranted that he was free from disease, whereas he had phthisis or tuberculosis, which, though undeveloped by physical signs, were existing:—Held, that these statements and concealments were material and constituted a breach of the warranty; and therefore the policy was void. Judgment was given for the defendants on their counterclaim for delivery up of the policy to be cancelled. *Smith* v. *Grand Orange Lodge of British America*, 24 Occ. N. 16, 6 O. L. R. 588, 2 O. W. R. 965.

Misstatement in Application as to Age—*Evidence of Bona Fides—Admissibility —Burden of Proof—Findings of Jury.*]—In an action on a policy of life insurance a defence was that the insured in his application, made in 1891, stated that he was 41 years of age, whereas in fact he was 44. The evidence shewed that 44 was his actual age at the time. Evidence of statements made by the insured, many years before the application, tending to shew his belief that he was born in 1850, was rejected; — Held, that the evidence should have been admitted for the purpose of shewing that the statement in the application as to age was made in good faith, and without intention to deceive. In answer to questions the jury found that the statement in the application that the insured was born in 1850, was untrue, and was material, but that the insured made the misstatement in good faith, believing it to be true, and without intention to deceive:—Held, that on these answers judgment should have been entered for the defendants, if the jury could not properly find that the statement was made in good faith and without intent to deceive; but, as the plaintiff was not allowed to elicit evidence on this point, there should be a new trial. Where the statement as to the age is found to be material and untrue, an avoidance of the contract follows, unless that result is prevented by its being made to appear that the statement was made in good faith and without intent to deceive; and it must lie upon the person seeking to uphold the contract to make proof of it. *Dillon* v. *Mutual Reserve Fund Life Association*, 23 Occ. N. 86, 5 O. L. R. 434, 2 O. W. R. 78, 4 O. W. R. 351.

Moneys Deposited by Company — *Recovery — Procedure — Action.*] — Where moneys have been deposited by an insurance company pursuant to art. 1198, R. S. Q., a claimant must proceed to obtain such moneys by action and not by petition; and in these cases petitions were dismissed without costs. *Coleman* v. *Catholic Order of Foresters*, 3 Q. P. R. 400; *In re Doran and Ancient Order of United Workmen*, *ib.* 441.

Mutual Benefit Society — Contract uberrimae fidei—Untrue representations in application—Agency. *Ryan* v. *Catholic Order of Foresters*, 1 O. W. R. 547.

Mutual Company—*Natural Premium System—Rate of Assessment—Rating at Attained Age—Fraud — Puffing Statements— Warranty—Rescission of Contract—Estoppel.*]—A. took out a policy on his life in a mutual association, relying on statements contained in circulars issued by the association stating that interest on the reserve fund would be sufficient to cover increases in the death rates, and make the policy, after a certain period, self-sustaining. The rates having been increased, A. paid the assessments for some years under protest, and then allowed his policy to lapse, and sued for a return of the payments he had made with interest, and for a declaration that the contracts were void ab initio:—Held, Sedgewick and Nesbitt, JJ., dissenting, that the statements in the circulars only expressed the expectation of the managers of the association as to the future, and did not prevent the rates being increased in the discretion of the directors. Mutual Reserve Fund Life Association v. Foster, 20 Times L. R. 715, distinguished. Provident Savings Life Assurance Society v. Mowat, 32 S. C. R. 147, referred to. *Angers* v. *Mutual Reserve Fund Life Association*, 35 S. C. R. 330.

Note Given for Premium—*Part Payment — Extension of Time — Forfeiture— Waiver—Estoppel.*]—A condition in a policy

of life insurance provided that if any premium, or note given therefor, was not paid when due the policy should be void. A note given, payable with interest, in payment of a premium, provided that if it were not paid at maturity the policy should forthwith become void. On the maturity of the note it was partly paid, and an extension was granted, and on a part payment being again made a further extension was granted. The last extension was overdue and balance on note was unpaid at the death of the assured. A receipt by the company, given at the time of taking the note, was of the amount of the premium, but at the bottom of the face of the receipt were these words: "Paid by note in terms thereof." While the note was running the policy was assigned for value, with the assent of the company, to the plaintiff, to whom the receipt was delivered by the assured:—Held, that no estoppel was created by the receipt; that there was no duty upon the company to have afforded the plaintiff an opportunity of paying the premium; and that the policy was void. *Wood* v. *Confederation Life Association*, 21 Occ. N. 149, 2 N. B. Eq. Reps. 217.

Payment of Overdue Premium—*Acceptance—Consent—State of Health of Assured.*]—Where, by the conditions of a policy of life insurance, the non-payment of a premium when it falls due renders a policy void, and where it is also declared that no premium in arrear will be accepted by the insurance company unless with the consent in writing of the president, vice-president, or secretary, the acceptance of a premium, after it was due, and the sending of a receipt signed by the secretary, are equivalent to the consent required to validate the late payment of the premium. 2. The fact that the assured was dying when the premium in arrear was paid, the insurance company not having inquired as to his state of health, and no false representation as to it having been made, does not invalidate the payment. *Page* v. *Metropolitan Life Ins. Co.*, Q. R. 23 S. C. 503.

Policy—*Assignment by Will—Identification.*]—The assignment of a policy of life insurance under Arts. 5581 and 5584, R. S. Q., may be by will. It is not necessary that the will should be annexed to the policy; it is sufficient if the will refers to the policy in such a way as to establish its identity beyond contest. *Hardy* v. *Shannon*, Q. R. 19 S. C. 325.

Policy in Favour of Mother—Advance by mother on faith of—Subsequent marriage of insured—Apportionment in favour of wife—Claim by mother as beneficiary for value. *Re Excelsior Life Ins. Co. and De Geer*, 1 O. W. R. 702, 771.

Policy Inconsistent with Application—*Repayment of Premium—Laches.*]—The plaintiff applied to the defendants for insurance at a fixed annual premium for life, but the policy sent to him contained a provision that the premium might be increased. He did not read the policy, and, pursuant to notices from the defendants, paid them seven annual premiums at the original rate. In the eighth year the defendants demanded a larger premium:—Held, that the policy, not being in accordance with the application, was a mere counter-proposal, and that there was no contract; that the plaintiff was under no obligation to read the policy, which he was entitled to assume, in the absence of anything done by the company to call his attention to the provision in question, to be in accordance with the application; that he was, therefore, not barred by acquiescence or delay; and that he was entitled to repayment of the premiums with interest; Maclennan, J.A., dissenting. *Mowat* v. *Provident Savings Life Assce. Socy.*, 21 Occ. N. 17, 27 A. R. 675.

Policy on Life of one Person for Benefit of Another—Assignment—Death of assured—Claim by administrator. *Bain* v. *Copp*, 1 O. W. R. 706, 784, 804.

Preferred Beneficiary — *Widow—Declaration by Will—Claims of Creditors.*]—Motion by executors under Rule 938 to determine the respective rights of the widow and the creditors of W. F. R. Wrighton, deceased, in regard to the proceeds of two policies of insurance upon his life, aggregating $3,000. The deceased made a will containing this provision: "I devise, give, and bequeath to my dear wife Amelia Wrighton, her heirs and assigns, absolutely, all my real and personal estate and effects of every nature and description whatsoever and wheresoever situate and being, and including therein any and all policy and policies of life and other assurance." In an earlier clause the testator directed his executors to pay his just debts and funeral and testamentary expenses out of his personal estate and cash on hand. The widow contended that she was entitled as a preferred beneficiary to the insurance moneys in question, to the exclusion of any claim thereupon of her late husband's creditors:—Held, the contention of the widow could not prevail. The very instrument conferring title upon the widow made that title subject to the payment of the debts of the testator. The insurance moneys were in the gift itself blended with and treated as forming part of the general estate out of which debts were expressly directed to be paid. The testator unmistakably expressed his intention that these insurance moneys should remain part of his general estate available to meet the claims of his creditors. *In re Wrighton*, 4 O. W. R. 261, 25 Occ. N. 44, 8 O. L. R. 630.

Preferred Beneficiary—Will—Trust — Estate. *Re Duncombe*, 3 O. L. R. 510, 1 O. W. R. 153.

Premium Note — *Contract — Amendment—Infant.*]—Where an infant insured his life and gave a promissory note for the first year's premium, which note, as to amount and time of payment, did not correspond with the policy issued:—Held, that the policy, and not the note, was the contract within the meaning of s. 150 (6) of the Insurance Act, R. S. O. c. 203; and the insurers could not recover upon the note by virtue of that section or otherwise:—Semble, that if the insurers were allowed to amend and sue on the policy, they could recover only a small part of the premium, because, by a condition indorsed upon the policy, it became void if the premium was not paid within a month. *Continental Life Ins. Co.* v. *Bowling*, 21 Occ. N. 246.

Presumption of Death from Absence—Rebuttal. *Roderick* v. *Supreme Tent of Knights of Maccabees of the World*, 2 O. W. R. 493.

Proceeds of Policy—*Payment by Instalments—Beneficiaries—Vested Rights.*]—The insured applied for a policy of $5,000 on his life, payable in the event of his death in fifteen instalments of $333.33 each. Being asked in the application: "In event of death of beneficiaries" (his three daughters) "do you desire that the assurance shall be made payable to your executors, administrators, or assigns?" he answered: "No; make to my two sons." This policy was drawn payable in fifteen annual instalments to the three daughters, or, in the event of their death, to the two sons. The three daughters applied to accelerate the payments and obtain the whole amount insured forthwith: — Held, that it was not desirable to incorporate the somewhat technical and not always satisfactory doctrine as to the vesting of legacies into policies of insurance. The intention of the insured was certainly to eke out the amount insured, so far as possible, by means of annual payments for the benefit of his daughters if alive at the date of payment, and, if not, for the benefit of his sons who might survive the deceased daughters. *In re McKellar*, 21 Occ. N. 381.

Profits — *Beneficiary.*]—The wife of the assured, the beneficiary in a policy of life insurance "with participation in profits," is not entitled to receive the profits in the lifetime of the assured. *Colleret* v. *Ætna Life Ins. Co. of Hartford*, 3 Q. P. R. 394.

Promissory Note Given for Premium—*Right to Recover on, Notwithstanding Forfeiture—Consideration.*]—An application for a policy of life insurance in the plaintiff company contained the following provision: "In consideration of the acceptance of this application and the expense incurred in connection therewith, I will accept said policy, when issued, and pay the first annual premium thereon, and if any note . . . or renewal or renewals thereof, given for the first or any subsequent premium, or any part thereof, be not paid when due, any policy issued hereunder will cease to be in force without any notice or action on the part of the company, but nevertheless the liability to pay such note . . shall continue and be enforceable, provided the company will revive the policy in its terms, on production of satisfactory evidence of continued good health." A promissory note, given by the defendant, for one-half of the premium on the policy issued by the plaintiff company, was not paid at maturity, and the company notified the plaintiff that the policy was forfeited, and made an entry to that effect on their books. It appearing that, in addition to the considerations mentioned in the application, the defendant had been insured for at least five months:—Held, that there was valuable consideration for the note, and that the plaintiffs were entitled to recover upon it. The effect of the words in the application "provided the company will revive," etc., was merely to signify the terms upon which a policy forfeited under the rules of the company could be revived, and formed an agreement on the part of the company independent of the payment of the premium. *Home Life Association* v. *Walsh*, 36 N. S. Reps. 73.

Promissory Note Given for Premium—*Right to Recover on, Notwithstanding Forfeiture—Consideration—Verdict of Jury.*]—Where a promissory note was given to the agent of an insurance company in payment of a first premium on a policy; and a policy was issued and sent to the insured and retained by him, containing provisions to the effect that the insurance should not take effect or be binding until the first premium had been paid to the company or a duly authorized agent; also, that if a promissory note or obligation were given for the premium, and should not be paid at maturity, the policy should not be in force while the default continued, but the party should be liable on the note; the Court refused to set aside a verdict for the agent of the company on the note, on the ground that there was no consideration, holding that the defendant (appellant) was bound to shew affirmatively that the verdict was wrong. *Crawford* v. *Sipprell*, 35 N. B. Reps. 344.

Promissory Note Given for Premium—*Part Payment — Extension of Time—Waiver—Assignment of Policy—Receipt—Estoppel—Duty to Assignee.*]—A condition in a policy of life insurance provided that if any premium, or note given therefor, was not paid when due, the policy should be void. A note given, payable with interest, in payment of a premium, provided that if it were not paid at maturity the policy should forthwith become void. On the maturity of the note it was partly paid and an extension was granted, and on a part payment being again made a further extension was granted. The last extension was overdue, and the balance on the note was unpaid at the death of the assured. A receipt by the company, given at the time of taking the note, was for the amount of the premium, but at the bottom of the face of the receipt were these words: "Paid by note in terms thereof." While the note was running the policy was assigned for value, with the assent of the company, to the plaintiff, to whom the receipt was delivered by the assured:—Held, that the company were estopped by the receipt, and by the extensions of the time for payment to the assured, from setting up against the plaintiff that the policy was void for non-payment of the premium. *Wood* v. *Confederation Life Association*, 35 N. B. Reps. 512.

Surrender of Policy—Inducement—Misstatements of agent—Release — Subsequent repudiation—Fraud. *Hamilton* v. *Mutual Reserve Life Ins. Co.*, 2 O. W. R. 155, 806, 3 O. W. R. 851, 4 O. W. R. 299, 416, 5 O. W. R. 162.

Tender of Premium—*Refusal to Accept—Necessity for Tender of Future Premiums.*]—In an action by the widow of a man whose life was insured by the defendants for $1,000, upon payment of a monthly premium of $1.34, to recover the amount of the insurance upon proof of his death, the plaintiff alleged that she tendered the monthly premium for January, 1892, but the defendants refused to accept it, or any future premium, unless the insured should be re-examined. He died in June, 1895:—Held, upon the evidence at the trial, that the plaintiff had not discharged the burden of proving the tender; but, in any case, one tender would not have been sufficient, the circumstances not being such as to justify a reasonable belief that future tenders would be rejected. *Webb* v. *New York Life Ins. Co.*, 22 Occ. N. 179.

Transfer of Policy—*Gift—Civil Code.*]—The provisions of the Civil Code as to gifts

inter vivos and their acceptance do not apply to transfers of life insurance policies. *Montreal Coal and Towing Co.* v. *British Empire Mutual Life Assurance Co.*, 5 Q. P. R. 302.

Unmatured Policy — *Present Value of Reversion—Mode of Calculating—Statute—Amendment—Declaration as to Former Law.*] —The ascertainment of the present value of the reversion in the sum assured by the policy at the decease of the life insured, as directed by the judgment in 21 Occ. N. 232, 1 O. L. R. 256, is a matter of simple calculation from the ordinary life insurance tables; the premium actually paid by the insured has nothing to do with the calculation. The statute 1 Edw. VII. c. 21 (O.), assented to on the 15th April, 1901, altering the manner of valuing unmatured policies, and enacting that the alterations declared the law of the province as it existed on the 14th April, 1892, did not affect the rights of the claimants under their policies, because those rights had been declared (by the judgment referred to above) before the Act was passed, and judgments are not re-opened even by such legislation. *In re Merchants' Life Assn. of Toronto, Vernon's Claims*, 22 Occ. N. 19, 2 O. L. R. 682.

See, also, S. C. (Master in Ordinary), 22 Occ. N. 65.

Validity of Policy—Lien against Transferred policy—Acceptance of premium—Evidence of contract — Foreign companies—License to do business in Canada. *Spooner* v. *Mutual Reserve Fund Life Association*, 1 O. W. R. 566, 583, 2 O. W. R. 363.

Wager Policy—*Endowment—Action for Cancellation—Return of Premiums.*]—If the beneficiary of a life insurance policy has no interest in the life of the insured, has effected the insurance for his own benefit, and pays all the premiums himself, the policy is a wagering policy and void under 14 Geo. III. c. 48, s. 1 (Imp.). The Act applies to an endowment as well as to an all life policy. Judgment of the Court of Appeal, 2 O. L. R. 559, 21 Occ. N. 557, affirmed. In an action by the company for cancellation of the policy under the Act, a return of the premiums paid will not be made a condition of obtaining cancellation. Judgment of the Court of Appeal reversed. *North American Life Assurance Co.* v. *Brophy*, 22 Occ. N. 250, 32 S. C. R. 261.

War Risk — *Extra Premium — Special Condition — Waiver — Consideration.*] — Policies on the lives of members of the fourth contingent for the war in South Africa were issued and accepted on condition of payment in each case of an extra annual premium "whenever and as long as the occupation of the assured shall be that of soldier in the army of Great Britain in time of war." Each policy also provided that "the assured has hereby consented to engage in military service in South Africa in the army of Great Britain, any restriction in the policy contract to the contrary notwithstanding." The restrictions were against engaging in naval or military service without a permit and travelling or residing in any part of the torrid zone. The contingent arrived at South Africa after hostilities ceased, and an action was brought against the company for return of the extra premium, on the ground that the insured had never been soldiers of the army of Great Britain in time of war:—Held, Davies, J., dissenting, that the risk taken by the company of the war continuing for a long time and the insurance remaining in force so long as the annual premiums were paid, was a sufficient consideration for the extra premiums, and it could not be recovered back:—Held, also, that the permission to engage in war in South Africa was a waiver of the restriction against travelling in the torrid zone. *Provident Savings Life Society* v. *Bellew*, 24 Occ. N. 301, 35 S. C. R. 35.

Withdrawal of Application — *Promissory Note for Premium—Failure of Consideration.*]—The defendants signed an application to the Mutual Life Insurance Company of New York for insurance on the lives of S. F., R. F., E. F., and G. H. W., members and directors of the defendant company. When the application was given, the plaintiff, the agent of the company, took from the defendants their promissory note, payable to his own order, for the amount of the premium, and gave the defendants a receipt on one of the company's forms which contained this provision: "The insurance so applied for shall be in force from this date, provided that the said application shall be accepted and approved by the said company at its head office in the city of New York, and a policy thereon duly issued. In case the application is not so accepted and approved and no policy is issued, or should the applicant receive no notification from the company, within 30 days from the date of this receipt, of any application, then in every such case no insurance shall be effected, and it shall be understood and agreed that the company declines the risk, whereupon all moneys paid hereunder shall be returned on the delivery of this receipt." The plaintiff discounted the note and placed the amount to his own credit, and phid the amount of the premiums, less his commission, to his principals after the note was discounted, but before the application was accepted the defendants notified the plaintiff and his principals at their head office in New York that they withdrew the application:—Held, in an action on the note by the agent, that the application was a mere proposal for insurance and might be withdrawn at any time before acceptance: that the consideration for the note having failed, the defendants were not liable in an action by the payee. *Johnson* v. *G. and G. Flewelling Manufacturing Co.*, 36 N. B. Reps. 397.

VI. Marine.

Assurance Broker — *Change in Policy —Authorization — Deviation — Custom — Necessity.*]—When an insurance company has insured a cargo for a voyage from Montreal to New Carlyle, and the assurance broker has of his own motion changed the description of such voyage by adding to it the words "and to Bonaventure River," which was the voyage the ship was to make, the contract of insurance is void ab initio, even when the loss takes place between Montreal and New Carlyle, the insurance broker not being able to change the description of the voyage without a special authorization, and the parties not being agreed upon a port of destination. Judgment in Q. R. 15 S. C. 469 affirmed on this point. When a cargo is insured for a

voyage described as "from Montreal to New Carlyle and Bonaventure River," without indication that the ship will touch at intermediate ports, the fact that the ship is delayed at Levis for six or seven hours, and for four days and six hours at St. Michel de Bellechasse, constitutes a deviation and vitiates the contract of assurance. Judgment in Q. R. 15 S. C. 476 reversed on this point. In order that custom or necessity may be invoked as authorizing such delay, the custom must be universally recognized or at least notorious enough to be known to the assurers, and the necessity must be such as could not be foreseen before the departure of the vessel; and in this case no such custom or necessity was proved. *Mannheim Ins. Co.* v. *Atlantic and Lake Superior R. W. Co.*, Q. R. 21 S. C. 200.

Re-insurance — *Salvage* — "*Special Charges*" — *Contribution* — *Constructive Total Loss.*]—The plaintiffs, having insured a large number of cattle and sheep, for the voyage from Montreal to Manchester, re-insured part of the risk with the defendants —the re-insurance policy or certificate containing the following clause: — "Insured against absolute total loss of vessel and animals, but to pay general average, and special charges." The ship carrying the animals struck a reef, and was finally abandoned three weeks later. In the meantime part of the animals had been landed on an island, whence they were carried to Halifax and other places. The amount payable for salvage of the live stock so transported was fixed at one-third of the gross proceeds of the sale thereof. A large sum was also paid for maintenance of the animals and other expenses until they were sold. The insured then assigned all right in the live stock to the plaintiffs, and were paid as for a constructive total loss. The plaintiffs alleged that all the expenditure for salvage, transportation, and maintenance of the animals, constituted "special charges," within the meaning of the re-insurance policy, and sued the defendants for their proportion of the amount:—Held, that the term "special charges" is equivalent to "particular charges," and includes expenses for salvage, preservation, and sale of the object insured. The word "special" merely distinguishes an expense incurred in a particular interest from an expense incurred in the general interest, which latter gives rise to general average contribution. Special charges cover all expenses occasioned by a peril insured against, when they have been necessarily incurred in consequence of such peril. 2. The fact that the plaintiffs had paid the principal insured as for a total loss, and the circumstance that the defendants may not have been interested in incurring all or any of the charges, did not relieve the defendants from liability for contribution to such charges. *Western Assurance Co.* v. *Baden Marine Assurance Co.*, Q. R. 22 S. C. 374.

Shipwreck — *Abandonment* — *Refusal to Accept—Acceptance by Conduct—Powers of Master—Arrival of Owner's Agent—Misdirection* — *Waiver* — *Evidence* — *Understanding of Witness—Special Jury—Demeanour of Witnesses—Services of Crew and of Agent.*] —The plaintiff's vessel having put into port damaged, notice of abandonment was given to the insurers, all of whom declined to accept. By direction of the agent for the insurers, the cargo was taken out and stored, and the vessel repaired, after which a portion was reloaded, when it was discovered that the vessel was leaking. The cost of repairs up to this time was over $4,000, and the vessel was valued at only $5,000. The persons who had made the repairs, in order to preserve their lien, refused to allow the cargo to be taken out a second time, and, in default of payment, took proceedings against the ship and cargo, under which they were finally sold:—Held, that the refusal to accept the abandonment did not prevent the working of an acceptance, and what was done constituted an acceptance of the abandonment, or, if not an abandonment, such a wrongful conversion of the ship as would preclude the insurers from setting up non-acceptance. 2. That the direction to the jury that the powers of the master in case of shipwreck were displaced upon the arrival of the owner, or of an agent having express authority to represent him, was right. 3. That misdirection as to the particular agent who waived proofs of loss was immaterial, if there was an acceptance of the abandonment. 4. That a mistake of the trial Judge as to a matter of fact about which there was no dispute was not ground for a new trial unless it was shewn that his attention had been directed to the mistake. 5. That under Order 37, Rule 6, the misdirection must have been such as to have occasioned some substantial wrong or miscarriage. 6. That evidence of a witness as to what he understood or did not understand generally was properly rejected, where the memory of the witness appeared to be defective as to conversations. 7. That where the underwriter was wrongfully interfering with the control of the ship, the insured might elect at the last moment to hold that the underwriter had accepted the abandonment. 8. That if the renewal of the notice of abandonment, when the project of the insurers to repair failed, did not conclude the matter, the vessel was lost to the insured by the sale. 9. That the Court, even if dissatisfied with the verdict, especially after a second trial, will defer to the opinion of a special jury of men peculiarly able to understand the subject matter. 10. That where such jurors were furnished with a shorthand report of the evidence of witnesses on a former trial, it was not important that they did not have an opportunity of observing the demeanour of the witnesses. 11. That the amount claimed by the plaintiff for services of the master and crew, while the vessel was in the hands of the underwriters, did not come within the "sue and labour" clause, and was not recoverable; nor was an amount sought for services of the plaintiff's special agent, who was acting adversely to the underwriters. *McLeod* v. *Ins. Co. of North America*, 34 N. S. Reps. 88.

INTERDICT.

Action against — *Parties* — *Curator—Amendment.*] — Interdiction for prodigality renders the interdict incapable of administering his estate, or of being lawfully served with or of lawfully appearing in judicial proceedings. 2. Where a writ has issued against an interdict for prodigality instead of against his curator, the defect cannot be cured by adding his curator as a defendant. Greene v. Mappin, M. L. R. 5 Q. B. 108, followed. *Leroux* v. *De Beaujeu*, Q. R. 20 S. C. 235, 4 Q. P. R. 35.

Action by — *Husband and Wife—Family Council—Curator.*]—If a woman, interdicted for drunkenness, wishes to bring an action for separation from bed and board, against her husband and curator, and the grounds stated in the petition are sufficient to justify such an action, the Court will order that a family council be held to advise as to the appointment of a curator ad hoc. *Clermont* v. *Charest*, 4 Q. P. R. 427.

Curator—*Account.*]—The curator to an interdict may be ordered, upon petition to that effect, to produce a summary account of his administration, certified by him, containing and setting forth the date, amount, and character of each loan made on behalf of the interdict, the time at which it is payable, the security held therefor, and the name and residence of the borrower; also the several deposits made on his behalf, and the name and residence of the persons or institutions with whom they are made. *Cardinal* v. *Cardinal*, 7 Q. P. R. 153.

Curator — *Removal — Pension—Family Council.*]—The curator of a person interdicted for habitual drunkenness has power to sue for an alimentary pension due to the interdict, and his refusal to do so when the interdict is in absolute need of the pension, is a ground for removing him from the curatorship. 2. The advice of a family council as to the expediency of removing the curator is useless where the council was not represented when evidence was given upon the demand for removal, or where such evidence was not communicated to the council. *Gagnon* v. *Gauthier*, Q. R. 22 S. C. 310.

Curator ad hoc— *Family Council.*] — Where it appears that an interdict has matters to litigate with his curator he is entitled to have a curator ad hoc appointed to him for the purpose of such litigation, and the Judge ought to reject the advice of the family council not to name a curator ad hoc to the interdict. *Cantlie* v. *Cantlie*, 7 Q. P. R. 193.

Intoxicating Liquors — *Excessive Use —Husband and Wife.*]—A husband has the right and it is his duty to apply for an interdiction (art. 336 (a), C. C.), against his wife who is addicted to the excessive use of intoxicating liquors. *Archambault* v. *Camiraud*, Q. R. 27 S. C. 30.

Mania for Spending Money—*Purchase on Credit—Necessaries—Loss of Records of Court.*]—Where a person to whom a judicial adviser has been appointed because of her mania for spending money, and with a prohibition against incurring any debts, buys, on credit, the creditor must prove that the goods sold were necessary and useful before he can recover:—Quære, when the records of Court are burnt (force majeure), is it necessary to re-inscribe the name on a new list of interdicts? *Borbridge* v. *Eddy*, Q. R. 26 S. C. 81.

INTEREST.

Bank Act—Bank stipulating for usurious rate — Reduction to maximum legal rate. *Bank of Montreal* v. *Hartman* (B.C.), 2 W. L. R. 57.

Claim for Price of Goods Sold—Interest not claimed in writ of summons—Report — Appeal — Items — Costs. *Kelly* v. *Smith*, 1 O. W. R. 732.

Contract—*Absence of Stipulation for Interest—60 V. c. 24, s. 175 (N.B.)—Rate of Interest.*]—A contract between the defendant, a contractor with the department of railways and canals of the Dominion government, and the plaintiff, a sub-contractor, provided that for $145,000 to be paid to him he was to complete certain work for the defendant, and that the payments should be made (less ten per cent.) monthly as the work progressed according to the estimate of the government engineer in charge. The work on the principal contract was to be completed on the 30th September, 1899. It was not completed for more than one year after that date, but the delay was not the fault of the plaintiff. There was no stipulation in the contract in reference to the payment of interest on any sums due but not paid. M.'s claim was disputed. On an action being brought, it was established that he was entitled substantially to what he claimed:—Held, that the plaintiff was not entitled to interest, his claim not being for a sum certain payable by virtue of a written instrument at a time certain, within the meaning of s. 175 of 60 V. c. 24 (N.B.) Semble, that if the plaintiff had been entitled to interest, the rate would not be restricted to 5 per cent. under 63 & 64 V. c. 29 (D.), the contract having been entered into before the passing of the Act. *Mayes* v. *Connolly*, 35 N. B. Reps. 701.

Contract — *Chattel Mortgage — Statement of Rate—Interest Act, 1897—Statutes —Waiver.*]——A chattel mortgage provided for the payment of $125, the principal money, in consecutive monthly instalments of $5 each, and for payment of $5 more with each instalment, for interest. The yearly rate to which this was equivalent was not stated, but there was a clause in the mortgage waiving in explicit terms the necessity for stating the yearly rate and waiving also the benefit of the Interest Act, 1897:—Held, that this being an Act passed on the ground of public policy for the benefit of borrowers, its application could not be waived, and that the mortgagee was entitled to interest only at the legal rate. *Dunn* v. *Malone*, 23 Occ. N. 328, 6 O. L. R. 484, 2 O. W. R. 1036.

Contract—*Sum Certain—Rental of Track —Interest by way of Damages—Demand of Payment.*]—By the agreement in question in the action the defendants agreed to pay to the plaintiffs $800 per annum per mile of single track and $1,600 per mile of double track occupied by the defendants' railway, not including "turnouts," in four equal quarterly instalments, on the 1st January, April, July, and October in each year. Disputes arose between the parties as to the meaning of the word "turnouts" and as to what tracks were to be measured and as to the manner in which they were to be measured, and this action was brought in reference to these questions, and was finally determined on appeal to the Judicial Committee. In the result the contention of neither party was given effect to, the mileage in respect of which rental was payable being held to be less than that contended for by the plaintiffs

and greater than that contended for by the defendants. The plaintiffs had from time to time demanded payment of the sums payable to them according to their construction of the agreement. The mileage and the sums consequently payable were fixed by the Master in accordance with the principles laid down in the judgments:—Held, that the defendants were bound at their peril to ascertain the sums properly payable and to pay or tender these sums to the plaintiffs; that not having done so the plaintiffs were entitled to interest upon these sums from the times at which they should have been paid; not, under s. 114 of the Judicature Act, R. S. O. 1897 c. 51, as being sums certain payable by virtue of a written instrument at certain times capable of ascertainment by arithmetical computation, but upon the ground that the case was one in which it would have been usual for a jury to allow interest, and therefore within s. 113 of that Act. Decision of Master in Ordinary, 2 O. W. R. 225, affirmed. *City of Toronto* v. *Toronto R. W. Co.*, 24 Occ. N. 86, 7 O. L. R. 78, 3 O. W. R. 204, 298, 4 O. W. R. 221, 330, 345, 446, 5 O. W. R. 14, 64, 130, 403, 415, 6 O. W. R. 574, 677, 871.

Disputed Accounts—*Federal and Provincial Governments—Award—Agreement as to Date from which Interest to be Computed.*]—In certain arbitration proceedings between the Dominion of Canada and the provinces of Ontario and Quebec, the first mentioned province was found to be indebted to the Dominion in the sum of $1,815,848.59 on the 31st December, 1892. Upon a case stated to determine whether interest was payable by the province from the 31st December, 1892, when a balance was struck in favour of the Dominion, or from the 1st July, 1894, only:—Held, that the correspondence shewed an agreement on the part of the Dominion that interest should only be paid from the date last mentioned. *Dominion of Canada* v. *Province of Ontario*, 23 Occ. N. 100, 8 Ex. C. R. 174.

Hypothec—*Several Properties — Sale — Distribution of Proceeds — Collocation.*] — When two or more immovables hypothecated by the same instrument are sold at different dates, and the amount of the obligation is not entirely paid by the proceeds of the first sale, the interest upon the obligation continues to run, and the creditor has a right to be collocated by virtue of his hypothec upon the proceeds of the second sale. *Garand* v. *Charlebois*, Q. R. 21 S. C. 488.

Irregular Judgment—*Moneys Retained Under—Refund.*]—Where executors, who were also residuary legatees, acting bona fide under a judgment afterwards held by the Court of Appeal to be irregular, and not binding on the parties concerned, retained a greater sum of money than they were subsequently held entitled to, but were exonerated from all fraud or misconduct, they were held not chargeable with interest. *Boys' Home* v. *Lewis*, 3 O. L. R. 208.

Judgment for Payment of Value of Bonds — Amount ascertained by Master — Interest on—Amendment of judgment. *Ray* v. *Port Arthur, Duluth, and Western R. W. Co.*, *Ray* v. *Middleton*, 3 O. W. R. 160.

Moneys Realized upon Execution — *Repayment when Judgment Reversed — Liability for Interest—Claim by Stranger—Rate of Interest—Costs.*]—After the Court of Appeal (3 O. W. R. 32) had affirmed the decision of the trial Judge (2 O. W. R. 93) in favour of plaintiff, plaintiff issued execution against defendants, and received a sum of $1,358.89, being proceeds of sale of goods of defendant Alice R. Cox. The Supreme Court of Canada on 14th December, 1904, reversed the judgment of the Court of Appeal, and plaintiff thereupon became liable to repay the $1,358.89. Some delay arose about this, as the money was claimed by another execution creditor. The plaintiff thereupon notified the claimants that he would apply for an interpleader order, and prepared the necessary material, but did not proceed further. Ultimately on 20th February, 1905, the money was paid by consent of all parties to the solicitors for the defendants, but without interest, though interest was asked for before payment of the principal. Defendant Alice R. Cox moved for an order for payment by plaintiff of interest at 5 per cent. from date of payment to plaintiff to date of repayment, nearly 11 months:—Held, the prima facie right to interest, in the circumstances of this case, is established by Rodger v. Comptoir d'Escompte de Paris, L. R. 3 P. C. 465, where the whole question is discussed by Lord Cairns. This was followed by Bacon, V.-C., in Merchant Banking Co. v. Maud, L. R. 18 Eq. 659, and by our own Court of Appeal in Sherk v. Evans, 22 A. R. 242 (see especially judgment of Osler, J.A., at p. 248). Counsel for plaintiff, contended that, in view of the conflict as to who was entitled to the principal, interest should not be allowed. But it was open to him to have guarded himself either by an order to pay the money into Court, or by getting a waiver of any right to interest from the rival claimants. The present lawful rate being 5 per cent., I think defendant Alice R. Cox is entitled to what she asks. *Adams* v. *Cox*, 5 O. W. R. 419, 10 O. L. R. 96.

Order on Further Directions to Pay Interest on Amount Decreed—*Power of Court—Discretion Overruled—Interest Intentionally Omitted from Final Judgment.*]—Where a decree of the Court of Appeal affirmed by the Judicial Committee had ordered the repayment of moneys received by the appellant in excess of his salary as manager of a company, but was silent as to interest on the sums so overdrawn: — Held, that the Court had power to order interest on further directions as a matter of discretion, but that, as it appeared from the judgment of the Judicial Committee that the order in council issued upon their advice intentionally omitted a direction to that effect, the discretion of the Court below should be overruled. As no claim for interest was made at the commencement of the action, it should be charged only on the amount decreed from the date of the decree of the Court of Appeal. Judgment in Earle v. Burland, 23 Occ. N. 276, 6 O. L. R. 327, reversed. *Burland* v. *Earle*, [1905] A. C. 590.

Promissory Note — *Collateral Oral Agreement to Pay Interest — Evidence.*] — Oral testimony cannot be received, even where there is "commencement de preuve par écrit," to establish an agreement alleged to have been made at the time of giving a

promissory note, which does not on its face bear interest, that interest would be payable on it. *Dombroski* v. *Laliberté*, Q. R. 27 S. C. 57.

Rate of—Chattel mortgage—Interest Act, R. S. C. c. 8—Express waiver of. *Dunn* v. *Malone*, 2 O. W. R. 1036, 6 O. L. R. 484.

Recovery of—*Debt*—"*Time Certain*"—*Writing.*] — The defendant P., in October, 1889, contracted with C. to build certain fences and gates along the line of the G. N. W. Central Railway, and associated the defendant M. with him. They sublet the contract to the plaintiffs by a written agreement which provided for payment to the plaintiffs as follows: "Estimates for the said work shall be made monthly by the engineer, and shall be paid forthwith upon same being paid to said P. and M. by said company." After payment of two estimates for part of the plaintiffs' work, difficulties arose, and the engineer, to prevent the bringing of an action, withheld further estimates; but in September, 1891, after litigation between C. and the company had commenced, P. accepted a judgment against the company for the balance due to him by C. upon his fencing contract. This judgment, however, was not paid until 1898, and then it was paid without interest: —Held, that the plaintiffs were not entitled to interest on their claim before action, as it was not payable by virtue of a written instrument at a time certain within the meaning of 3 & 4 Wm. IV. c. 42, s. 28. London, Chatham, and Dover R. W. Co. v. South-Eastern R. W. Co., [1892] 1 Ch. 120, followed. Judgment in 20 Occ. N. 359 varied. *Sinclair* v. *Preston*, 21 Occ. N. 97, 13 Man. L. R. 228.

Written Contract—*Debt and Time Certain—3 & 4 Wm. IV. c. 42, s. 28.*]—To entitle a creditor to interest under 3 & 4 Wm. IV. c. 42, s. 28 (Imp.), the written instrument under which it is claimed must shew by its terms that there was a debt certain payable at a certain time. It is not sufficient that the same may be made certain by some process of calculation or some act to be performed in the future. Judgment in 21 Occ. N. 97, 12 Man. L. R. 228, affirmed. *Sinclair* v. *Preston*, 22 Occ. N. 9, 31 S. C. R. 408.

INTERIM ALIMONY.

See HUSBAND AND WIFE.

INTERIM INJUNCTION.

See INJUNCTION.

INTERLOCUTORY JUDGMENT.

See DAMAGES—JUDGMENT.

INTERNATIONAL BRIDGE.

See ASSESSMENT AND TAXES.

INTERNATIONAL LAW.

See SHIP.

INTERPLEADER.

Application by Executor — Adverse claims to estate—Delay in applying for probate — Discretion — Remedy. *Re Smith and Bennett*, 2 O. W. R. 399.

Issue—*Party Plaintiff—Sheriff Remaining in Possession—Place of Trial — Security for Costs—Execution Creditor — Insolvency.*] — Where the claimant is in possession of the goods at the time of seizure, the execution creditor is made plaintiff in the interpleader issue directed on the sheriff's application. And this rule applies where the claimant is the wife of the execution debtor, and the goods are seized upon the premises in which a business is carried on by her in which she is assisted by him, but in which he has no interest. Where the goods seized were manufactured materials, the product of a going concern, a direction in the interpleader order that the sheriff should continue in possession until the final disposition of the issue, was upheld against the contention of the execution creditor that the sheriff should be directed to sell the goods, or the claimant to pay into Court or give security for the appraised value. An interpleader issue should ordinarily be tried in the county where the goods are seized, but where the sheriff is to remain in possession of the goods of a going concern, a speedy trial is so important that for the purpose of securing it, the issue may be sent to another county, having regard to considerations of expense and convenience. Under the discretionary powers given by Rule 1122, the execution creditor, being in insolvent circumstances, may be ordered to give security for the sheriff's costs. *Farley* v. *Pedlar*, 21 Occ. N. 294, 1 O. L. R. 570.

Security for Goods—*Sole Bond of Chartered Bank.*]—The sole bond (approved by the proper officer of the Court) of a chartered bank, the claimant of the goods in question in an interpleader, is sufficient security for the forthcoming of the goods; it is not necessary to procure sureties, nor to give proof by affidavit of the responsibility of the bank. *Ontario Bank* v. *Merchants Bank of Halifax*, 21 Occ. N. 188, 1 O. L. R. 235.

Shares—*Certificate and Transfer — Claim for Damages—Parties Out of Jurisdiction—Laches—Collusion.*]—A transfer of shares in a company having been made, the transferor set up that it was procured by fraud, and the transferor and transferee each brought an action against the company:—Held, that the company were entitled to relief by way of interpleader, notwithstanding the claim against them for damages made by one of the claimants:—Held, also, that, although both claimants were out of the province, and the company's head office was also outside of the province, there was jurisdiction to make an interpleader order, the claimants themselves having brought the company into the jurisdiction, and the documents being within the jurisdiction:—Held, also, that the laches of the company had not been so great as to disentitle them to the relief claimed, and the

charge of collusion between the company and the transferor was not sustained:—Held, also, that the transferee was entitled to have preserved to him any claim he might have for damages against the company. *In re Underfeed Stoker Co. of America*, 21 Occ. N. 146, 1 O. L. R. 42.

Sheriff—*Delay—Indemnity.*] — A delay of three weeks after receipt of the claimant's notice before making interpleader application will not disentitle the sheriff to relief, unless the party objecting has been prejudiced. Quære, whether a sheriff who has taken indemnity from one of the parties after seizure would now be held by that fact alone to have lost his right to interplead:—Held, that in any event it is not open to the party giving the indemnity to take such objection. *McCallum* v. *Schwan, Gould* v. *Schwan*, 5 Terr. L. R. 471.

Sheriff—Goods exigible in possession of third person—No actual seizure. *Brown* v. *Markland Publishing Co.*, 6 O. W. R. 142.

Sheriff—Judgment debtor as claimant—Seizure of building under fi. fa. goods — Annexation to freehold — Exemptions Ordinance — Homestead exemption — Workshop. *Eastern Townships Bank* v. *Drysdale* (N.W. T.), 2 W. L. R. 423.

Sheriff—Seizure — Inconsistent claims to goods seized—Form of order—Sale of goods by sheriff—Separate issues. *Nisbet* v. *Hill*, 5 O. W. R. 155, 293, 337, 402.

Sheriff—Seizure of goods under execution—Claim by wife of execution debtor—Right to interpleader order—Issue—Burden of proof—Parties—Plaintiff in issue. *Brownlee* v. *Eads* (Y.T.), 2 W. L. R. 123, 216.

Stakeholder—Demand and refusal of indemnity — Replevin — Nominal damages — Costs. *McCallum* v. *Williams* (N.W.T.), 1 W. L. R. 257.

Stakeholder — Promissory notes — Payment—Costs. *Miller* v. *McCurdy*, 6 O. W. R. 433.

Stakeholder — *Rival Claimants — Issue — Plaintiff—Insurance Moneys—Security for Costs.*]—By the terms of an insurance policy it was made payable to the wife of the insured, giving her name. The insured had lived for many years in this province with a person who passed as his wife, and by whom he had a family, and who had possession of the policy; but shortly before his death he made a will whereby he left the policy in question to a person of the same name, who resided out of the province, whom he described as his wife, and to a daughter by name. In directing an interpleader issue to try the right to the policy, it was ordered that the legatees under the will should be plaintiffs, and they were not required to give security for costs; the difficulty having been caused by the deceased himself, it might be assumed that the costs of all parties would be made payable out of the fund. *Bruce* v. *Ancient Order of United Workmen*, 25 Occ. N. 45, 4 O. W. R. 241.

See ATTACHMENT OF DEBTS — BILLS OF SALE AND CHATTEL MORTGAGES—CHOSE IN ACTION — ASSIGNMENT OF — LANDLORD AND TENANT—TRIAL.

INTERROGATORIES.

See DISCOVERY—EVIDENCE—PARLIAMENTARY ELECTIONS.

INTERVENTION.

Inscription—*Practice.*]—When an intervener contests the demand of the plaintiff, and the plaintiff has not replied to the intervention, he cannot inscribe ex parte in respect of the intervention at the same time as in respect of the principal action. *Williamson* v. *Yates*, 6 Q. P. R. 300.

Re-opening of Cause—*Preliminary Exceptions—Deposit.*]—An intervenant has not the right, at any stage of the case and without deposit, to re-open it on questions pleadable only by preliminary exceptions. *Bisaillon* v. *Curé, &c., of St. Valentin*, 4 Q. P. R. 191.

Service—*Certificate of Prothonotary.*] — A certificate of the prothonotary stating that an intervener has not served his intervention within three days after its filing, will be set aside on motion if it is stated that the parties have received a copy of the intervention, the service of the intervention not being necessary. *Montreal Loan and Mortgage Co.* v. *Heirs of Mathieu*, 6 Q. P. R. 459.

INTOXICATING LIQUORS.

Action for Price—*License—Production—Pleading.*]—The plaintiff was a grocer, and sued to recover the amount of an account for intoxicating liquors sold. The defendant moved for an order that the plaintiff should be directed to declare whether at the time of the sale of such beverages he had a license required by law, and to produce such license:—Held, that the plaintiff was not obliged to allege that he was the holder of a license nor was he obliged to produce one as long as the defendant did not by his pleading allege that the plaintiff had not obeyed the law upon this point. *Martel* v. *Paquet*, 5 Q. P. R. 109.

N. W. T. Act—*Permit—Municipal Ordinance—By-law—Licenses — Police Regulation—Revenue—License Fee.*]—The North-West Territories Act, R. S. C. c. 50, s. 92, enacts, inter alia, that no intoxicant shall be imported into the Territories, or be sold, exchanged, traded, or bartered, or had in possession therein, except by special permission in writing of the Lieutenant-Governor. The Municipal Ordinance authorizes municipal councils to make by-laws for licensing, regulating, and governing, inter alia, hotels, places of public resort, and places where liquid refreshments are sold; and for fixing the sum to be paid for a license:—Held, that a permit from the Lieutenant-Governor did not dispense the holder from a compliance with a municipal by-law passed under the above mentioned provision of the Municipal Ordinance:—Held, that, assuming that the power to impose a license under the Ordinance was intended as a power to make a police regulation, and not for the purpose of raising a revenue (but semble, contra), a by-law imposing a license fee of

$100 was valid as against the objection that the fee was excessive. *Regina* v. *Salterio*, *Regina* v. *McKenzie*, *Regina* v. *Tumulty*, 11 Occ. N. 27, 1 Terr. L. R. 301.

See CANADA TEMPERANCE ACT—CONSTITUTIONAL LAW — CRIMINAL LAW — LIQUOR LICENSE ACT.

INTRA VIRES.

See CONSTITUTIONAL LAW.

INVENTION.

See PATENT FOR INVENTION.

INVENTORY.

See SURROGATE COURTS.

INVESTMENTS.

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IRREGULARITY.

See ARREST—BILLS OF SALE AND CHATTEL MORTGAGES—WRIT OF SUMMONS.

JOINDER OF CAUSES OF ACTION.

See PARTIES—PLEADING.

JOINDER OF ISSUE.

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JOINDER OF PARTIES.

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JUDGE OF HIGH COURT.

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JUDGMENT.

I. DEFAULT JUDGMENT, 824.

II. FOREIGN JUDGMENT, 825.

III. INTERLOCUTORY OF FINAL, 829.

IV. OPENING UP, RESCINDING, AND VARYING, 829.

V. REGISTRATION OF, 835.

VI. SUMMARY JUDGMENT, 835.

VII. OTHER CASES, 841.

I. DEFAULT JUDGMENT.

Debt—*Interest — Unliquidated Demand — Irregularity.*]—Where in an action for a debt or liquidated demand, there is also a claim for interest as accruing prior to the issue of the writ, but no allegation in the statement of claim of any contract, express or implied, to pay it, it cannot, being an unliquidated demand, be included in a judgment signed by default under Rule 90. Such judgment will be set aside as irregular. *Ewing* v. *Latimer*, 5 Terr. L. R. 499.

Dismissal of Action—*Default of Plaintiff—Application by Plaintiff for Relief—Service on Defendant's Solicitor—Duration of Retainer — Absent Defendant.*] — On 20th December, 1904, the usual præcipe order for security for costs was taken out and served. Owing to a change in the firm of plaintiffs' solicitors, the order was not complied with; and on 18th January, 1905, an order issued under Rule 1203 dismissing the action with costs; but no judgment was entered or costs taxed. On 23rd January this order came to the knowledge of plaintiffs' solicitors; they at once moved under Rule 358 to be allowed to put in security and proceed with the action. Notice of this motion was served on defendant's solicitor (as appeared by admission indorsed thereon). But on the return of the motion on 28th January, he stated that defendant had been informed by him that the action had been dismissed, and that defendant had left the province, without giving any address; and that the solicitor did not consider himself any longer entitled to act:—Held, wherever a judgment has been entered on default of either party, a possible remedy is provided by Rule 358; and that, so long as that Rule can be invoked, the action is still pending. In all such cases the motion has to be made in the action, which must therefore be viewed as still pending—otherwise no motion could be made—and the only remedy would be by petition, if any remedy existed. Then it follows that if the action is pending, the solicitor on the record is still solicitor until a change has been made as directed in Rule 335. [See Newcombe v. McLuhan, 11 P. R. 461.—ED.] *Muir* v. *Guinane*, 5 O. W. R. 324, 6 O. W. R. 64, 10 O. W. R. 367. See also 6 O. W. R. 383, 844.

Failure to Comply with Order for Security for Costs—Judgment issued ex parte—Terms of order—Motion to set aside judgment—Merits. *Thomas* v. *Clark* (Y.T.), 1 W. L. R. 512, 2 W. L. R. 126.

Leave to Defend — *Solicitor's Slip — Merits—Discretion of Judicial Officer — Appeal.*]—When a judgment is regularly entered

in default of a defence, a good defence on the merits should be shewn on an application to set it aside and allow a defence to be filed, even if it was by the error of the clerk of the defendant's solicitor, in not carrying out his instructions, that the defence intended was not filed in time. Watt v. Barnett, 3 Q. B. D. 363, approved. Where, however, the referee has exercised his discretion in favour of the defendant and made an order giving leave to defend, such order should not be reversed on appeal, although the Judge cannot find that any defence on the merits has been shewn. Moore v. Kennedy, 12 Man. L. R. 173, followed. *McCaul* v. *Christie*, 15 Man. L. R. 358, 1 W. L. R. 332.

Motion to Set Aside—Defence—Counterclaim —Security for costs — Summons or notice of motion—Affidavit of merits—Security in hands of defendants. *Moyie Lumber and Milling Co.* v. *May* (N.W.T.), 1 W. L. R. 152.

Motion to Set Aside—Defence on merits —Delay in moving—Terms—Costs. *Gillard* v. *McKinnon*, 6 O. W. R. 365.

Motion to Set Aside Order Dismissing Action — Default of security for costs—Rule 1203. *Sparrow* v. *Blue Ribbon Theatrical Co.*, 6 O. W. R. 389.

Res Judicata—*Judgment for Defendant by Default at Trial—New Action for Same Cause—Proof of Identity.*]—A judgment in favour of the defendants in default of the plaintiff's appearance at the trial, under O. 34, r. 29, is to be considered a dismissal of the action on the merits, and when set up as a defence in a second action in respect of the same subject matter, which may be established by the specially indorsed writ in the first action, is a bar. The proper course for the plaintiff was to have applied to the Judge who heard the cause to set aside the judgment and for a re-hearing. *Mumford* v. *Acadia Powder Co.*, 37 N. S. Reps. 375.

Time for Filing Defence—Computation —Vacation—Sunday — Irregularity. *Handley* v. *Scott and Warren* (N.W.T.), 2 W. L. R. 341.

Want of Jurisdiction Ratione Personae Vel Loci—*Waiver—Duty of Court.*]—Want of jurisdiction ratione personæ vel loci is only waived by the appearance of the defendant and his default to plead it within the delays; it does not give a Court power to condemn by default a defendant improperly summoned. If want of jurisdiction is pleaded on appeal by the defendant, the duty of the Court is to put the parties out of Court, reserving the plaintiff his recourse before the competent tribunal. *Canadian General Electric Co.* v. *Canada Wood Manufacturing Co.*, 7 Q. P. R. 140.

See DISMISSAL OF ACTION—WRIT OF SUMMONS.

II. FOREIGN JUDGMENT.

Action on — Defence — Defendant not served with process in original action—Finding of fact—Leave to amend—Original cause of action—Parties. *Bank of Montreal* v. *Morrison*, 5 O. W. R. 90, 540.

Action on—Defence—Fraud—Evidence to sustain. *Anderson Produce Co.* v. *Nesbitt*, 1 O. W. R. 818, 2 O. W. R. 430.

Action on—*Defence—Non-service of Process in Original Action—Pleading—Reply.*]—The declaration charged that the defendant was indebted to the plaintiff in $326, by virtue of a judgment recovered in the Superior Court of the District of M., in the Province of Q. Plea, that the defendant was not personally served with the first process in the suit within the jurisdiction of the Court where the judgment was obtained, and that the defendant was never indebted to the plaintiff in the claim on which the judgment was obtained. Replication that the contract on which the judgment was recovered was made at M., within the jurisdiction of the Superior Court of the district of M.; that the said Court had jurisdiction of the subject matter of the said suit, and the said judgment was regularly obtained according to the practice of the said Court, and that the sum mentioned in the said judgment and ordered to be paid is justly and truly due and payable by the defendant to the plaintiff. Demurrer to the replication, and notice of objection to the plea:—Held, that the plea as an allegation that the enforcement of the judgment by this Court was contrary to natural justice, was bad, as it did not negative the existence of all facts which, if proved, would render the judgment enforceable, that it was not sufficient to enable the defendant to go into the merits of the original cause of action under C. S. c. 48, as it did not set out the cause of action. That the replication was bad, as it did not join issue on the conclusion of the plea "never indebted," and merely reiterated in another form the right to enforce the judgment. *Shearer* v. *McLean*, 36 N. B. Reps. 284.

Action on—*Defences Set Up in Original Action—Motion to Strike Out — Embarrassment—Delay.*]—The defences that may be set up in an action in Manitoba an a foreign judgment by virtue of s.-s. (1) of s. 38 of the King's Bench Act, R. S. M. 1902, c. 40, are not limited to such as might have been, but were not, pleaded in the original action, but include such as were actually pleaded there, subject to the power of the Court or a Judge to strike them out on the ground of embarrassment or delay; and a motion to strike out defences was refused. Gault v. McNabb, 1 Man. L. R. 35, distinguished. Meyers v. Prittie, 1 Man. L. R. 27, not followed. British Linen Co. v. McEwan, 8 Man. L. R. 99, discussed. *Hickey* v. *Legresley*, 15 Man. L. R. 304, 1 W. L. R. 546.

Action on—Jurisdiction of foreign Court — State Court — Subject of "country" — Resident of another country—Submitting to jurisdiction. *Dakota Lumber Co.* v. *Rinderknecht* (N.W.T.), 1 O. W. R. 481, 2 W. L. R. 86, 275.

Action on—*Equitable Relief—Declaratory Judgment — Simple Contract Creditor — Statute of Limitations.*]—A creditor under a Quebec judgment asked a declaration that the judgment debtor was beneficial owner of a certain claim against the Dominion government:—Held, that being in this province in the position of a simple contract creditor he was not entitled to such relief, for the same reasons which debar a simple contract creditor

from taking garnishee proceedings or proceedings for equitable execution; and also because, the claim being one against the Crown, no consequential relief was or could be asked. Held, also, that the judgment, being more than six years old, would under ordinary circumstances have become barred; but since the judgment debtor was not at the time of the recovery, nor had been since, in this province, the plaintiff's remedy was saved by R. S. O. 1897 (vol. 3) c. 324, s. 40. *Stewart* v. *Guibord*, 23 Occ. N. 242, 6 O. L. R. 262, 2 O. W. R. 168, 554.

Action on—*Lis Pendens—Similar Action in Another Province.*]—A judgment rendered in a province of the Dominion other than the province of Quebec will not be considered as a judgment rendered in a foreign country, and the Quebec Courts are obliged to recognize a judgment so pronounced if it is in accordance with the provisions of art. 211, C. P. 2. A defendant by a plea of lis pendens may except to a suit begun in the province of Quebec by alleging that a suit of the same nature, between the same parties, and for the same cause of action, is pending in another province of the Dominion. 3. But, if the action has no object but to have the judgment rendered in another province of the Dominion declared executory, the fact that the plaintiff has set up a like cause of action in another province, and that it is actually pending, does not justify a plea of lis pendens, provided that the Court is not asked to pronounce upon the cause of action, but only to state that the judgment has been regularly obtained. *Blackwood* v. *Percival*, 22 Occ. N. 417, 5 Q. P. R. 110, Q. R. 23 S. C. 5.

Action on—Motion for summary judgment—Defence. *Chambre* v. *Gundy*, 2 O. W. R. 243, 244.

Action on—*Plea to—Damages not Due.*]—A defendant who is sued upon a foreign judgment declaring a contract to be executory and awarding damages by reason of its non-execution, may, notwithstanding such judgment, by virtue of arts. 111 and 202, C. P., plead to the allegation of the debt in the declaration, that the damages claimed are not due and give the grounds for such conclusion. *Reid* v. *McCurry*, 4 Q. P. R. 251.

Action on—*Pleading—Declaration — Original Cause of Action.*] — An action was brought in the province of Quebec upon a foreign judgment. The defendant made an exception to the form, upon the ground that the plaintiff had failed to indicate the causes of action in the suit in which the judgment had been rendered:—Held, that the plaintiff bringing an action upon a foreign judgment is not bound to state the grounds of the original action, where it is shewn, by the certificate of the clerk of the Court by which the judgment was rendered, that the claim sued on was personally served on the defendant, together with the writ of summons in the action in which the foreign judgment was rendered. *Smith* v. *Beaubien*, 22 Occ. N. 419.

Action on — Pleading—Defence—False testimony in foreign Court—Jurisdiction of foreign Court — Counterclaim — Original cause of action — Jury notice. *Hallock* v. *Orillia Export Lumber Co.*, 6 O. W. R. 597.

Action on — Proof of judgment—Seal of foreign Court—Certificate of Clerk—Proof of identity of plaintiffs. *Stephens* v. *Olsen* (N.W.T.), 1 W. L. R. 572.

Action on — Statute of Limitations—Absence of defendant beyond seas—C. O. (Y.T.) c. 29, s. 1—21 Jac. I.—4 & 5 Anne—Construction — Repeal. *United States Saving and Loan Co.* v. *Rutledge* (Y.T.), 2 W. L. R. 471.

Action on — *Proof of—Exemplification — Void Contract — Company — Extra-territorial Contracts of Carriage.*]—A default judgment obtained in a foreign jurisdiction, though liable to be set aside so long as it stands, is "final and conclusive," within the meaning of that expression as applied to foreign judgments, and consequently it may be sued on in this province. In an action on a foreign judgment the defendant is entitled to challenge the validity of the judgment on the ground that it is manifestly erroneous, such as being founded on an ex facie void contract. The province may create a company with power to undertake extra-territorial contracts of carriage, and so it is not ultra vires of a company incorporated in British Columbia to contract to carry goods from British Columbia to a point in the Yukon Territory. Per Martin, J.:—An exemplification of judgment under the seal of the Court in which the judgment was pronounced, is equivalent to the original judgment exemplified, and notice under the Evidence Act of intention to produce it in evidence is unnecessary. *Boyle* v. *Victoria Yukon Trading Co.*, 22 Occ. N. 377, 9 B. C. R. 213.

Action on, in Ontario — *Original Consideration—Ontario Judicature Act—Promoter of Company—Loan to—Personal Liability.*]—Under the Ontario Judicature Act, as before it, the declaration in an action on a foreign judgment may include courts claiming to recover on the original consideration. A promoter of a joint stock company borrowed money for the purposes of the company, giving his own note as security. The lender was informed at the time of the manner in which the loan was to be, and was, applied:—Held, that, as the company did not exist at the time of the loan, it could not be the principal debtor, nor the borrower a mere guarantor. The latter was, therefore, primarily liable for repayment of the loan. Judgment of the Court of Appeal, 27 A. R. 96, 20 Occ. N. 57, affirmed. *Bugbee* v. *Clergue*, 21 Occ. N. 136; *S.C., sub-nom. Clergue* v. *Humphrey*, 31 S. C. R. 66.

Warrant of Attorney — *Confession — Jurisdiction—Residence of Defendant.*]—The general rule is, that a judgment valid by the law and practice of the state where it is rendered or confessed, may be sued upon as a ground of action in any other state. A judgment by confession is an instance of a party voluntarily submitting himself to the jurisdiction of the Court, whereby competence is acquired to deal with the matter submitted:—Held, that a judgment recovered in the State of Pennslyvania, after the defendant has ceased to be a resident of that State, upon a warrant of attorney executed there, was valid, and that the Courts there had jurisdiction to deal with the matter. *Ritter* v. *Fairfield*, 21 Occ. N. 73, 32 O. R. 350.

III. Interlocutory or Final.

Interim Injunction—*Leave to Appeal.*]—The judgment granting an interlocutory injunction does not fall under Art. 46, C. P., and leave to appeal therefrom will not be granted. *Wright* v. *City of Hull*, 4 Q. P. R. 52.

Revocation of Stay of Execution — *Leave to Appeal.*]—An interlocutory judgment is one which is rendered in a cause between the institution of the suit and the final judgment therein, and is given in an intermediate state of the cause on some intermediate question before the final decision. A judgment revoking the stay of execution previously ordered by the Court, and ordering the bailiff to proceed with the execution of the property seized, is a final judgment, and a petition for leave to appeal therefrom cannot be granted. *Shannon* v. *Turgeon*, 4 Q. P. R. 49.

IV. Opening up, Rescinding, and Varying.

Action—*Petition* — *Fraud*—*Affidavit.*]—The revocation of a judgment may be demanded by a direct action, while it may also be effected by means of a petition. 2. One who attacks, on the ground of fraud, a judgment against him, and alleges that it causes him serious prejudice, is not obliged to make it appear in his declaration that, but for the alleged fraud, the judgment would have been different from what it is. 3. A petition should be accompanied by an affidavit, but if, upon an inscription in law against a direct action, the absence of such affidavit is not set up as a ground, the Court cannot, of its own motion, take notice of the absence of the affidavit. *Charette* v. *Leveillé*, 4 Q. P. R. 310.

Action to Annul—*Fraud* — *Parties* — *Creditors.*]—A decree, like a contract, may be attacked for fraud by a party interested. 2. An action to annul a decree is subject to the same rules as an action to set aside a conveyance, and, in the same way, enures to the benefit of all the creditors interested. *McNally* v. *Préfontaine*, 4 Q. P. R. 125.

Action to Set Aside Assignment of Salary — Previous garnishing proceeding in Division Court—Res Judicata — Fraud — False testimony. *Johnston* v. *Barkley*, 4 O. W. R. 453, 6 O. W. R. 549, 10 O. L. R. 724.

Action to Set Aside Judgment—*Jurisdiction—Fraud — Pleading.*]—Where a judgment has been obtained by fraud, the Court has jurisdiction, in a subsequent action brought for that purpose, to set the judgment aside; but a statement of claim alleging that "the plaintiff believes and charges the fact to be that no service of the writ of summons in the said action was ever made upon him, and that the said liability of the plaintiff to the defendants and co-indorser was satisfied and discharged either prior or subsequent to the institution of said action, as defendants well knew at the time, is insufficient as not alleging that the judgment in question was obtained by fraud, or, if it can be held to do so, as not positively averring the recovery of the judgment against the plaintiff, which is also essential. *Richards* v. *Williams*, 11 B. C. R. 122, 1 W. L. R. 9.

Amending Judgment after Entry — *Costs — Practice — Supreme Court of Canada.*]—The minutes of judgment as settled by the registrar directed that the appellants' costs should be paid out of certain moneys in Court, and in this form the judgment was duly entered and certified to the clerk of the Court below. Subsequently it was made to appear that there were no moneys in Court available to pay these costs, and upon the application of the appellants the Court amended the judgment, directing that the costs of the appellants should be paid by the respondents forthwith after taxation. *Letourneau* v. *Carbonneau*, 35 S. C. R. 701.

Amendment — Ex parte application — Changing personal into proprietary judgment —Leave to amend—Rescinding order. *Bolster* v. *Booth*, 2 O. W. R. 890.

Application to Vary — *Costs.*]—The defendant K., an auctioneer, advertised at the instance of the defendant M. certain land for sale at public auction claimed by the plaintiff and M. This suit was brought for an injunction restraining the sale and for a declaration of title. An interim injunction was granted. An ejectment action was also brought by the plaintiff against M. in respect of the same land, and judgment therein was given for the plaintiff. The defendants appeared by the same solicitor and joined in their answer in this suit. At the hearing a decree was made against the defendants with costs. K. now applied to vary the decree so far as it ordered him to pay costs, alleging that since putting in his answer he had had nothing to do with the conduct of the suit, believing himself to be but a nominal defendant, and his co-defendant to be responsible for the defence:—Held, that the application should be refused, but without costs. *Robertson* v. *Kerr*, 23 Occ. N. 266.

Consent — Misrepresentations—Motion to stay—Motion to vacate—Forum. *Dominion Syndicate* v. *Oshawa Canning Co.*, 2 O. W. R. 674.

Consent Judgment — *Setting Aside.*]—A judgment declaring the contestation to an opposition maintained by consent cannot be set aside upon petition, unless it is attacked by way of improbation. *Beaubien Produce and Milling Co.* v. *Corbeil*, 3 Q. P. R. 435.

Correction of Interlocutory by Final Judgment.] — A judgment dismissing an exception to the form, in which the defendant, a married woman, separate as to property, complained of being sued alone, can be corrected by the final judgment. *Ogilvie* v. *Fraser*, 3 Q. P. R. 546.

Default—Application to set aside—Delay —Discovery of defence—Condition of payment into Court. *Cayley* v. *Graham*, 2 O. W. R. 400.

Default—Opening up—Terms—Alimony. *Edgeworth* v. *Edgeworth*, 2 O. W. R. 404, 3 O. W. R. 71.

Default Judgment—*Motion to Set Aside —Order Reducing Amount—Power to Make*

—*Costs—Mala Fides.*]—An action having been brought in a County Court to recover an amount claimed for taxes, an agreement was entered into on behalf of the defendant to pay the amount claimed for debt and costs within a day or two from a time fixed, the 16th or 17th May, 1901. On the 18th May an amount was paid on account of costs, and on the 21st, the balance not having been paid, judgment by default was entered for the full amount claimed for debt and costs, without giving credit for the amount paid on account. An application to set aside the judgment was refused, but an order was made reducing it to the proper amount:—Held, that under O. xiii, r. 10, the Judge of the County Court had power to make such an order. Inasmuch as the application was a necessary one, the defendant should have had the costs of the motion below, but, as there was a substantial condition in respect of which he had not succeeded, there should be no costs of the appeal. Semble, that, if the judgment had been entered in breach of good faith, the amendment should not have been granted, but that in this case it was the defendant's duty to have seen that the terms of the arrangement as to payment were complied with. *City of Halifax* v. *Bent*, 33 N. S. Reps. 546.

Default Judgment—*Statement of Defence—County Court.*]—An order made in an action in a County Court for service of notice of a writ out of the jurisdiction provided that the defendant should have twelve days after service "within which to appear to notice of the writ and file his defence to the action." Within the twelve days an appearance in the usual form was entered, the following words being added: "The defendant admits only $103, but otherwise disputes plaintiffs' claim in this action:"—Held, that this was in effect a statement of defence; that filing was, under the order, all that was necessary, and that a judgment entered for default of defence was void. *Voight Brewery Co.* v. *Orth*, 23 Occ. N. 168, 5 O. L. R. 443, 2 O. W. R. 304.

Default Judgment—*Petition for Review—Declinatory Exception.*]—A defendant who does not reside in Canada and has been summoned by way of publication, may, with his petition for review of a judgment rendered against him by default, file preliminary exceptions, and notably a declinatory exception, if the contract set up by the plaintiff has not been made in the province of Quebec and the cause of action has not arisen there. *Levy* v. *Arkbulatoff*, 5 Q. P. R. 204.

Default of Appearance—*Motion to Set Aside Service of Writ of Summons out of Jurisdiction—Stay of Proceedings—Irregular Judgment.*]—A notice of motion by the defendant to set aside an order for service of a writ of summons out of the jurisdiction, on grounds of irregularity, operates as a stay of proceedings until finally disposed of, so that the time for entering the appearance does not run in the meanwhile. A judgment signed by the plaintiffs, for default of appearance on the same day that an order dismissing the defendant's motion was issued, was set aside as irregular. *Confederation Life Association* v. *Moore*, 24 Occ. N. 25, 6 O. L. R. 603, 2 O. W. R. 941, 1030, 1087, 1120.

Default to Shew Cause—*Motion to Set Aside—Merits—Improvidence.*]—On a motion for judgment under Order XIV., after due service of notice of motion, affidavits, and exhibits, the defendant did not appear, and the plaintiff secured an order. This was an application to set aside the order, on the ground that the defendant's affidavits to resist the motion were misdirected to Toronto instead of to Halifax. The order was set aside on payment of costs. On such an application the merits will not be looked at, the sole question being: "Has the judgment been improvidently entered?" A subsequent day was appointed for the argument of the merits. *Le Gresley* v. *Le Moine*, 21 Occ. N. 88.

Exception to Petition — *Validity as Tierce-Opposition.*]—A court document intituled "petition for revocation of judgment," but not containing any of the necessary grounds, will not be rejected upon exception to the form if it can be held valid as a tierce-opposition. *In re Montreal Cold Storage and Freezing Co.*, 5 Q. P. R. 91.

Laches.]—Judgment was signed against the defendant for $542.68 and costs, in default of appearance, on the 2nd July, 1892. In 1901 he moved to set it aside on the grounds that he was never served with the writ of summons and that he did not owe any money to the plaintiff. The plaintiff's husband swore that on the 21st June, 1892, he personally served the defendant, with whom he was well acquainted, with the writ of summons in the usual way, in the presence and hearing of the plaintiff's solicitor, and the affidavit of the solicitor shewed that he was present on the occasion in question, when the defendant, after being served with the writ of summons, admitted that the amount set out in the indorsement was correct and that he had no defence:—Held, that, the defendant not having explained the delay on his part of nearly nine years, nor satisfied the Court that he had any merits, and the judgment being regular, the application should be refused. *Fooks* v. *Cox*, 22 Occ. N. 44.

Mistake in Date—Correction—Consent—Amendments — Costs. *St. Mary's Creamery Co.* v. *Grand Trunk R. W. Co.*, 2 O. W. R. 328, 472, 3 O. W. R. 472.

Motion to Set Aside—*Action for Value of Services—Appearance—Affidavit—Account—Service of Copy—Default Judgment—Evidence.*]—An action by a civil engineer for the value of services rendered, detailed in an account, such services consisting in the preparation of a plan, is not a summary matter within the meaning of Art. 1150, C. P. C., and, therefore, when the writ is returned during vacation, the defendant is not obliged to file with his appearance an affidavit stating that such appearance is entered in good faith and not with the object of unjustly delaying the proceedings. 2. The neglect to serve upon the defendant with the original process a copy of the account sued upon is not a ground for setting aside a judgment rendered ex parte against the defendant, where such account has been filed with the writ and afterwards served upon the solicitors for the defendants, with a notice to plead within two days, the time for pleading having

then expired. 3. In an action by a civil engineer for the value of professional services, with a detailed account to support it, the plaintiff, when the defendant has been noted in default of a plea, is not obliged to set the case down for enquête, but he may at once set it down for judgment, filing with his inscription an affidavit that the amount claimed is due to him; and the defendant cannot move against the judgment upon the ground that he has had no opportunity to cross-examine the plaintiff, inasmuch as he could have subpœnaed him for that purpose if he had thought well. 4. In such an action viva voce evidence is admissible to prove the plaintiff's claim. *Kennedy* v. *Canadian Construction Co.*, Q. R. 18 S. C. 507.

Motion to Set Aside Consent Judgment—Jurisdiction of Master in Chambers—Third party notice after judgment. *McLean* v. *Canadian Pacific R. W. Co.*, 6 O. W. R. 369.

Motion to Vary—*Custody of Infant—Neglect to Provide for—Inscription in Review.*]—Where the plaintiff, in an action for separation from bed and board, also prays for the custody of a minor child, some order should be made by the Court of first instance, in delivering judgment, with respect to this portion of plaintiff's conclusions. 2. Where the Court of first instance has omitted to make such order, the plaintiff is not entitled by motion not notified to the opposite party, to ask that an addition be made to the judgment, disposing of the prayer for the guardianship of the minor, it appearing in this case that the omission complained of was not a mere clerical error. 3. On an inscription in review from the first judgment, the Court of Review may either make such order, or, if it seem to be more desirable, may send the record back to the Court of first instance, for such further proceedings as may be proper or necessary to enable the latter tribunal to adjudicate as to the custody of the minor. *Smith* v. *Cooke*, Q. R. 24 S. C. 14.

Motion to Vary—Difficulty arising in proceeding under judgment—Deaths of members of Court — Lapse of time. *Uffner* v. *Lewis*, 2 O. W. R. 441, 3 O. W. R. 306, 5 O. W. R. 39.

Motion to Vary—*Rehearing—Costs — Parties.*]—In a suit to restrain the sale of property by K., an auctioneer, at the instance of M., and for a declaration of the plaintiff's title, K. appeared and jointly answered with M. et al. thereafter undertook the conduct of the suit, and alone appeared at the hearing, K. holding himself to be but a nominal party. Judgment with costs having been given against both defendants, an application by K. to have the suit reheard for the purpose of varying so much of the decree as ordered him to pay costs, was refused. *Robertson* v. *Kerr*, 23 Occ. N. 266, 2 N. B. Eq. Reps. 494.

Motion to Vary Judgment—*Disposition of Costs—Clerical Error.*]—A disposition in a final judgment awarding costs in a manner absolutely contrary to that which the Judge wished to direct, as appears in consideration of the whole text of the judgment, may be corrected on application to the Judge, this correction being considered as the correction of a clerical error provided for by Art. 546, C. P. C. Gervais v. Lesly, Q. R. 1 S. C. 44, followed. *Regina* v. *Stadacona Water, Light, and Power Co. and Town of Famborn*, Q. R. 25 S. C. 525.

Opposition—*Defendant not Served—Petition in Review—Exception to Form.*]—An opposition to a judgment, based upon the fact that the defendant has not been served with process in the action, must shew the grounds of defence of the defendant in the action, and, if it is begun after the time fixed, it cannot be regarded as a petition in review if it does not contain such grounds. 2. Semble, that an exception to the form must reserve the recourse of the plaintiff. *Hénault* v. *Fulton*, 5 Q. P. R. 213.

Opposition—*Petition for Review—Nullity of Service—Saisie-gagerie — Irregular Sale—Damages—Res Judicata.*]—The defendant may proceed by way of opposition to a judgment or of petition for review of a judgment rendered without the defendant having been heard or called upon, and in such a case it is sufficient to allege the nullity of the service without any other ground of defence. 2. A party whose effects have been sold upon a writ of saisie-gagerie en expulsion, which has not been served upon him, may claim damages for the irregular sale of his effects, and the order dismissing his opposition to a judgment based upon the defective service, does not constitute res judicata against him in his suit for damages. *Fulton* v. *Hénault*, 5 Q. P. R. 258.

Petition to Open up—*Cause Heard ex parte.*]—Where judgment was given by a Court without hearing one of the parties, in consequence of a misunderstanding between the solicitors, such party may, on petition, have the judgment opened up. *Fabien* v. *Gougeon*, Q. R. 18 S. C. 242.

Petition to Open up—*Error as to Statute.*]—Where the parties and the Judge have, by a common error, supposed that a certain statute had been promulgated and was applicable to the case in hand, whereas, though it had been passed by the Legislative Assembly, it had been modified by the Legislative Council so as to make it inapplicable to pending causes, there is ground for proceeding by petition against a judgment rendered in accordance with such supposed law. *Lamalice* v. *La Campagnie d'Imprimerie Electrique*, 4 Q. P. R. 63.

Petition to Reopen—*Discovery of Fresh Evidence.*]—A party cannot by petition demand the setting aside of a judgment upon the allegation that he has since found letters of such a nature that they would have the effect of changing the judgment, if such letters were in his possession at the time of trial. *Warin* v. *Werthemer*, 5 Q. P. R. 462.

Petition to Vary—*Final Judgment — Contestation of Dividend Sheet—Curators—Inscription — Notice.*]—A judgment maintaining the contestation of a dividend sheet is a final judgment, subject to review or appeal, and can only be modified by the Court which pronounced it in accordance with one or other of the modes provided by Arts. 1163

et seq., C. P. 2. There is ground for a petition against such a judgment when it alleges that the curators affected by the judgment had no notice of the last inscription of the contestation. *Bayeur* v. *Seath*, 5 Q. P. R. 241.

Reference by Consent to Experts — *Misunderstanding of Counsel as to Purpose of Reference—Opening up Judgment.*]—In a proceeding before a Master in a mechanic's lien matter, an understanding was arrived at between the counsel for the plaintiff and defendant, and orally communicated to the Master. When the time arrived to act on the understanding, the counsel disagreed in their recollection of what their understanding was. The Master entered judgment for the amount found due by certain experts, in accordance with the understanding of the agreement:—Held, that the judgment given by the Master, whose recollection of the understanding was the same as that of the plaintiff's counsel, in favour of the plaintiff, must be reopened and the matter referred back, as the parties were not ad item. Wilding v. Sanderson, [1897] 2 Ch. 534, referred to. *Beaudry* v. *Gallien*, 23 Occ. N. 46, 5 O. L. R. 73, 1 O. W. R. 793.

Revocation — *Amendment—Default of Adjudication.*]—A petition in revocation of judgment will lie against a final judgment which does not adjudicate upon the issue raised by an amendment to a pleading. *Lusher* v. *Pulmoti*, 6 Q. P. R. 331.

Revocation—*Contestation of Account—Grounds.*]—If a petition in revocation of a judgment is granted and a party allowed to contest an account by means of newly discovered evidence, he cannot, nevertheless, insert in the contestation which he is allowed to file, grounds of contestation not set forth in the petition in revocation. *Hill* v. *Campbell*, 6 Q. P. R. 424.

V. Registration of.

Effect of—*Lands Purchased by Debtor—Conveyance to Nominee of Debtor.*]—A creditor who registers his judgment against an immovable bought by his debtor at a sheriff's sale, but the purchase money of which has not been paid, cannot maintain an hypothecary action against a person who has afterwards become the transferee of the purchaser's rights and has paid the purchase money to the sheriff, who has given him the title to the immovable. *Lemieux* v. *Mitchell*, 3 Q. P. R. 367, Q. R. 18 S. C. 528.

Lien on After-acquired Land.]—The registration of a judgment creates a hypothec on land acquired by the judgment debtor after the recovery of judgment. *McClure* v. *Croteau*, Q. R. 18 S. C. 336.

VI. Summary Judgment.

Action for Mortgage Money—Defence — Agreement to postpone — Unconditional leave to defend—Writ of summons—Special indorsement — Interest. *McGavin* v. *Campbell*, 6 O. W. R. 94.

Action on Bills of Exchange — Defence — Illegality—Powers of company. *Canada Permanent and Western Canada Mortgage Corporation* v. *Briggs*, 6 O. W. R. 180.

Action on Bills of Exchange — Indorsement—Collateral agreement — Failure to establish — Correspondence. *Imperial Bank of Canada* v. *Tuckett*, 6 O. W. R. 121, 461.

Admissions—*Pleading — Rules 259, 261, 616.*]—Rule 616 is not intended to apply to the case of alleged insufficiency in law of the statements of facts pleaded in the defence. A motion for judgment should not under such circumstances be made under that Rule, but the procedure indicated in Rule 259 or Rule 261 should be adopted. *Edward* v. *Cole*, 24 Occ. N. 360, 8 O. L. R. 141, S. C. sub nom. *Edwards* v. *Cook*, 4 O. W. R. 112.

Admissions of Fact—*Pleading—Costs—Rule 615 (Man.)*]—The words "admissions of fact in the pleadings" in Rule 615 of the King's Bench Act, R. S. M. 1902 c. 40, are not confined to such admissions made by an opposite party, and this Rule may be availed of by the party making the admissions and an order made accordingly; and, when the defendant in his statement of defence consents to the relief asked for by the plaintiff and offers to give the conveyance required by him, such consent and offer, although strictly speaking not an admission of fact, should be treated as one for the purposes of the Rule, as its object is to save further proceedings and further costs when the need of trying issues is removed by admissions. The statement of defence, besides the consent and offer referred to, denied the allegations of the statement of claim:—Held, that, as the defendant, by making an application under Rule 615, had put it out of the power of the plaintiffs to prove their allegations and out of the power of the Court to decide, on the merits, who should pay the costs of the action, the case should be treated, for the purpose of awarding costs, as if the defendant had admitted the truth of the plaintiffs' pleadings, as well as submitted to the relief asked for, and that the defendant should pay the main costs of the action, including the costs of the motion. *Houghton* v. *Mathers*, 24 Occ. N. 246, 14 Man. L. R. 733.

Admission of Part of Claim—Division of claim—Interest — Rule 228. *Lisle* v. *De Lion* (Y.T.), 1 W. L. R. 274.

Conditional Leave to Defend—Claim on contract — Mining coal—Lien—Counterclaim—Writ of attachment—Setting aside—Absence of fraud. *Fey* v. *Scimer* (Y.T.), 2 W. L. R. 566.

County Court — *Affidavit.*]—The materials used in support of a motion for speedy judgment in a County Court action in which the plaintiff sued on an account stated were an affidavit of the plaintiff verifying his cause of action, and an affidavit of the plaintiff's solicitor verifying the defendant's signature to the account, and stating that he believed the plaintiff had a good cause of action and that the defendant had no defence:—Held, that the materials were sufficient to support a judgment for the plaintiff:—Quære, whether an affidavit of the plaintiff,

verifying his cause of action, and an affidavit of his solicitor stating that the defendant had no defence, would be sufficient under s. 94 of the County Courts Act to support a speedy judgment. *Bremner* v. *Nichol*, 24 Occ. N. 413, 11 B. C. R. 35.

County Court, B. C.—*Defences—Leave to Defend — Affidavit—Cross-examination.*]—On a motion for speedy judgment in a County Court action, it is open to the defendant to set up other defences than those disclosed in his dispute note. 2. On the facts, the defendant was entitled to unconditional leave to defend. 3. Per Irving, J.:—The defendant should have been allowed to cross-examine the plaintiff on his affidavit. *McGuire* v. *Miller*, 9 B. C. R. 1.

Defence — *Company—Indebtedness Exceeding Statutory Limit—Directors' Liability.*]—In an action against a company incorporated under R. S. O. 1897 c. 199, for goods sold and delivered, the amount claimed being admitted, in which the defendants set up that their indebtedness when the goods were purchased largely exceeded the limits prescribed by ss. 11 and 40 of that Act, and that the directors were personally liable, and not the company, a motion for summary judgment was dismissed. Jacobs v. Booth's Distillery Co., 85 L. T. R. 262, followed. *Canadian General Electric Co.* v. *Tagona Water and Light Co.*, 24 Occ. N. 61, 6 O. L. R. 641, 2 O. W. R. 1055.

Defence—Conditional leave to defend—Terms—Payment into Court—Costs. *Mendell* v. *Gibson*, 2 O. W. R. 857, 3 O. W. R. 551, 4 O. W. R. 336, 5 O. W. R. 233.

Defence — *Counterclaim—Payment into Court.*]—The plaintiff employed the defendant to sell a property at Sydney, of which the plaintiff had an option. The defendant was not a regular real estate broker, and the parties did not settle upon any rate of payment for the service. The defendant effected a sale for $13,200, at a profit of $2,200 for the plaintiff. The defendant became possessed of the $2,200 profit after having effected the sale, and wired the plaintiff that he had effected a sale and held this amount. The defendant to effect the sale, had personally undertaken that certain necessary steps to vest title in the purchaser would be duly taken. The plaintiff moved for judgment under Order XIV. for $2,000. He gave credit to the defendant for $200, which the plaintiff alleged to be sufficient commission on the sale, questioned the defendant's solvency by affidavit, and sought immediate judgment for the amount in the defendant's hands, less the $200. The sum in the defendant's hands was all he was to receive from the purchaser, but there was, at the time of the hearing of the motion for judgment, a matter of the transfer of a mortgage from the original mortgagee of the property to another, still incomplete. The Judge ordered the sum of $2,000 to be paid into Court to abide the event of the action. Costs to be costs in the cause. *Le Gresley*, v. *Le Moine*, 21 Occ. N. 89.

Defence — Municipal debentures—By-law—Payment of principal—Statute. *Standard Life Assurance Co.* v. *Village of Tweed*, 2 O. W. R. 731, 747, 922, 983.

Implied Covenant for Payment—Instrument of charge — Defence — Unconditional leave to defend—Terms. *Farmers' L. and S. Co.* v. *Munns*, 2 O. W. R. 503, 823.

Leave to Defend—*Allegations of Fraud—Costs, refusal of.*]—When a defendant intends to rely on a defence of fraud, he should set it up definitely in his statement of defence, and, in meeting a motion for leave to sign judgment under Rule 593 of the King's Bench Act, he should file an affidavit in answer shewing such definite facts pointing to the alleged fraud as to satisfy the Judge that it would be reasonable that he should be allowed to raise such defence. In this case the only evidence in support of the allegation of fraud consisted of some general statements of defendants in their examinations on their affidavits filed in answer to the plaintiffs motion, and it was held that an order allowing the plaintiff to sign judgment was right. Wallingford v. Mutual Society, 5 App. Cas. 685, followed. Costs of appeal refused partly on account of the great mass of material heaped up, including diffuse examinations on affidavits. *Canadian Motive Plow Co.* v. *Cook*, 21 Occ. N. 422, 13 Man. L. R. 439.

Mortgage—Defence—Release — Conveyance. *Farmers' L. and S. Co.* v. *Barheart*, 2 O. W. R. 454.

Motion by Plaintiff—*Dismissal of Action.*]—Held, 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. *Hill* v. *Hill*, 21 Occ. N. 560, 2 O. L. R. 541.

Motion for—Action on covenant in mortgage—Defence—Denial of execution and consideration. *Farmers' Loan and Savings Co.* v. *Stratford*, 2 O. W. R. 1060, 1142, 3 O. W. R. 297.

Motion for—*Affidavit of Plaintiff—Cross-examination on—Discretion to Refuse.*]—On the return of a summons for judgment under Order XIV., an application was made on behalf of the defendants for leave to cross-examine the plaintiff on his affidavit filed in support of the summons. No affidavit of merits had been filed on behalf of the defendants:—Held, refusing the application, that it is only in exceptional cases that a defendant will be permitted to cross-examine the plaintiff on his affidavit, and then only after the defendant has filed an affidavit of merits. *Ward* v. *Dominion Steamboat Line Co.*, 22 Occ. N. 424, 9 B. C. R. 231.

Motion for—Defence—Company—Indebtedness exceeding statutory limit. *Grose* v. *Tagona Water and Light Co.*, 3 O. W. R. 353.

Motion for—Defence—Guaranty — Condition of taking effect—Admission of liability—Premature action. *Dominion Bank* v. *Crump*, 3 O. W. R. 58.

Motion for—Defence—Money demand—Assignment of claim—Company—Shares — Counterclaim. *MacLean* v. *World Newspaper Co.*, 3 O. W. R. 57.

Motion for—Rule 616—Pleadings—Admissions in examination of defendant—Recovery of possession of land—Motion for judgment—Forum. *Traplin* v. *Traplin*, 3 O. W. R. 793.

Motion Refused—Costs—Cross-examination—Substitution as discovery. *Lawrence* v. *Smith*, 2 O. W. R. 521.

Payment into Court — Payment out without prejudice. *Dominion Paving and Contracting Co.* v. *Magann*, 1 O. W. R. 220.

Pleading—*Rule 616, Breach of Promise of Marriage—Admission of no Breach before Action.*]—Defendant moved under Rule 616 for summary judgment dismissing an action for breach of promise of marriage, on the grounds (1) That the statement of claim did not allege that there was a breach of the alleged contract before action, and (2) That plaintiff, under examination for discovery admitted that there was no breach before this action. Motion refused, as it was a matter to be left to a jury to say if there was or was not such a breach. *Barnum* v. *Henry*, 5 O. W. R. 56, 9 O. L. R. 319.

Powers of Referee—Rescinding order—Appeal — Setting aside judgment — Costs. *Walker* v. *Robinson* (Man.), 1 W. L. R. 181.

Promissory Note — Contemporaneous agreement. *Lander* v. *Blight*, 2 O. W. R. 553.

Promissory Note — *Defence—Unconditional Leave to Defend.*]—In an action upon a promissory note the defendant set up, in answer to a motion for summary judgment under Rule 603, that the consideration for the note consisted in whole or in part of the purchase money of a patent right, and that the note had not the words "given for a patent right" written or printed across the face, and was, therefore, void under the Bills of Exchange Act, s. 30, s.-s. 4, in the hands of the plaintiff, who was alleged to have notice of such consideration. The plaintiff denied that the note was given for such consideration:—Held, that the defendant was entitled to unconditional leave to defend. *Davey* v. *Sadler*, 21 Occ. N. 343, 1 O. L. R. 626.

Promissory Note—Fraud—Notice—Costs of motion. *Merchants Bank* v. *Irvine*, 2 O. W. R. 47.

Promissory Note—*Holder for Value — Fraud—Onus.*]—Where the maker and one of the indorsers of the promissory note sued on, in answer to a motion by the plaintiff for summary judgment under Rule 603, swore that they were induced to become parties to the note by certain fraudulent misrepresentations made by their co-defendants, whereof they had reason to believe the plaintiff had notice:—Held, having regard to s. 30, s.-s. 2, of the Bills of Exchange Act, that they were entitled to unconditional leave to defend, notwithstanding the plaintiff's affidavit that he was a holder for value. Fuller v. Alexander, 47 L. T. N. S. 443, followed. *Farmer* v. *Ellis*, 21 Occ. N. 598, 2 O. L. R. 544.

Promissory Note — Mortgage — Mining claim — Representation work — Conditional leave to defend — Terms — Costs. *Alaska Mercantile Co.* v. *Ballentine* (Y.T.), 1 W. L. R. 504, 2 W. L. R. 115.

Promissory Note—Renewal—Banking—Notice — Leave to defend. *Bank of New Brunswick* v. *Montrose Paper Co.*, 4 O. W. R. 404.

Recovery of Possession of Land — Action by assignee of mortgagee — Unconditional leave to defend. *Hall* v. *Barclay*, 6 O. W. R. 976.

Rule 103 (N.W.T.)—Delay in applying—Delivery of defence no bar to application. *Victoria Lumber Co.* v. *Magee* (N.W.T.), 2 W. L. R. 1.

Rule 603—Action on foreign judgment—Defence—Defective service of process—Leave to defend—Terms. *Molsons Bank* v. *Hall*, 4 O. W. R. 452, 5 O. W. R. 625.

Rule 603—Compromise of claim—Repudiation—Authority of solicitor—Unconditional leave to defend. *Hill* v. *Edey*, 5 O. W. R. 689, 719.

Rule 603 — "*Debt or Liquidated Demand*"—*Contract—Ascertainment.*]—The defendant, having entered into an agreement to manufacture for and deliver timber to the plaintiff, received from him certain advances in money, exceeding the value of the timber actually delivered, and failed to complete his contract. No adjustment of accounts took place, nor was the amount to be paid for the delivered timber ascertained. In an action to recover the balance of the advances overpaid:—Held, that the claim was not a debt or liquidated demand within the meaning of Con. Rule 138, and an order of a local Judge giving leave to sign judgment under Con. Rule 603 was set aside. *McIntyre* v. *Munn*, 23 Occ. N. 297, 6 O. L. R. 290, 2 O. W. R. 694, 3 O. W. R. 41.

Rule 603—Liability of defendants—Finding of fact on correspondence, affidavits, and depositions. *Globe Printing Co.* v. *Sutherland*, 1 O. W. R. 589.

Rule 603—Promissory note—Defence—Collateral security—Sureties—Extent of liability. *Nisbet* v. *Hill*, 5 O. W. R. 155, 203, 337, 402.

Rule 603—Promissory note—Defence—Absence of consideration—Unconditional leave to defend. *Boehmer* v. *Boehmer*, 6 O. W. R. 348.

Rule 616—Payment into Court—Money demand—Acceptance of amount paid in but not in full—Leave to proceed for balance—Pleading—Separation of issues. *Barry* v. *Toronto and Niagara Power Co.*, 6 O. W. R. 741, 935, 11 O. L. R. 48.

Summons—*Abridging Time for Return.*]—Notwithstanding the provisions of Rule 548 a Judge has no power to abridge the time for the return of a summons for speedy judgment taken out under Rules 103 and 104 of the Judicature Ordinance. *Toronto R. W. Co.* v. *Bain*, 4 Terr. L. R. 28.

Time—*Appearance—Collusive Judgment—Motion to Set Aside—Affidavit.*]—An order allowing the plaintiff to sign judgment on a

specially indorsed writ may be made under s. 73 of 60 V. c. 24 (Supreme Court Act), though the time limited for appearance by the writ has not expired. A judgment will not be set aside on the ground of collusion and undue preference where the affidavit in proof of the collusion is founded on information and belief only, and does not state the origin of the information, and no circumstances are assigned for the deponent's belief. *Dominion Cotton Mills Co.* v. *Maritime Wrapper Co.*, 35 N. B. Reps. 676.

VII. Other Cases.

Account—*Time Fixed by Judgment for Rendering—Damages in Default—Death of Defendant during Time Fixed — Revivor—Universal Legatee—Payment of Costs.*]—On 16th November, 1901, the judgment of the Court required the defendant to render to the plaintiff, within 30 days, an account of a quantity of wood which defendant had to dispose of for plaintiff, and, in case of default to render the account, to pay to plaintiff $9,000, with interest, and costs in any case. On 30th November, 1901, the defendant died, leaving his wife his universal legatee. His decease was not entered on the roll. On 2nd December, 1901, the widow, as universal legatee, paid the costs of the action. On 13th January, 1902, the plaintiff served the judgment on the universal legatee, with a demand for payment of the $9,000 within eight days, in default of which the judgment would be executed against her. On 21st January, 1902, she presented a petition alleging the death of her husband, her capacity of universal legatee, and asking that she should be added as a party to the suit in place of her husband and allowed to proceed in it. The plaintiff answered that the 30 days having expired, the judgment had become final as to the $9,000; that the petitioner had acquiesced in the judgment by paying the costs; and that there was no suit to which the petitioner could be made a party:—Held, that the plaintiff had not at the time of the defendant's death acquired a right to the $9,000, since it was not due till after the expiry of 30 days, and then only in default of the account being produced within that time. 2. That the decease of the defendant stopped the running of the 30 days, for a dead man cannot render an account; and it was not a case within Arts. 268, 269, C. P., which say that suits are valid up to the day of service of notice of a party's death, for as against the defendant there had been no suit since his death. 3. That the universal legatee, in paying the costs of the action, acquiesced in the judgment, but did not acquiesce in the default to render an account and to pay the $9,000. 4. That the universal legatee was in a position to take up the suit at the point where it was at the death of the defendant. 5. Quære, as to the effect of the judgment, whether the defendant, if he had lived, could, after the expiry of the 30 days, have demanded and obtained further time to render the account. *Girard* v. *Latellier*, Q. R. 21 S. C. 192.

Action on—*Limitation—Writ of Summons—Renewal.*]—Notwithstanding R. S. O. 1877 c. 108, s. 23 (see R. S. O. 1897 c. 133, s. 23), twenty years is the period of limitation applicable to an action on a judgment of a court of record. Boice v. O'Loane, 3 A. R. 167, and cases following it, followed in preference to Jay v. Johnston, [1893] 1 Q. B. 25, 189. The renewal of a writ of summons after its expiration is matter of judicial discretion, and where the Judge of the County Court in which the action was brought made an order for the renewal of a writ which had the effect of defeating the operation of the Statute of Limitations, and the defendant made no attempt to appeal from such order, but appeared to the writ without objection, the High Court, on appeal from the judgment rendered at the trial, refused to entertain an objection to the validity of the writ. *Butler* v. *McMicken*, 21 Occ. N. 71, 32 O. R. 422.

Carrying Out Terms of—Testing machinery—Differences between parties—Reference to person to be named—Appointment by Court. *Fuel Economizer Co.* v. *City of Toronto*, 3 O. W. R. 366.

Certificate of—Court of Appeal—Power to amend after issue — Mistake — Costs. *Whipple* v. *Ontario Box Co.*, 1 O. W. R. 36.

Compromise of Action—*Enforcement by Order of Court—Forum—Jurisdiction of Master in Chambers—Practice—Motion to Court.*]—Appeal by plaintiffs from order of Master in Chambers dismissing application for order allowing plaintiffs to enter judgment against defendant for $160, the amount which the parties had agreed should be paid by defendant in settlement of the action:—Held, since the Judicature Act the Court has jurisdiction to enforce in the action a compromise of it to which the parties have agreed. The proper practice in such cases is to apply to a Judge in Court for such order as may be necessary to enforce the compromise. Where the compromise is to be carried out by a stay or dismissal of the action, the Master in Chambers may have jurisdiction to make the order. It follows that plaintiffs fail in their appeal. But treating their substantive motion as having been transferred into and heard by a Court: order made for payment by defendant of the $160 to plaintiffs forthwith. *Pirung* v. *Dawson*, 4 O. W. R. 499, 25 Occ. N. 71, 9 O. L. R. 248.

Confession of Defence Arising after Action—*Judgment for Costs — Waiver of Other Defences.*]—Action for damages for trespass to land and for an injunction. An interlocutory injunction was granted, but afterwards discharged by consent, the right to acquire the land having been obtained after action. The defendants then obtained leave to plead, and pleaded that since the commencement of the action, the town of B. had expropriated the plaintiff's land, etc., and had paid him the damages awarded, and that said award included all damages done to the plaintiff's land by the defendants, as well as all the trespasses, acts, and grievances complained of in the statement of claim. The plaintiff confessed this defence, and entered judgment for his costs to be taxed:—Held, that this defence operated as a waiver of other defences; and a motion to set aside the judgment was refused. *Calder* v. *Middleton and Victoria Beach R. W. Co.*, 23 Occ. N. 22.

Construction—Order to refund money retained by executors—Joint or several liabili-

ties—Reference—Leave to appeal from reports — Terms — Interest. *Boys' Home* v. *Lewis*, 3 O. W. R. 625, 779, 4 O. W. R. 243, 5 O. W. R. 39.

Date of—*Amendment—Death of Plaintiff between Argument and Judgment—Administrator ad Litem.*]—The plaintiff died after the argument of an appeal by him from the judgment of the High Court dismissing his action with costs, but before judgment was given on such appeal. The Court was not informed of the death, and gave judgment dismissing the appeal with costs. The defendants, in ignorance of the death, obtained the issue of the certificate of judgment, which bore date as of the day on which the judgment was pronounced. Upon an application made by the defendants some months later, the Court directed that the certificate should be amended by dating it as of the day of the argument, and by inserting in the body thereof a direction that it be entered as of the day of the argument. Turner v. London and South-Western R. W. Co., L. R. 17 Eq. 561, and Ecroyd v. Coulthard, [1897] 2 Ch. 554, followed. The defendants were entitled to have an administrator ad litem appointed to represent the plaintiff's estate in order that the costs of the action and appeal might be recovered. *Gunn* v. *Harper*, 22 Occ. N. 208, 225, 3 O. L. R. 693, 1 O. W. R. 366.

Defence Arising after Action Brought — *Confession — Judgment for Costs without Judge's Order—Other Defences.*]—The defendant under Order 24, Rules 1 and 2, pleaded a defence arising after action brought, which was a good answer to the whole action. The plaintiff confessed this defence and signed judgment against the defendant for costs under Rule 3 of Order 24, which provides that the plaintiff may deliver a confession of such defence, and may thereafter sign judgment for his costs up to the time of pleading such defence, unless the Court or a Judge shall otherwise order. The defendant moved to set aside the judgment because (1) it was entered up by the prothonotary without a Judge's order, and (2) such judgment could not be entered while the other defences remained undisposed of:—Held, that the words of the Rule specifically enable the plaintiffs to sign a judgment without further proceedings except taxing costs, unless the defendant obtain an order otherwise. The subsequent defence amounts to a waiver of the original defence pleaded. It would be futile to go to trial on the remaining defences, as there is no question remaining to be tried as in Hoght v. Tottenham, [1892] W. N. 88. Bridgetown, &c., Co. v. Barbadoes, &c., Co., 38 Ch. D. 378, distinguished. *Ruggles* v. *M. and V. B. R. W. Co.*, 22 Occ. N. 432. Affirmed 35 N. S. Reps. 553.

Desistment—*Appeal Pending—Jurisdiction of Court Below—Costs.*]—Where the action has been dismissed, and the plaintiff appeals from the judgment dismissing it, and the parties in whose favour the dismissal has been granted desist from the judgment in their favour, the Superior Court is, in spite of such desistment, functus officio in the cause, and cannot take cognizance of subsequent proceedings as long as the appeal is pending. 2. A motion dismissed upon a ground not set up by the parties will be dismissed without costs. *Lamothe* v. *Piche*, 5 Q. P. R. 172.

Desistment—*Proof of—Authority of Attorney—Ratification.*]—The authority of an attorney ad litem to file a desistment from a judgment in the name of his client, or the ratification of such desistment by the client, cannot be proved by witnesses, when the judgment is for more than $50, without a commencement of proof by writing. *Gauthier* v. *Barcelo*, Q. R. 19 S. C. 498, 4 Q. P. R. 224.

Disregarding Findings of Jury.]—The power conferred on the Court by Rule 615 to give judgment on the evidence before it, may be exercised though the result may be to disregard the findings of a jury, but it must be used with great caution. *Clayton* v. *Patterson*, 21 Occ. N. 117, 32 O. R. 435.

Effect of, as Evidence—*Contradicting.*]—A judgment of the Superior Court is an authentic document which makes full proof of the statements contained therein, and their veracity cannot be impeached by parol evidence, except upon inscription en faux. *Beaubien Produce and Milling Co.* v. *Corbeil*, Q. R. 18 S. C. 484.

Interlocutory Judgment—*Judge at the Trial—Review by.*]—The Judge at the trial cannot review an interlocutory judgment of the Superior Court, for, although it may be this Court that sits at the trial and becomes seised of the merits of the case, it is only so seised of the merits when the trial is over, and it is only in deciding on the merits that it can review the interlocutory judgment. Whilst the case has not reached the stage when it is under consideration by the Judge, he is not in a position to judge of the merits even, and he plainly cannot modify an interlocutory judgment on a question of law. *Galindez* v. *The King*, Q. R. 26 S. C. 171.

Interpretation—*Reasons for Judgment.*]—If the reasons for a judgment shew that there is a mistake, ambiguity, or obscurity in the adjudication, they may be taken into consideration in order to shew the meaning. *Adam* v. *Gagné*, Q. R. 22 S. C. 367.

Life of Judgment—*Statute of Limitations—Payment—Sale under Execution—Purchase by Execution Creditor—Crediting Price—Ex parte Order for Execution — New Right.*]—At a sale of land under execution, the lands sold were bid in by the judgment creditor, and the amount of the bid credited on the execution by the sheriff on account of the judgment debt:—Held, that this was not a payment by or on behalf of the debtor to take the case out of the Statute of Limitations:—Held, further, that an order for the issue of a writ of execution, made by a Judge ex parte, during the currency of the period of twenty years from the recovery of the judgment, the judgment debtor having died out of the province intestate, and no administrators having been appointed, conferred no new right upon the defendant sufficient to keep the judgment alive, and unbarred by the statute:—Held, that to obtain a new right against anyone, by reason of such an order, the defendant must have given notice, which he could have done, either by applying as a creditor to have administrators appointed, or by notifying the heirs. *Lefurgey* v. *Harrington*, 36 N. S. Reps. 88.

Proof of—*County Court — Entries by Clerk in Book—Irregularity.*]—To prove a County Court judgment the plaintiff produced the procedure book of the County Court shewing the entries therein of the different proceedings in the action in which such judgment was alleged to have been recovered, and also filed a copy of such entries, certified as a true copy by the clerk of the Court, pursuant to s. 46 of the County Courts Act. Amongst the entries so proved was one of judgment by default against M., which entry itself, by s. 103 of the Act, constituted the judgment of the County Court:—Held, that, as the entry of the judgment in the procedure book constituted the judgment, and as the Court itself was a Court of record, the entry of the judgment became a record of a Court of record, if so, its production, or the statutory proof of it by a certified copy, proved the jurisdiction of the Court over the matters in respect of which the judgment was recovered, and the recovery, existence, and validity of such judgment. It was argued that the procedure book shewed on its face that the judgment was invalid, as it did not shew the note required by s. 105 to be made in such book:—Held, that the making of such note was only a ministerial act to be performed by the clerk; it was not a part of the judgment itself; the validity of the judgment did not depend on such note being made. The failure to make it would seem to be merely an irregularity. *Dixon* v. *Mackay*, 22 Occ. N. 374.

Reference by Consent to Experts—Misunderstanding of counsel as to purpose of reference—Opening up judgment. *Beaudry* v. *Gallien*, 1 O. W. R. 793.

Service of—*Opposition—Interruption of Right.*]—The service of judgment required by Art. 1166, C. P., as a means of interrupting the defendant's right to file an opposition thereto, must be that of a duly stamped and certified copy of said judgment. *Migneron* v. *Yon*, 4 Q. P. R. 185.

Set-off of Judgment Purchased by Defendants—Equitable right — Discretion —Attachment of debts. *Bleasdell* v. *Boisseau*, 4 O. W. R. 155, 239.

JUDGMENT DEBTOR.

Collection Act, N. S.—*Examination—Power of Examiner to Direct Assignment—Discretion—Statute—Imperative or Directory.*]—Section 28 of the Collection Act, R. S. N. S. c. 182, provides that upon the examination of a debtor the examiner may verbally require that the debtor shall execute an assignment of all his real and personal property, not exempt from levy or execution, to the creditor in trust for the payment due on the judgment. The examiner in the present case ordered the assignment, holding that he had no discretion in the matter:—Held, on appeal, that the examiner had a discretion, and that the statute was not mandatory as to directing an assignment. *McMillan* v. *Watson*, 21 Occ. N. 446.

Collection Act, N. S.—*Wilful and Malicious Tort—Committal.*]—Action for assault. The defendant, with a defence denying liability, paid money into Court. The plaintiff took it out of Court and entered judgment under Order XXII., R. 7. Upon an examination of the defendant before a commissioner under the Collection Act, the plaintiff made application to have the defendant committed to gaol under s. 27 (*f*) of the Act. The commissioner refused the application, on the ground that the evidence that the tort was wilful and malicious was not receivable, as there had not been an adjudication of a tort by the Court:—Held, that the commissioner was in error in assuming that it was necessary to have a formal adjudication by the magistrate that a tort had been actually committed. The expression in this sub-section—"cases of tort"—does not mean cases where a judgment has been given expressly finding a tort, but is merely intended to deal with all actions of tort in the same manner as preceding sections cover actions upon contracts. *Etter* v. *Graham*, 21 Occ. N. 484.

Committal—*Conditional Order — Service —Arrest—Terms of Discharge—County Court Practice—Registrar's Minute.*]—An order to commit a judgment debtor under s. 193 of the County Courts Act must be absolute, not conditional. Where an order to commit a party is made in his absence, he must be served with a copy of the order before arrest. Orders to commit should be drawn up and should contain the terms on which discharge out of custody may be obtained, as required by Order XIX., r. 13. Where a registrar is present and takes a minute of an order, the minute so taken is conclusive, even though the Judge's recollection of the order is different. *Wallace* v. *Ward*, 9 B. C. R. 450.

Examination—*Assignment for Creditors —Examination under Assignments Act.*]—The fact that the judgment debtor had, before judgment, made an assignment for the benefit of his creditors, and had been examined as an insolvent assignor under the provisions of s. 34 of R. S. O. 1897 c. 147, does not deprive a judgment creditor, after obtaining his judgment, of the right to examine the debtor under Rule 900. *Bank of Hamilton* v. *Scott*, 24 Occ. N. 268. 3 O. W. R. 716, 717.

Examination—*Default—Motion to Set aside Summons.*] — The examination of a debtor, after judgment, can only take place in the cases mentioned in Art. 590, C. P. 2. A debtor who has made default to appear upon a summons wrongly issued, may nevertheless demand, by motion, the setting aside of the summons. *Alden Knitting Mills* v. *Hershfield*, 5 Q. P. R. 390.

Examination—Default of attendance on adjourned appointment—Costs. *Moran* v. *McMillan*, 2 O. W. R. 410.

Examination — Insufficient answers — Further examination. *Ivey* v. *Moffat*, 1 O. W. R. 519.

Examination—Judgment summons—Issue of second while first pending—Necessity for special motion. *Brownlee* v. *Eads* (Y. T.), 2 W. L. R. 123, 216.

Examination—Making away with property—Committal. *Hunt* v. *Robins*, 1 O. W. R. 80.

Examination—*Opposition Pending.*]—A judgment debtor cannot be called upon for examination as such while an opposition to the seizure made under the judgment against him is pending. *Duplessis* v. *Quinn*, 6 Q. P. R. 222.

Examination—Unsatisfactory answers—Disposition of property—Pending actions. *Gault* v. *Pentecost*, 2 O. W. R. 636.

Examination—Unsatisfactory answers — Preference — Committal. *Hepburn* v. *Vanhorne*, 1 O. W. R. 506.

Examination of—*Committal—Incurring Debt by Fraud—Appeal.*]—The defendant received from the plaintiff several sums of money, part of which were to be invested and part expended on the plaintiff's farm. The defendant placed these moneys to his wife's credit, made no investments, kept no accounts, and could not account at all for a large portion, although he said it had been expended on the farm. Before the plaintiff got judgment, and while the action was pending, the defendant allowed his wife and sister-in-law to get judgments against him:—Held, by the full Court, reversing the order of Drake, J., that the defendant had not incurred the debt by fraud or false pretences within the meaning of s. 15 of the Arrest and Imprisonment for Debt Act. An appeal lies direct from an order committing a debtor to gaol, and no preliminary motion to the Judge for discharge is necessary. *Bullock* v. *Collins*, 21 Occ. N. 191, 8 B. C. R. 23.

Examination of — *Order for—Refusal to Obey—Contempt of Court — Attachment for—Privilege—Judge of Supreme Court.*]—The proceedings for the oral examination of a judgment debtor under s. 36 of 59 V. c. 28, should be by summons and order; and not by an ex parte order in the first instance. A Judge of the Supreme Court has no privilege against an attachment for any contempt which is of a criminal and not of a civil kind. The process of attachment which may be issued under the provisions of s. 36 of 59 V. c. 28, against a judgment debtor for contempt of an order calling upon him to appear and be examined orally as to any and what property he has, which by law is liable to be taken in execution, is punitive or criminal in its nature; therefore, a Judge of the Supreme Court cannot protect himself by his privilege against an attachment issued against him for refusing to obey such an order. *In re Burkhardt* v. *Van Wart—Ex p. Van Wart*, 35 N. B. Reps. 78.

Examination of Transferee—Evidence of transfer. *Holme* v. *McGillivray*, 2 O. W. R. 519.

Examination of Transferee — *Third Mortgage — "Exigible under Execution."*]—A third mortgage upon real estate made by a judgment debtor is not a transfer of property "exigible under execution," within the meaning of Rule 903, and the third mortgagee is not, therefore, liable to be examined as a person to whom such a transfer has been made. The words quoted refer to legal execution and do not include equitable execution or the appointment of a receiver. *Canadian Mining and Investment Co.* v. *Wheeler*, 22 Occ. N. 123, 3 O. L. R. 210, 1 O. W. R. 103.

Fraudulent Disposition of Property—*Order for Committal—Refusal to Execute Assignment—Term of Imprisonment—Collection Act.*] — A judgment was recovered against the defendant for debt, the amount of which at the time of the proceedings to be referred to was $50.32, and was unsatisfied. The defendant entered into a recognizance for $45, and justified on oath as being worth, in personal property, consisting of household furniture, $45, over and above all his debts, including the judgment mentioned and another, which were specifically brought to his notice. An execution was issued, and the sheriff, five days later, demanded the property, but the defendant replied that he had sold it for $60, which he gave to his wife to buy household supplies. The defendant, being examined under the Collection Act, shewed that he had conveyed away other property to relatives, etc. The examiner made an order under the Collection Act, s. 27 (e), committing the defendant to gaol for two months for a fraudulent disposition of his property, or until he should pay $61.42, the amount due on the judgment:—Held, that the examiner was fully justified in making the order for imprisonment. 2. That where the debtor refuses to execute the assignment mentioned in s. 28 of the Collection Act, and the Judge or examiner determines to commit him under s. 27 of the Act, the warrant or order of committal cannot then direct an assignment to be executed, but such refusal of the debtor to execute it can be taken into consideration by the officer or Judge only in fixing the term of imprisonment. *Henniger* v. *Brine*, 24 Occ. N. 143.

Garnishee—Order for payment—Examination of debtor of garnishee—Rules 835, 903, 904. *Roaf* v. *Ditzel*, 6 O. W. R. 931.

Motion to Commit — Imperial Debtor's Act in force in N. W. T.—Non-payment of judgment—Examination of debtor—Refusal to disclose property. *Iverson* v. *Enwright* (N.W.T.), 2 W. L. R. 20.

Order for Committal — *Appeal from—Questions of Fact — Affidavit — Oral Evidence.*]—The Court will not set aside an order committing a judgment debtor to prison on the ground of his having made a fraudulent disposition of his property whereby the judgment creditor is materially prejudiced in obtaining satisfaction of his judgment, unless it appears that the Judge making the order has taken some manifestly mistaken view of the law or the facts. As such Judge has had the opportunity of hearing the witnesses give their testimony viva voce, and of observing their demeanour, his decision on questions of fact must be taken to have the same weight as the verdict of a jury. On an application for a rule nisi to rescind a Judge's order imprisoning a judgment debtor, the applicant cannot shew by affidavit what took place before the Judge to whom the application was made; the stenographer's return of the evidence must be produced. *Ex p. Despres, In re O'Leary* v. *Despres*, 36 N. B. Reps. 13.

Transfer of Shares in Company—Injunction to restrain further transfer — Examination of transferee—Aid of execution—Affidavit. *Coleman* v. *Hood*, 4 O. W. R. 309, 433.

JUDICIAL COMMITTEE OF PRIVY COUNCIL.

See APPEAL.

JUDICIAL NOTICE.

See CONTRACT.

JUDICIAL SALE OF LAND.

Effect of—*Extinction of Title—Action to Remove Cloud on Title.*]—After the sale under a decree of an immovable of which he was the owner, the debtor has no longer any interest in the property, and therefore has no right of action to have removed from the property a hypothec which he alleges has been illegally registered. *Kauntz* v. *Léveillé*, Q. R. 24 S. C. 537.

Party having Conduct Purchasing—*Invalidity — Objection — Person Interested in Proceeds.*]—In the absence of any order or direction, the plaintiff and not the clerk of the Court is to be considered to have the conduct of a judicial sale. Where the plaintiff, who had conduct of such a sale, purchased the land without leave, confirmation was refused. Such a sale is void, not merely voidable, and it is unnecessary for the person opposing to shew that the purchaser has perpetrated fraud, or acquired the property at less than its value, or obtained undue advantage, or that the lands should have realized sufficient to give him an interest in the proceeds. Any person having any interest in the proceeds of a sale, whether a party or not, has a right to object to confirmation. *Pruden* v. *Squarebriggs*, 2 Terr. L. R. 200.

See MORTGAGE.

JUDICIAL SECURITY.

Authorized Company — *Justification—Requisition.*]—A company authorized to furnish security in the Courts may be required to justify as to solvency, but its security will not be rejected unless it appears that the party complaining of it has required the company to justify. *Ludlam* v. *Weiss*, 6 Q. P. R. 208.

See ARREST—COSTS.

JUDICIAL SURETY.

See PRINCIPAL AND SURETY.

JUNCTION.

See RAILWAY.

JURA REGALIA.

See CONSTITUTIONAL LAW.

JURISDICTION.

Objection to—*Right of Judge to Raise.*]—Where a petition was presented for payment over of insurance moneys deposited by the insurers, whereas the claimant should have brought an action: — Held, that the Judge hearing the petition had a right to raise the objection to jurisdiction of his own motion. *In re Doran and Ancient Order of United Workmen*, 3 O. P. R. 441.

Provincial Court — *Foreign Lands—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, 19 Occ. N. 281, affirmed; Maclennan, J.A., dissenting. *Gunn* v. *Harper*, 21 Occ. N. 552, 2 O. L. R. 611.

See APPEAL—COURTS—WRIT OF SUMMONS.

JURORS.

See ATTACHMENT OF DEBTS—TRIAL.

JURY.

Special Jury—Notice of striking—Time—Holiday. *Holman* v. *Times Printing Co.*, 1 O. W. R. 7, 338, 756.

See CRIMINAL LAW — NEGLIGENCE — NEW TRIAL—TRIAL.

JUSTICE OF THE PEACE.

Action against — *False Imprisonment—Evidence—Innocence of Plaintiff.*]—By C. S. N. B. c. 90, s. 31, it is enacted that, "where the plaintiff shall be entitled to recover in any action against a justice, he shall not have a verdict for any damages beyond two cents, or any costs of suit, if it shall be proved that he was guilty of the offence of which he was convicted," etc. In an action for false imprisonment brought against a magistrate, who without jurisdiction had committed to prison the plaintiff for making default in payment of a fine imposed upon him for selling liquor without a license, evidence was offered and admitted in proof of the plaintiff's innocence of the charge: — Held, that the evidence was properly received, and that the plaintiff, in order to prove his innocence, was not confined to such evidence as had been given before the magistrate on the trial of the information. *Labelle* v. *McMillan*, 34 N. B. Reps. 488.

Certiorari — *Return of Moneys Collected.*]—A justice of the peace whose judgment is removed upon a writ of certiorari, must, in presenting to the Court the documents relating to the matter, deposit all sums of money collected by him under his judgment. 2. If he does not do so a rule nisi may be issued against him obliging him

to make such deposit. *Mercier* v. *Plamondon*, Q. R. 21 S. C. 335.

Collection of Fine and Costs — *Presumption of Proper Disposition—Duty, where Conviction Quashed.*] — Held, in an action against a justice of the peace to recover the sum of $15 paid to him as fine and costs, upon a conviction under a Territorial Ordinance, which was afterwards quashed, that it must be presumed, in the absence of evidence, that the moneys were properly applied, i.e., the fine transmitted to the Attorney-General, and the costs paid over to the complainant, for whom they were received by the justice as agent. There is no duty imposed on the justice in such case to obtain a refund. The justice's personal fees when retained by him are in effect paid to him by the complainant, against whom he had the right to retain them. *Kauditzki* v. *Telford*, 5 Terr. L. R. 488.

Conviction — *Certiorari—Costs of Conveying to Gaol.*] — The Superior Court has jurisdiction to take cognizance, upon certiorari, of every decision rendered by a justice of the peace, even in criminal matters. 2. A recorder has no right, in imposing a fine and the costs of a prosecution, and imprisonment in case of non-payment, to require as a condition precedent to the liberation of the defendant, the payment of the costs of prosecution and conveying to gaol; and a conviction containing that provision will be quashed upon certiorari. *Leonard* v. *Pelletier*, Q. R. 24 S. C. 331, 6 Q. P. R. 54.

Conviction — *Certiorari — Selling Unwholesome Meat—Public Health Act—Criminal Code.*]—A charge was laid against the defendant of exposing and offering for sale on a public market meat unfit for food for man. The charge was so worded as to leave it doubtful whether it was intended for one under s. 122 of the Public Health Act or under s. 194 of the Criminal Code. The magistrates treated the charge at first as one of an offence against the Code, and, the defendant electing against a summary trial, took evidence, and adjourned for a week. They then announced that a case had been made out under the provisions of the Public Health Act, but not such as to warrant sending for trial under the Code, and adjourned for some days to enable the accused to put in a defence under the new conditions, if he so desired. The defendant objected to the case being proceeded with under the Public Health Act, and offered no defence, and the magistrates then convicted him:—Held, that the conviction must be quashed. It is not competent for magistrates, where the information charges an offence which they have no jurisdiction to try summarily, to convert the charge into one which they have jurisdiction to try summarily, and to so try it, on the original information. *Rex* v. *Dungey*, 21 Occ. N. 435, 2 O. L. R. 223.

Conviction — Certiorari — No return of evidence—Absence of record of proceedings before justice—Invalidity of conviction. *Rex* v. *McGregor* (B.C.), 2 W. L. R. 378.

Conviction — Information charging more than one offence — Trial — Jurisdiction—Amendment—Appeal. *Rex* v. *Austin* (N.W. T.), 1 W. L. R. 371.

Conviction — *Minute of — Absence of Formal Entry—Quashing—Costs.*] — Where a justice of the peace convicts or makes an order against a defendant, and a minute or memorandum of such is then made, the fact that no formal conviction has been drawn up is no reason why the conviction should not be quashed. The Court has jurisdiction by virtue of s. 119 of the Judicature Act to award the costs of a motion to quash a conviction under an Ontario statute against either the justice of the peace or informant. Rex v. Bennett, 4 O. L. R. 205, 1 O. W. R. 360, distinguished. *Rex* v. *Mancion*, 24 Occ. N. 288, 8 O. L. R. 24, 3 O. W. R. 756.

Conviction — *Superior Court — Certiorari.*]—The Superior Court has power over a conviction by a justice of the peace in a penal matter. *Mercier* v. *Plamondon*, Q. R. 20 S. C. 288.

Conviction Quashed — Costs. *Rex* v. *Dungey*, 2 O. W. R. 620.

Convictions — *Separate Offences—Disposition of Both Cases after Hearing Evidence in Both.*]—Two informations were preferred before a justice of the peace against the accused for distinct offences of selling liquor to Indians. At the conclusion of the first case, the magistrate reserved his decision, and proceeded with the second case, in which he convicted, and then dismissed the first. On an application to quash the conviction, the magistrate stated on affidavit that in convicting he was governed only by the evidence in the case in which the conviction was made:—Held, that the postponement by the magistrate of his decision in the first case until he had concluded the second, did not, under the circumstances, render the conviction in the second case bad in law. Regina v. McBerny, 3 Can. Crim. Cas. 339, distinguished. *Rex* v. *Sing*, 22 Occ. N. 423, 9 B. C. R. 254.

Disqualification — *Interest.*]—Justices of the peace, who belong to an association (a temperance alliance) of which the president is the party prosecuting, and the fine to be imposed upon the accused will ultimately be paid over to said association, have no jurisdiction, and are prevented from acting on account of interest sufficient to disqualify them. *Daigneault* v. *Emerson*, Q. R. 20 S. C. 310.

Illegal Arrest — *Action against Magistrate—Warrant of Commitment—Ministerial Act—Excessive Punishment.*] — The defendant, a stipendiary magistrate, made a conviction against the plaintiff under the Canada Temperance Act, which was admittedly good. When he issued the warrant, he departed from the conviction and directed imprisonment with hard labour. The plaintiff was discharged on habeas corpus proceedings, and brought this action for damages for illegal arrest:—Held, that the magistrate was liable. If the issue of the warrant were a judicial act, the plaintiff would fail, as no malice was proved. The issuing of the warrant was, however, a ministerial act. Banister v. Wakeman, 15 L. R. A. 201, Briggs v. Wardell, 10 Mass. 356, Noxon v. Hill, 2 Allen 215, referred to. The case was distinguishable from Mott v. Milne, 31 N. S. Reps. 372, because the latter case proceeded on the assumption that the issuing of a warrant to

arrest for an indictable offence by a magistrate upon an information had before him was a judicial act. The defendant was not entitled to the protection of R. S. N. S. 1900 c. 40, s. 16, because the plaintiff was undergoing a greater punishment than the law assigned for the offence. *McIver* v. *MacGillivray*, 24 Occ. N. 142, 237.

Jurisdiction — *Conviction for Trespass —Warrant of Commitment — Necessity for two Justices—Habeas Corpus — Certiorari.*] —The prosecutor charged the petitioner before a justice of the peace with having cut wood upon his property. The petitioner took no notice of the summons served upon him, and the justice convicted him and ordered him to pay a fine of $5 and costs and upon default to be imprisoned for 15 days at hard labour. A warrant of commitment was issued by the justice under s. 783 of the Criminal Code, and the petitioner was imprisoned. He obtained a habeas corpus and certiorari in aid, alleging that a single justice of the peace cannot issue a warrant of imprisonment, and that the conviction was illegal:—Held, that a single justice has no jurisdiction to issue a commitment under s. 783. 2. When it appears on the face of the conviction that the justice has exceeded his jurisdiction a certiorari in aid is not necessary. 3. In such a case the writ of habeas corpus was maintained and the conviction and commitment were quashed. *Coté* v. *Durand*, Q. R. 25 S. C. 33.

Jurisdiction—*Conviction not Conformable to Municipal By-law—Payment of Fine —Acquiescence.*]—A by-law of the town of Levis enacted that all umbrella-menders, whether residing in the town of Levis or not, but carrying ont that trade or business there, before carrying on such trade or business should take out a license, and that on failure to do so they should be liable to a fine of $50 or to imprisonment for one month. The applicant was convicted and ordered to pay a fine and in default of immediate payment to be imprisoned for 15 days, because he "was arrested by Constable Odillon Houde at sight within the limits of the town of Levis, whilst, in contravention of the town by-law, soliciting orders as an umbrella-mender without having taken out the license required by the said by-law and the law." The applicant thereupon paid the fine:—Held, that the conviction was not conformable to the by-law, which did not require that those who solicited orders as umbrella-menders should take out licenses; that the conviction was therefore entirely beyond the jurisdiction of the justice of the peace. (2) The applicant must be presumed to have paid his fine to obtain his liberty, and such payment did not therefore constitute acquiescence. *Cardoni* v. *Robitaille*, Q. R. 25 S. C. 444.

Jurisdiction—*Hearing in Absence of Accused—Appearance for Sentence—Right to Adduce Evidence.*]—A justice of the peace has no right, after having heard the case in the absence of the accused, and issued a new warrant, to compel the accused to appear before him to receive sentence, to prevent the accused from adducing evidence when he appears in answer to that warrant. *Levesque* v. *Asselin*, 6 Q. P. R. 64.

Jurisdiction—*Information—Date of Offence—Liquor License Act—Prohibition.*]—An information was laid at Halifax on the 25th April, 1904, by the chief inspector of licenses for the municipality of Halifax county, who resided 35 miles from the city of Halifax, before the stipendiary magistrate for the county of Halifax, against the defendant, charging him "for that he within the space of six months last past previous to this information at . . unlawfully, . . (a) did sell, . . . and (b) did keep for sale . . . intoxicating liquor contrary to the provisions of the Liquor License Act." The only evidence offered by the prosecution was that of the chief constable for the county of Halifax, who swore that in company with the inspector on the 23rd April, 1904, he visited the defendant's house within the county of Halifax, and found a gallon of liquor in his bedroom, but there was no bar or other appliances generally found in a place where liquor is sold, and that he had on former occasions served the accused with papers under the Liquor License Act. The defendant gave no evidence nor called any witnesses, but asked for a dismissal of the complaint on several grounds. The justice adjourned to consider the application of the defendant who in the meantime applied ex parte for a writ of prohibition under Crown Rule 72:—Held, following Rex v. Boutillier, 24 Occ. N. 240, that, as it did not appear by the information that it was laid within six months after the commission of the offence, or that the defendant had committed the offence within six months previous to its being laid, and as the evidence given on the trial in the presence of the defendant did not amount to a charge for violation of the law so as to dispense with the formality of an information, the magistrate was acting without jurisdiction, and should be prohibited from further proceeding in the matter. Regina v. Bennett, 1 O. R. 445, referred to. *Rex* v. *Breen*, 24 Occ. N. 325.

Jurisdiction—Summary trial—Charge of keeping common gaming house—Interpretation of Criminal Code. *Re Rex* v. *Flynn* (Y. T.), 1 W. L. R. 388. 2 W. L. R. 468.

Justice's Civil Court — *Jurisdiction— —Omission to Give Security for Costs—Foreign Corporation—Goods sold and Delivered.*] —The plaintiffs, who were a company incorporated abroad, but having a place of business in the province, brought an action against the defendant in a justice's court for goods sold and delivered. To prove their case they put in evidence a paper in the form of a promissory note, whereby the defendant promised to pay the plaintiffs a sum certain with interest. There were certain conditions as to the possession of the goods and the title thereto incorporated in the note or paper. Security for costs was not demanded at the trial, and none was given:—Held, that indebitatus assumpsit would lie, and that the omission to give security for costs did not deprive the magistrate of jurisdiction to try the case. Per Tuck, C.J., that 49 V. c. 53, s. 1, does not apply to companies incorporated abroad, but having a place of business within the province. Per Barker, J., that the defendant by not demanding the security at the trial waived the benefit of 49 V. c. 53. *Massey-Harris Co.* v. *Stairs*, 34 N. B. Reps. 591.

Ministerial Duties—*One Justice Sufficient.*]—In cases tried under the Summary

Act, purely ministerial duties, such as receiving complaint, issuing warrant, etc., may be done by one justice of the peace, even where the statute under which the proceedings are had, says that the case can only be tried by two justices of the peace. *Bousquet* v. *Gagnon*, Q. R. 23 S. C. 35.

Offence Committed in a Harbour—*Jurisdiction—Adjacent County.*]—Upon the shores of the high sea it is only land not cover d by the sea which forms part of the adjacent counties, and, therefore, the jurisdiction of the Courts of these counties does not extend beyond the line of low tide. 2. Bays, gulfs, mouths of rivers, harbours, ports, roadsteads, or waters situated between the necks of land, where one can see from one bank to the other, form part of neighbouring or adjacent counties, and consequently an offence committed upon such waters is within the territorial jurisdiction, and not the Admiralty. 3. The port of Percé, in which an offence was committed, is part of the adjacent county of Gaspé, having regard to the facts (a) that it is an inland water almost entirely surrounded by land, and lying between necks of land, and (b) that the statute, in making the river the border of this county and including in it the nearest islands, includes also the waters of the ports and the roadsteads which lie between these islands and the mainland because they are between necks of land. 4. Consequently, a magistrate of the district of the county of Gaspé has jurisdiction over an offence or a tort or a quasi-tort committed at this place: and a writ of prohibition against the enforcement of a decision of such a magistrate will not be maintained. *Duguay* v. *North American Transportation Co.*, Q. R. 22 S. C. 517.

Penalty—*Excessive Fee—Information for Indictable Offence—Pleading—Amendment.*]—An information having been laid by the plaintiffs before the defendant, a justice of the peace, for an indictable offence under ss. 210 (2) and 215 of the Criminal Code, over which the defendant had no summary jurisdiction as a justice:—Held, that he was not entitled to any fee whatever, and that the plaintiffs, while they were entitled to recover by action the amount of the fee which they paid, could not maintain an action under s. 3 of R. S. O. 1897 c. 95, or under s. 902, s.-s. 6, of the Criminal Code, to recover a penalty from the defendant for receiving a larger amount of fees as a justice of the peace than he was entitled to. Bowman v. Blyth, 7 E. & B. 26, applied and followed. It was alleged by the statement of claim that the defendant wrongfully, illegally, and maliciously, and without reasonable or probable cause, demanded from the plaintiffs the sum of, etc., contrary to the Ontario Act. At the trial the plaintiffs were allowed to amend by substituting "wilfully" for "maliciously and without reasonable or probable cause," and by making an alternative claim under s. 902, s.-s. 6, of the Criminal Code:—Held, that the amendments were properly made. *McGillivray* v. *Muir*, 23 Occ. N. 282, 6 O. L. R. 154. 2 O. W. R. 663.

Powers of—*Master and Servant—Complaint for Non-payment of Wages—Damages for Disobedience of Orders—Set-off.*]—B., a servant, under the provisions of s. 3 of Consolidated Ordinances c. 50, the Masters and Servants' Ordinance, lodged with a justice of the peace a complaint against C., his master, for non-payment of wages, and on the hearing, besides that bearing on the question of wages, some evidence was introduced tending to shew that, by reason of B.s neglect to obey C.'s directions in regard to some oats, the oats became entirely lost and destroyed, and, notwithstanding the objection of B.'s counsel, the justice expressed his determination to allow the claim for damages as a set-off to the wages:—Held, that the justice exceeded the power conferred on justices by the Ordinance in holding that, upon hearing of an information laid under s. 3, damages claimed for any of the causes set out in s. 2 can be adjudicated upon, and if found set off against wages proved under s. 3. *In re Brown and Craft*, 21 Occ. N. 103.

Preliminary Inquiry—*Continuation before Another Magistrate—Jurisdiction—Commencement de Novo.*]—A preliminary inquiry in a criminal matter commenced before a magistrate cannot be continued by another. 2. But if a magistrate who has commenced a preliminary inquiry, dies or is deposed from office or resigns, or if he discharges himself from the matter, another competent magistrate may take the matter in hand, but he must begin the inquiry de novo; he may not continue the proceedings already commenced. 3. A Judge of sessions of the peace who commenced a preliminary inquiry, having obtained leave of absence, and having, without finishing the inquiry, departed for a journey to Europe, was held to have discharged himself from the matter; and in this case, with the consent of the Crown, the prosecutor properly obtained from another magistrate, who replaced the former, an order to commence de novo the preliminary inquiry. 4. A writ of certiorari to prevent the second magistrate from seising himself of the matter and recommencing it was refused. *Bertrand* v. *Angers*, Q. R. 21 S. C. 213.

Proceedings as to Maintenance of Pauper—*Jurisdiction—Notice of Discontinuance of Previous Proceedings—Interest of Justice in Prosecution—Certiorari—Appeal.*]—Proceedings were taken by the plaintiffs before a justice of the peace with a view to having a pauper made chargeable to poor district No. 5 in the county of Pictou. Subsequently, and without notice to district No. 5, proceedings against that district were discontinued, and proceedings were commenced before another justice with a view to having the pauper made chargeable to the defendants' district. On the depositions taken before the magistrate applied to in the second instance, the stipendiary magistrate for the county (who was also county treasurer) took further depositions, and made an adjudication that the pauper was legally chargeable to the defendants' district:—Held, that the adjudication so made was bad, both because of the failure to give notice of discontinuance of the original proceedings, and because the stipendiary magistrate, as county treasurer, was a party to the proceedings and should not have acted. Held, that the order made under the circumstances mentioned was open to attack either by certiorari or by appeal. *Pictou Overseers of the Poor for District No. 7* v. *Pictou Overseers of the Poor for District No. 6*, 36 N. S. Reps. 326.

Recusation—*Proof of Facts Alleged—Appeal — Prohibition — Prosecution—Complainant.*]—Where, in a complaint brought

before a justice of the peace, by virtue of Art. 5551 et seq., concerning damages to property, the justice has been challenged by the defendants, it is for them to prove the facts alleged in their récusation, and that even before the justice challenged, preserving the right to appeal or to move for prohibition, if the justice persists in sitting, the provisions of the Code of Civil Procedure not applying in such a case. 2. It is not necessary that such a prosecution should be brought in the name of the complainant as well as of the municipal corporation. *In re Guertin and Beauchemin*, Q. R. 18 S. C. 516.

Summary Conviction — *Jurisdiction—Merits—Certiorari.*]—Where a summary conviction is not on its face defective, and the justice had general jurisdiction over the subject matter, the adjudication involved in the merits of the case on the facts, as distinguished from collateral facts upon which the justice's jurisdiction depends, is not reviewable upon certiorari. *Rex* v. *Beagan* (*No. 1*), 36 N. S. Reps. 206.

Summary Conviction Quashed—*Action to Recover Fine and Costs.*]—In an action for the recovery from the defendant, a justice of the peace, of the fine and costs paid to the defendant by the plaintiff upon a summary conviction made by the defendant under an Ordinance of the North-West Territories, which conviction had been quashed, it was held that the action did not lie against the magistrate, since, under s. 11 of the Ordinance respecting justices of the peace, Con. Ord. (1898) c. 32, he was bound to transmit the fine to the Attorney-General forthwith upon its receipt by him, and, in the absence of evidence that he had not remitted, must be presumed to have done so, and the costs were, by the conviction, directed to be paid to the complainant, whose agent to receive them the plaintiff must have known the defendant to be. *Kaulitski* v. *Telford*, 24 Occ. N. 108.

Territorial Jurisdiction—*Act for Protection of Sheep—Offence against—Locality of—Owning Vicious Dogs—Order for Destruction—Order for Damages—Information—Quashing Orders—Costs.*]—Upon a motion to quash an order of a justice of the peace for the county of Waterloo under ss. 11-13 of R. S. O. (1897 c. 271, an Act for the Protection of Sheep and to impose a tax on dogs, finding that the defendant, at the town of Waterloo, did unlawfully have in his possession two dogs, which dogs worried and injured two sheep, the property of the complainant, at the township of Wellesley, and ordering the defendant to kill the dogs:—Held, that the offence under s. 11 was the having in possession a dog which, wherever the act was done, had worried, injured, or destroyed sheep, and therefore the offence was committed at the town of Waterloo, where the defendant lived, and a magistrate for the county had no jurisdiction, there being a police magistrate for the town, and it not appearing that the convicting magistrate was acting for or at the request of such police magistrate. Upon the same information the same magistrate also made an order, under s. 15 of the Act, for payment by the defendant to the complainant of $10 (said to be the value of the sheep) and costs:—Held, that a proceeding under s. 15 is independent of one under ss. 11-13, and the magistrate had no power to award damages for the injury to the sheep, without a separate complaint. The first order was quashed without costs, because the question of the magistrate's jurisdiction was not raised before him, and the assuming jurisdiction was his mistake. The second order was quashed with costs to be paid by the complainant, because he insisted on going on with the claim for damages before the magistrate. *Rex* v. *Duering*, 21 Occ. N. 588, 2 O. L. R. 593.

Void Conviction—*Action en Nullité.*]—A conviction made by a person illegally exercising the functions of a justice of the peace is void, and may be attacked by way of a direct action to declare it void. *Corporation of Ham Nord* v. *Juneau*, Q. R. 21 S. C. 539.

Warrant of Arrest — *Grounds—Issue without Inquiry — Liability.*]—A justice of the peace who issues a warrant of arrest without inquiring into the grounds which the complainant has for suspecting the accused, is responsible to the latter when the complaint is not justified by any serious, reasonable, or plausible ground. *Murfina* v. *Sauvé*, Q. R. 19 S. C. 51.

KIDNAPPING.

See CRIMINAL LAW.

LABOUR.

See WORK AND LABOUR.

LACHES.

See ACCOUNT — COSTS — CRIMINAL LAW — CROWN—HUSBAND AND WIFE — INSURANCE — INTERPLEADER — MINES AND MINERALS—VENDOR AND PURCHASER.

LAND.

See CROWN—RAILWAY.

LAND SUBSIDY.

See RAILWAY.

LAND TITLES ACT.

Claim on Assurance Fund—*Transfer—Fraud—Forgery — Bonâ Fide Purchaser for Value without Notice.*]—The plaintiff, being the owner of land registered under the Land Titles Act, R. S. O. 1897 c. 138, was, by the fraud of two persons, G. and H., induced to transfer her land to one D. Subsequently a transfer to McD., purporting to be signed by D., was registered, but D.'s signature was forged. McD. then transferred to O'M., and O.'M. to B., both being parties to the fraud

with G. and H. B. transferred to C., an innocent purchaser for value without notice. All the transfers were duly registered. None of the parties to the fraud being financially responsible, an action was brought for compensation for the loss of the land out of the assurance fund, under ss. 130 and 132 of the Act: — Held, that the plaintiff was not "wrongfully deprived" under s. 132, and that she could not recover. *Fawkes* v. *Attorney-General for Ontario*, 23 Occ. N. 328, 6 O. L. R. 490, 2 O. W. R. 149.

Execution—*Renewal—Refiling—Notice to Execution Creditor — Confirmation of Tax Sale—Statute — Retroactivity.*]—The Land Titles Act, 1894, s. 92, s.-s. 1, is amended by 63 & 64 V. c. 21, s. 2 (assented to 7th July, 1900), by the addition of a proviso "that every writ shall cease to bind or affect land at the expiration of two years from the date of the receipt thereof by the registrar, unless before the expiration of such period of two years a renewal of such writ is filed with the registrar in the same manner as the original is required to be filed with him." This proviso is not retroactive so as to apply to a writ of execution which would have expired but was renewed before the 7th July, 1900; such a writ, therefore, remains in full force though a renewal thereof has not been filed with the registrar either before or after that date. The execution creditor in such a writ should consequently be notified of an application for the confirmation of a tax sale of land of the execution debtor. *Re Town of Prince Albert*, 4 Terr. L. R. 510.

Executions against Lands—*Renewal—Expiry—Memorandum on Certificate of Title—Sheriff—Judge's Order—Seizure—Statute—Amendments.*]—The Land Titles Act, 1894, s. 92, provides for the delivery by the sheriff of a copy of a writ of execution against lands to the registrar, until the receipt by whom no land shall be bound by the writ. It also provides that "no certificate of title shall be granted except subject to the rights of the execution creditors under the writ while the same is legally in force," and also that the registrar on granting a certificate of title shall by memorandum hereon express that it is subject to such rights. This section was amended by 63 & 64 V. c. 21, s. 52 (which came into effect on being assented to the 7th July, 1900), by adding a proviso to the effect that every writ shall cease to bind or affect land at the expiration of two years from the date of the receipt thereof by the registrar, unless before the expiration of such period of two years a renewal of such writ is filed with the registrar in the same manner as the original is required to be filed with him:—Held, that this proviso applies only to writs of execution filed with the registrar after the passing of the amending Act, and, therefore, among other consequences, a writ of execution filed with the registrar before the passing of the amending Act, and regularly renewed, does not require to be re-filed with the registrar. The Land Titles Act, 1894, s. 93, provides that upon the delivery to the registrar of a certificate by the sheriff or a Judge's order shewing the expiration or satisfaction or withdrawal of the writ, the registrar shall make a memorandum on the certificate of title to that effect. 63 & 64 V. c. 21, s. 3, substituted for the above section a provision that upon the satisfaction or withdrawal from his hands of any writ the sheriff should transmit a certificate to that effect to the registrar, and that the registrar on its receipt or on receipt of a Judge's order shewing the expiration, satisfaction, or withdrawal of the writ, should make a memorandum on the certificate of title to that effect:—Held, that now a sheriff cannot give a certificate of the expiry of a writ of execution; that unless the proviso added to s. 92 applies, and the writ appears by force of that proviso to have expired, the registrar can make a memorandum of its expiry only upon a Judge's order. If the sheriff has begun to execute a writ, e.g., by seizure, it does not require a renewal. The delivery by a sheriff to the registrar of a copy-writ pursuant to s. 92 is not a seizure or other inception of execution which will prevent the expiry of the writ. *In re Blanchard Estate*, 5 Terr. L. R. 240.

Tax Sale Transfer—*Registration—Time — Appeal — Non-prosecution—Notice of Appeal—Time for.*]—Rule 460 of the Judicature Ordinance, C. O. 1898 c. 21, providing for two clear days' notice of motion, except by special leave, applies to motions to the Court en banc. An order stopping the registration of a tax sale transfer and Judge's order confirming the sale, as provided for by s. 97 of the Land Titles Act, also acts as an order extending the time for registration of the transfer, as provided for by s. 95 of the Act. An appellant is excused for not having proceeded with the appeal by the fact that the original documents from which the appeal book is to be prepared have remained in the respondent's possession, he having neglected to file them in the Land Titles Office, as directed by the order appealed from. *In re Donnelly*, 5 Terr. L. R. 270.

LANDLORD AND TENANT.

I. Distress, 860.
II. Injury to Tenant, 863.
III. Lease, 865.
IV. Lien of Landlord, 880.
V. Notice to Quit, 881.
VI. Overholding Tenants, 881.
VII. Rent, 886.
VIII. Other Cases, 888.

I. Distress.

Attachment for Rent and Damages — *Desistment as to Damages.*]— There is nothing to prevent the plaintiff in an attachment of goods for rent and damages from abandoning the claim for damages, and such desistment will not be rejected on motion. *Gariépy* v. *Poulin*, 4 Q. P. R. 105.

Chattel Mortgage — Seizure under — Illegal distress—Appropriation of payments—Abandonment of distress—Renewal—Proceeding under Overholding Tenants Act — Res judicata — Estoppel — Rent — Damages — Counterclaim—Use and occupation—Findings of jury—New trial. *Stone* v. *Brooks*, 2 O. W. R. 306, 3 O. W. R. 482, 527.

Claim to Goods — *Notice to Landlord — Service—Proof.*]—A bailiff is not empowered to serve upon a landlord the notice required by law to be given him by the owner of chattels in order to deprive the landlord of his right to a lien upon goods on the premises demised; and the bailiff's certificate alone is not sufficient evidence of the notice required by law in such cases. *Duperreault* v. *Pauzé*, Q. R. 25 S. C. 401.

Default to Sell — *Suspension of Action for Rent.*] — Where a distress for rent has been made, and the goods distrained remain unsold in the landlord's hands, his right of action for rent is suspended. Lehain v. Philpot, L. R. 10 Ex. 242, followed. *Smith* v. *Haight*, 4 Terr. L. R. 387.

Excessive Distress — Irregularities — Waiver—Sale for full value—Account of proceeds. *Piché* v. *Montgomery*, 1 O. W. R. 325.

Goods of Tenant — *Refusal to Deliver up.*]—The plaintiff had rented an office from the defendants until the 1st May. On the 15th March he notified the defendants that he abandoned the office from that day, and engaged to pay $35, the amount due up to that day, on the 2nd April. At the end of March the plaintiff claimed his goods left in the office, which the defendants refused to give up:—Held, that the defendants had the right to retain the goods of the plaintiff until payment of the $35. This principle was a result of the right to follow which expressly belongs to a landlord. The goods are his pledge, and he cannot be forced to part with them until the sum for payment of which they are security has been paid. *McAvoy* v. *Merchants Bank of Halifax*, 3 Q. P. R. 400.

Goods of Third Person—*Claim—Notice—Opposition.*]—The landlord's lien for his rent upon the goods which are on the demised premises extends to those which belong to a third person, and an opposition made by such third person to a seizure for rent which is based solely upon his right of property, and not upon a notice given to the landlord before seizure, will be dismissed as frivolous and ill-founded. *Quebec Bank* v. *Tozer*, 4 Q. P. R. 131.

Goods of Third Person—*Claim—Notice to Landlord — Description of Goods—Intervention—Costs.*]—A third party, the owner of goods in the possession of a tenant, who wishes to take advantage of the provisions of art. 1622, C. C., as modified by 61 V. c. 45 (Q.), should give a notice to the landlord describing the goods of which he is the owner, and it is not sufficient for him to notify the landlord that he is the owner of the greater part of the goods which are found in the possession of the tenant. 2. An intervention filed in a suit begun against the tenant by the landlord, with conservatory seizure of the furniture upon the demised premises—no rent being then due—is a sufficient notice of the ownership of such third party, if it describes the goods which belong to the intervener. 3. Nevertheless, in this case, the intervener, having given occasion for the proceedings of the landlord—by taking away without distinction the goods upon the demised premises, of which some belonged to the defendant, before any sufficient notice of his ownership had been given to the landlord—was responsible for the costs incurred by the latter, and should have tendered them with his intervention, and, in the absence of such tender, he should be condemned in the costs of the contestation of his intervention. *Mathieu* v. *Clifford*, Q. R. 19 S. C. 410.

Goods of Third Party — *Exemptions — Claim by Third Party.*]—A landlord has no right to seize the chattels of a third person found on the demised premises, which are exempt from seizure, or those which should be left to the debtor at his election; and, as the law does not make any distinction of persons, this choice may be exercised as well by the third party interested as owner of such chattels, as by the debtor himself. *Battison* v. *Potvin*, Q. R. 27 S. C. 165.

Illegal Distress — *Abandonment—Agreement to Suspend Right — Violation — Trespass.*]—Under a distress for rent issued on the 12th March the defendant took possession of the plaintiff's store and evicted him. On the 13th March, discovering that the distress was illegal, he induced the plaintiff to go to the store with his attorney and the bailiff who made the distress, where they informed him that the distress was illegal, and a new one would have to be made, and they then handed him the key of the store and an inventory of the goods distrained, and tendered him $17 as damages for the eviction. The bailiff immediately informed him that he had a new demand, and received back the key and they left the store. In an action for illegal distress, it was not left to the jury to say whether there had been an abandonment of the distress under the first warrant, but they found, in answer to a question, that the bailiff at no time prior to the service of the second warrant gave up the possession and control of the goods under the first:—Held, that it should have been specifically left to the jury to say whether what took place, and what was done on the discovery of the mistake made on executing the warrant, and making the distress after sunset, was done with the intention of abandoning the distress. Per McLeod, J., that the evidence and the answers of the jury to the questions submitted shewed that the defendant at the time the second warrant was issued had the goods in his possession by virtue of an illegal warrant, and the trespass continued as if no second warrant had issued. Where an agreement was made between the plaintiff and the defendant that if the plaintiff would pay the rent on the 1st April and give up the premises so that the defendant could have the month for making repairs for a new tenant coming in on the 1st May, he, the plaintiff, would not distrain for the rent until after default on the 1st April:—Held, that the agreement would have the effect of suspending the right to distrain, and, if the defendant in violation of it distrained, he would render himself a trespasser. *Moores* v. *Manzer*, 36 N. B. Reps. 205.

Illegal Distress — Seizure of growing crops—Chattel mortgage. *Meighen* v. *Armstrong* (Man.), 2 W. L. R. 578.

Judgment for Costs—*Priority.*]—On a landlord's distress upon the goods of a tenant the costs of an action brought by the tenant, which has been dismissed, are costs "de justice," and ought to be ranked as such par

privilége, by virtue of art. 1994, C. C. *Roberge* v. *Loyer*, Q. R. 27 S. C. 32.

Lodger's Goods—*Action for Damages—Pleading—Cause of Action.*]—In an action for damages for the alleged wrongful distress of a piano, the property of the plaintiff, the statement of claim set out that the plaintiff was a lodger; that her property was seized and illegally removed, for which she claimed compensation under the provisions of R. S. N. S. c. 172, s. 15; that the property seized and removed was only returned under order of the Judge of a County Court:—Held, per Townshend, J., that, as the whole of s. 15 was necessarily made a part of the statement of claim, its provisions, read in connection with the other facts alleged, disclosed a good cause of action. Per Meagher, J., that, as the cause had been fully tried out, and no hardship could result, the cause should be treated as if the pleadings were correct, although there were defects on both sides. Per Ritchie, J., that the statement of claim disclosed no cause of action, and that the appeal should therefore be allowed and the action dismissed, although it appeared that the defendant had no defence to the cause of action proved at the trial, but not disclosed by the statement of claim. *Gray* v. *Harris*, 35 N. S. Reps. 519.

Removal of Goods—*Following — Replevin—Owner—Depositary.*]—The privilege of the landlord ceases after the lapse of 8 days from the removal of goods from the demised premises, and that is so even where the tenant, not being the owner of such goods, has pledged them to the landlord; and the true owner may replevy them from the landlord. 2. In this case a merchant with whom the goods had been deposited was to be considered as a depositary of the goods, and could claim from the owner the value of such deposit. *Emmans* v. *Savage*, Q. R. 24 S. C. 104.

Second Distress — *Appraisement — Appraisers not Sworn.*]—After a distress for a month's rent, it is not illegal to make another distress for the next month's rent, although it was due and in arrear at the time of the first distress. Under 11 Geo. II. c. 19, s. 19, the want of the sworn appraisement required by 2 W. & M., sess. 1, c. 5, is only an irregularity, and the tenant can only recover such special damage as he can shew to have resulted from it. Lucas v. Tarleton, 3 H. & N. 116, and Rodgers v. Parker, 18 C. B. 112, followed. *McDonald* v. *Fraser*, 24 Occ. N. 101, 14 Man. L. R. 582.

II. Injury to Tenant.

Defects in Premises — *Apparent Defects.*]—A landlord is not responsible to his tenant for damages for injuries sustained on account of defects in the demised premises which were apparent and existed at the time of the execution of the lease. *Cartier* v. *Durocher*, Q. R. 22 S. C. 255.

Defects in Demised Premises — *Liability.*]—Where the tenant suffers personal injuries resulting from the giving way of a portion of the structure leased, the fault is not contractual but delictual, and the lessor is responsible therefor without having been put in default, even where the defect was not apparent, and was unknown to either proprietor or tenant. *Vineberg* v. *Foster*, Q. R. 24 S. C. 258.

Demise of Part of Building — *Defective Condition of Other Part.*]—The plaintiff was tenant of a store on the ground floor of a building owned by the defendant, and sued for damages to her goods caused by rain water entering an unglazed fanlight over a door at the end of a hall extending from the head of a stairway leading to the second floor of the building. The water, flowing over the floor above the plaintiff's store, came through the ceiling, and caused plaster to fall which damaged the plaintiff's goods. The defect complained of existed at the time of the demise to the plaintiff:—Held, following Humphrey v. Wait, 22 C. P. 580, Colebeck v. Girdlers' Co., 1 Q. B. D. 234, and Carstairs v. Taylor, L. R. 6 Ex. 217, that the defendant was not liable. Miller v. Hancock, [1893] 2 Q. B. 177, distinguished. A tenant taking part of a building, in other parts of which are defects likely to result in damage to him, should examine the premises and contract for the removal of such defects as are apparent, otherwise he will have no remedy afterwards against the landlord for damages caused by such defects. *Rogers* v. *Sorell*, 23 Occ. N. 247, 14 Man. L. L. 450.

Disturbance of Enjoyment—*Escape of Water from Adjoining Premises.*] — A landlord is liable to his tenant for injuries done to the tenant's goods arising from the fact of thieves having entered an adjoining dwelling-house belonging to the landlord and there upset a cistern, which caused water to escape into the house leased to the tenant, such act not being a simple trespass committed by a third person, within the meaning of art. 1616, C. C., but a substantive act which modified the enjoyment in a manner prejudicial to the tenant. *Brisker* v. *Larue*, Q. R. 25 S. C. 447.

Disturbance of Tenant's Possession — *Trouble de Droit—Trespass—Crown Lands.*] —The cutting of hay, and hunting, upon leased property, by a third party not pretending to have any right upon the property leased, but merely asserting that the land on which he cut hay and hunted was not part of the property leased, is not a trouble de droit, but a mere trespass, against which, in the terms of art. 1616, C. C., the lessor is not obliged to warrant the lessee. 2. The pretension of a third party that he had acquired a right by prescription to cut hay on the leased property, which pretension was never brought to the notice of the Crown, lessor, by a legal proceeding or otherwise, and which was manifestly untenable as regards property of the Crown, would not constitute a trouble de droit under art. 616, C. C. *Fitzpatrick* v. *Lavallée*, Q. R. 25 S. C. 296.

Repair of Premises—*Injury to Tenant.*] —The lessee is not obliged to notify the lessor of the need of repairs to the leased premises, which the lessor is obliged to make. It is the duty of the proprietor to inspect his own property from time to time, and ascertain what repairs are necessary. He is, therefore, although not notified of any defects, responsible in damages for an accident which happened to the tenant in consequence of the weakness of a railing on the leased premises. *Troude* v. *Meldrum*, Q. R. 21 S. C. 75.

Repairs—*Landlord Exceeding Time Specified for Doing—Damages—Measure of—Contemplation of Parties at Time Lease was Made.*]—A tenant can claim from the landlord, who has exceeded the time specified in the lease for making repairs, only such damages as result directly from non-compliance with the conditions of the lease, and which might have been foreseen at the time it was granted. As a consequence, if he did not know that the premises had been leased for a place of business, the owner could not foresee that he might be called upon to pay any other damages than those resulting from the lease of an ordinary dwelling-house; and, therefore, he cannot be held responsible in damages which arise from the fact that the tenant has been prevented from carrying on the trade of a tailor whilst the repairs were effected at a place leased for the purpose of a residence only. *Léveillé* v. *Pigeon*, Q. R. 26 S. C. 73.

III. Lease.

Abandonment—*Re-letting— Cancellation—Deficiency in Rent.*]—When a tenant abandons the demised premises and the landlord lets them to another, there is a tacit cancellation of the lease, 2. Nevertheless, such cancellation being due to the fault of the tenant, he must pay to the landlord the difference between the old and the new rent. *Jodoin* v. *Demers*, Q. R. 24 S. C. 189.

Acceleration Clause — *Assignment for Creditors—Forfeiture—Assignee's Election — Payment of Rent.*]—The effect of s. 34 of R. S. O. c. 170, the Landlord and Tenant Act, is to place the assignee who has elected by notice in writing under his hand to retain the premises occupied by the assignor at the time of the assignment, for the unexpired term of the lease, in the same position as respects the lease as the assignor would have been in had the assignment not been made; the landlord in such cases being entitled to the full amount of the rent reserved by the lease, but to nothing more. And where accelerated rent due for the unexpired term of a lease containing the usual forfeiture clause had been paid by the assignee, who had elected to retain the premises till the end of the term, he was held entitled to recover back a further sum for rent of the premises for a portion of the same period which he had paid, on demand of the landlord, under protest, to avoid distress. *Kennedy* v. *MacDonell*, 21 Occ. N. 233, 1 O. L. R. 250.

Action by Tenant—*Pleading.*] — A tenant who sues by virtue of his lease is not obliged to allege that he has fulfilled all the conditions which it imposes upon him; that is implied by his setting up the lease. *Trempe* v. *Larivière*, 6 Q. P. R. 367.

Agreement for—*Construction—Condition—Waiver.*]—The defendant contracted to let to the plaintiff a house, then under construction, for the term of one year from the 1st June, 1900, at the rental of $20 per month, payable monthly in advance. It was agreed that in the event of the house not being completed by the 1st June there should be a proportionate reduction in the rent. The house was not completed by the time agreed, but the plaintiff moved in on the 24th June, when the work was still unfinished. No rent was charged for the month of June, but the plaintiff paid rent in advance for the months of July, August, September, and October, and continued in occupation of the premises until the 1st May, 1901, when he moved out. In an action by the plaintiff for damages for goods distrained by the defendant for rent in arrear:—Held, that the trial Judge was right in construing the agreement as a letting for a year from the 1st June, 1900, with a condition that if the occupancy was prevented by reason of the house not being ready for occupation at that time, there should be a deduction from the rent in respect to the period of time during which the house was not occupied. Held, also, that the payments made by the plaintiff shewed a waiver of the provision made in respect to the house being finished by a fixed date, or rather, in respect to the reduction which was to be made in consequence of its not being finished. *Acorn* v. *Hill*, 34 N. S. Reps. 508.

Agreement for — *Municipal Corporation—Lease to Railway Company — Settling — Taxes—Rent — Covenants.*] — Property of a city municipality, when occupied by a tenant other than a servant or officer of the corporation occupying the premises for the purposes thereof, is subject to taxation (Assessment Act, R. S. O. 1897 c. 224, s. 7, s.-s. 7); and such tax is a tenant's tax payable by him, and not in any event payable by the landlord as between him and the tenant. Section 26 of the Act, as to tenants deducting taxes from their rent, has no application to such a case, as it applies only to taxes which can be legally recovered from the owner. The reason of the rule embodied in that section disappears when the property is in the hands of the landlord exempt, and becomes liable to be taxed only when in occupation of a tenant. Semble, also, that where the tenant, as in this case, holds in perpetuity under a renewable lease, he may be regarded as the "owner," within the meaning of the Assessment Act, and as such is liable to taxation without recourse to the owner in fee. Where the municipality had entered into an agreement to grant a lease for a rent specified, but no mention had been made of taxes:—Held, that the fixing of the rent payable to the city did not interfere with the right of the latter in its governmental capacity and exercising its sovereign power to lay taxes upon the property when no longer exempt, by reason of its being under lease. Taxes and rent are distinct things and collectible by the corporation in different capacities, and the imposition of the yearly taxes is not a derogation from or inconsistent with the contract. A covenant by a tenant to pay taxes is a "usual" covenant, and it lay upon the tenant here objecting to give it, to shew by competent evidence that it was not so in such a case as that in question here or in this country, which the tenant had failed to do. No covenant to repair should be inserted in the lease, the jurisdiction to keep the railway in effective operation being in the Railway Committee of the Privy Council, and it not having been shewn that this was insufficient to protect the city. *In re Canadian Pacific R. W. Co. and City of Toronto*, 22 Occ. N. 235, 4 O. L. R. 134, 1 O. W. R. 255, 2 O. W. R. 385, 5 O. L. R. 717,

Agreement for — *Specific Performance.*] —Where the lessee refuses to sign a notarial lease in the terms of the agreement between him and the lessor in respect of the premises leased, the lessor has a right to bring suit, and have the lessee condemned to sign the lease, and, in default of his so doing, to have it ordered that the judgment of the Court shall serve as such lease. *Walsh* v. *Brooke*, Q. R. 21 S. C. 394.

Agreement for Lease—Incomplete contract—Nature of tenancy—Possession. *Grant* v. *McPherson*, 1 O. W. R. 240.

Attornment—Damage to tenant by act of third party — Negligence. *Slonemsky* v. *Faulkner*, 2 O. W. R. 551, 1099.

Breach of Covenant—Quiet enjoyment—Eviction—Covenant not to sublet—Forfeiture —Waiver. *Armstrong* v. *Canada Co.*, 6 O. W. R. 888.

Cancellation—*Use of Premises Changed.*] —There is a change in the use of the demised premises, affording ground for the cancellation of the lease, when the tenant of a bakery sublets it for a laundry. *Pearson* v. *Potvin*, Q. R. 25 S. C. 54.

Charge on Land—*Opposition to Sale by Sheriff.*]—A lease for one year, whether registered or not, does not constitute a charge upon the immovable leased, and gives no right to the tenant to make an opposition afin de charge, when the immovable is to be sold by the sheriff. *Lantaigne* v. *Skelling*, Q. R. 22 S. C. 304.

Construction — Unincorporated society —Lease signed by officers—Action for expulsion from demised premises—Parties—Damages. *Trudeau* v. *Pepin*, 3 O. W. R. 779.

Covenant—*Breach of—Assignment without Leave—Re-entry—Formal Execution of Assignment after Action.*]—The right of re-entry under the short form of lease applies to the breach of a negative as well as an affirmative covenant, so that there is a right of re-entry for breach of the covenant not to assign or sublet without leave. Toronto General Hospital Trustees v. Denham, 31 C. P. 203, followed. The making of an agreement for the assignment of a lease, the settlement of the terms thereof, and the taking of possession by the assignee, constitute sufficient evidence of the breach of such covenant, so that the fact of the document shewing the transfer not having been executed until after action brought, is immaterial. *McMahon* v. *Coyle*, 23 Occ. N. 225, 5 O. L. R. 618, 2 O. W. R. 265.

Covenant—*Goods on Premises to Secure Rent—Valuation.*]—Where, by a lease, the lessee undertook to furnish the leased premises with "a sufficient quantity of household furniture or goods to secure the payment of one year's rent," the effects upon the leased premises should be valued in accordance with their ordinary merchantable value, and not in accordance with what they might bring at a forced sale. *Rousseau* v. *Archibald*, Q. R. 12 K. B. 14.

Covenant — *Implied Covenant to Crop and Cultivate—Damages for Deterioration.*] —The plaintiff leased to the defendant's husband land for five years, yielding and paying therefor the clear yearly rent or sum of one-third of the crop. The lease contained covenants by the lessee that he would cultivate in a good husbandlike and proper manner so as not to impoverish or injure the soil, and plough and crop the same in a proper farmer-like manner. Afterwards a new lease was made substituting the defendant as lessee, instead of her husband. This did not contain any of the above-mentioned covenants, or anything specially applicable to leases of farms, but contained the following: "Yielding and paying therefor yearly and every year during the said term . . . the sum of one-third of the crop grown, to be payable, . . . the first of such payments to become due and to be made when threshed in the fall of each year," and a covenant to plough in each year of the term four inches deep, which was written into it. It did not contain express covenants to cultivate or crop:—Held, that there should be judgment for the plaintiff for deterioration in value of land from defendant's omitting to plough, cultivate, and crop in 1902, $300, and for loss of wheat, barley, and oats, $291.76, in all $591.76. Implied covenants to cultivate and crop in each year should be read into the second lease: McIntyre v. Belcher, 14 C. B. N. S. 654; Hamlyn v. Wood, [1891] 2 Q. B. 491. The defendant bound herself to plough four inches deep in each year. That must mean that she would plough for the purpose of cultivating and cropping. The wording of the provision as to the payment to the lessor of a third of the crop in each year, would imply that a crop was to be grown in each year of the term. *Dunsford* v. *Webster*, 23 Occ. N. 290.

Covenant — *Improvements — Renewal —Independent Covenants—Option.*]—A lease contained a covenant to the effect that the lessee might make improvements upon the demised premises; that at the expiration of the lease or any renewal thereof the same should be valued and paid for by the lessor; and concluding as follows: "And upon such payment, upon such valuation not being duly made, the party of the first part, his heirs or assigns, shall, if so required, give or renew a lease including the covenants of the present lease to the parties of the second part for a further period of five years, with the like agreement of valuation and payment for improvements as in this lease expressed and at the same yearly rent." On the expiration of the term, a dispute having arisen between the lessor and lessee as to the effect of the covenant—the former claiming that it was optional with him either to renew the lease or pay for the improvements after valuation, the latter that he was entitled to have the improvements valued and paid for by the lessor—a special case was stated in Equity for the opinion of the Court. Each party was ready and willing to perform the covenant as interpreted by him:—Held, that the covenant was single, and therefore that the lessor was discharged upon his shewing that he was ready and willing to renew the lease; (2) that, even if there were two separate and independent covenants, one to pay the appraised value of the improvements and the other to renew, only one was to be performed, and the option lay with the lessor, he being the first person called upon to act. Quære, per Tuck, C.J., whether a special case

stated under the provisions of 53 V. c. 4, s. 139, should not be first heard by the Judge in Equity. *Ward* v. *Hall*, 34 N. B. Reps. 600.

Covenant—*Lease by Tenant for Life—Straw and Manure — Property in—Emblements.*]—During the lifetime of the widow and tenant for life, two of the farms belonging to the estate were leased for five years, dependent on her living so long, and the lessees covenanted to cultivate, till, manure . . . and to spend, use, and employ in a proper husbandlike manner all the straw and manure . . . and not to remove or permit to be removed from the premises any straw of any kind, manure, wood or stone, and to carefully stack the straw . . . and turn all the manure thereon into a pile (so it may heat and rot so as to kill and destroy foul seeds), and thereafter and not before to spread the same on the land:—Held, that the defendants were not entitled to the straw and manure as emblements, as the widow was not in actual occupation or cultivation of the lands on which it was produced:—Held, also, that the lessees would have been entitled to the straw and the manure, which had been piled into heaps, but for their covenants, which precluded them from making any claim; and that the covenants might be construed or held to operate as a reservation of the straw and manure to the lessor to be dealt with in the stipulated manner, and, as the lessees' right or power and obligation so to deal with it came to an end with the death of the lessor, it passed to her representatives unrestricted thereby. Snetsinger v. Leitch, 32 O. R. 440, referred to. *Gardner* v. *Perry*, 23 Occ. N. 295.

Covenant—*Not to Cut Timber—Statutory Covenant—Common Law Rights.*]—Under a covenant in a lease made in pursuance of the Short Forms Act, the lessee was not to cut down timber for any purpose whatever, except for fire wood, but he was to have the privilege of using for any purpose all lying down hard wood timber, cedar only excepted:—Held, that the covenant was a restriction of the statutory covenant, under which the lessee could cut down timber or timber trees for necessary repairs or for fire wood, but was an extension of the common law right, which was limited to lying down dead timber, and that the covenant allowed the lessee to use all the lying down hard wood timber, sound or unsound, except in so far as restricted by the exception as to cedar. *Snellie* v. *Watson*, 7 O. L. R. 635, 2 O. W. R. 118, 3 O. W. R. 475.

Covenant — *Not to Sublet—Lodgers.*]—A condition in a lease, prohibiting subletting of the premises in whole or in part is not violated by a tenant who lets furnished rooms to lodgers, the tenant retaining the entire care and control of such rooms, and the lodgers not even being in possession of keys thereto. *Collerette* v. *Bassinet*, Q. R. 24 S. C. 372.

Covenant — *Railway Company — City Lease—Usual Covenants—Covenants to Pay Taxes and Repair—Right of Re-entry—Rent in Arrear — Interest on.*] — An agreement made between the corporation of the city of Toronto and the Canadian Pacific Railway Company, provided, amongst other things, for a lease renewable in perpetuity, in successive terms of fifty years, at an agreed rent, payable on named days, nothing being said about covenants:—Held, that the lease should contain a covenant by the appellants to pay the same, partly because the effect of the Assessment Act in force at the date of the contract was to impose such liability on the lessees of municipal lands without recourse to the corporation, and partly because a covenant to that effect was shewn to be a usual covenant, in the sense that the corporation invariably insisted on it in their leases. Judgment in In re Canadian Pacific R. W. Co. and City of Toronto, 23 Occ. N. 218, 5 O. L. R. 717, affirmed in the main, but varied as to interest. *Canadian Pacific R. W. Co.* v. *City of Toronto*, [1905] A. C. 33.

Crops — *Defence—Tilling and Sowing—Harvesting.*] — In a defence claiming the value of crops the defendant is not entitled at the same time to the cost of tilling and sowing and the cost of harvesting, and a claim for the latter will be set aside upon inscription in law. *Désormeau* v. *Bastien*, 5 Q. P. R. 417.

Crops—*Provision as to—Execution against Tenant—Rights of Landlord—Bills of Sale Act—Seizure of Equitable Interest.*] — The claimant let to the execution debtor the farm on which the grain had been grown by an indenture reserving as rent "the share or portion of the whole crop which shall be grown upon the demised premises as hereinafter set forth," and the lease provided that the lessor might retain from the share of the crop that was to be delivered to the lessee a sufficient amount to cover taxes, and to repay advances and other indebtedness; that the lessee immediately after threshing, should deliver the whole crop, excepting hay, in the name of the lessor, at an elevator to be named by the lessor; that all crops of grain grown upon the said premises should be and remain the absolute property of the lessor until all covenants, conditions, provisoes, and agreements therein contained should have been fully kept, performed and satisfied; and that the lessor should deliver to the lessee two-thirds of the proceeds of the crop to be stored in the elevator, less any sum retained for taxes, advances, indebtedness or guaranties previously mentioned. The grain in question had, until its seizure under the plaintiff's execution, remained on the farm in the possession of the lessee. The claimant claimed it as owner under the terms of the lease and not for rent:—Held, that the lease did not operate to prevent the lessee from ever having any property in the grain to be grown. 2. That, even if the legal ownership of the grain was to be in the lessor, it was still, as to two-thirds, held for the benefit of the lessee subject to the lessor's charges for taxes and advances, etc., and the lessee had an equitable interest in it, and the lessor's lien or charge would be void under the Bills of Sale and Chattel Mortgage Act, R. S. M. 1902 c. 11, s. 39, as being a charge upon crops to be grown in the future. 3. That the interest of the lessee in the grain whether legal or only equitable, was subject, under s. 182 of the County Courts Act, R. S. M. 1902 c. 38, to seizure and sale under execution, and that the claimant's interest could not prevail over that of the plaintiff. *Campbell* v. *McKinnon*, 23 Occ. N. 234, 14 Man. L. R. 421.

Emphyteusis — *Bail-à-rente — Petitory Action—Transfer by Lessee.*] — An instrument by which lands were leased for sixteen

years at an annual rental, subject to a renewal for a further term of twelve years, provided for the construction of certain buildings and improvements by the lessee upon the leased premises, and hypothecated these contemplated ameliorations to secure payment of rent and performance of the obligations of the lessee. On disturbance, an action, with both petitory and possessory conclusions, was brought by a transferee of the lessee against an alleged trespasser, who pleaded title and possession in himself, without taking objection to its cumulative form:—Held, that, under the circumstances, the action should be treated as petitory only; that the contract under the instrument described was neither emphyteusis nor a bail-à-rente (lease in perpetuity), but merely an ordinary contract of lease which conveyed no title to land or real rights sufficient to confer upon the transferee the right to institute a petitory action:—Held, also, that a deed of sale from the lessee would not support the petitory action, as the lessee could not transfer proprietary rights which he did not himself possess. *Price* v. *LeBlond*, 20 Occ. N. 449, 30 S. C. R. 539.

Evidence of — *Commencement in Writing—Third Party—Confession of Judgment.*] —A lease for a year at more than $50 rent cannot be proved by verbal testimony, even as against a third party, without a commencement of proof by writing, and such commencement of proof by writing is not to be found in the allegation, by such third party, of a monthly lease. 2. A confession of judgment by the tenant in an action brought against him by the landlord is not proof of a verbal lease against a third person who has been made a party. *Laliberté* v. *Langelier*, Q. R. 9 Q. B. 398.

Expiry — *Continuance of Possession by Tenant—Special Agreement — Tenancy at Will.*]—The reservation or payment of rent in aliquot proportions of a year, is the leading circumstance which turns tenancies for uncertain terms into tenancies from year to year. But this payment does not create the tenancy. It is only evidence from which the Court or jury may find the fact. And the circumstances may be shewn to repel the implication:—Held, therefore, in this case, where the landlord, before he accepted any rent after expiry of the lease, expressly told the tenant that he would not consent to any tenancy from year to year, so as to require any notice of termination to be given, but that they should remain in the same position as they were on the expiry of the lease, to which the tenant assented—the rent, however, to be the same as that reserved in the lease, and to be paid in like manner—the tenant was not a tenant from year to year, but a tenant at will. *Idington* v. *Douglas*, 23 Occ. N. 286, 6 O. L. R. 266, 2 O. W. R. 734.

Farm — Crop-payments—Negligence and want of skill of tenants—Action for damages —Joinder of defendants—Farming operations —Conflicting evidence — Damages — Costs. *Graviston* v. *Johnston* (N.W.T.), 2 W. L. R. 81.

Forfeiture — *Assignment for Creditors.*] —A lease is not terminated or dissolved by operation of law in consequence of an abandonment of his property by a trader for the benefit of his creditors. *Milot* v. *Hains*, 4 Q. P. R. 58.

Forfeiture—Breach of covenant not to sublet without leave—Acquiescence—Waiver —Breach of covenant to repair. *Mauk* v. *White* (Man.), 1 W. L. R. 401.

Forfeiture—*Non-payment of Rent—Damages—Declinatory Exception.*] — A declinatory exception, which concludes simply for the dismissal of the action, where it is shewn that the Court is competent, must be dismissed. 2. A landlord who demands the cancellation of the lease for non-payment of rent, may allege, besides, that he incurred, on account of the loss of future rents, damages to a certain amount, and is not obliged to limit his demand to three months' rent to fall due. *Bélanger* v. *Dubois*, 5 Q. P. R. 342.

Forfeiture — *Waiver—Estoppel—Covenant — Sub-lease—Company — Assignment for Creditors.*]—A lease to a joint stock company provided that, in case the lessee should assign for the benefit of creditors, six months' rent should immediately become due, and the lease should be forfeited and void. The two lessors were principal shareholders in the company, and while the lease was in force one of them, at the meeting of the directors, moved, and the other seconded, that a by-law be passed authorizing the company to make an assignment, which was afterwards done, the lessors executing the assignment as creditors assenting:—Held, reversing the judgment of the Court of Appeal, 1 O. L. R. 172, 21 Occ. N. 111, that the lessors and the company were distinct legal persons, and the individual interests of the former were not affected by the above action. Salamon v. Salamon, [1897] A. C. 22, followed. The assignee of the company held possession of the leased premises for three months, and the lessees accepted rent from him for that time, and from sub-lessees for the month following:—Held, reversing the judgment, that, under the facts of the case, the lessors could not be said to have waived their right to claim a forfeiture of the lease. Mortgagees of the premises having notified the sub-tenants to pay rent to them, the assignee paid them a sum in satisfaction of their claim, with the assent of the lessors, against whose demand it was charged:—Held, that this, also, was no waiver of the lessors' right to claim a forfeiture. Quære: Was a covenant by the company to supply steam and power to its sub-tenants anything more than a personal covenant by the company, or would it, on surrender of the original lease, have bound the lessor and a purchaser from him of the fee? *Littlejohn* v. *Soper*, 22 Occ. N. 45, 31 S. C. R. 572.

Hotel Premises—*Requirements of By-law —Illegal Lease.*]—Premises leased for use as an hotel did not fulfil the requirements of a by-law in regard to the number of bedrooms, and of this both the lessor and lessee were aware at the time the lease was entered into. The lessee was prevented by the municipal authorities from using the premises as an hotel:—Held, in an action by the lessor on covenants for rent and repair, that the lease was void ab initio, and the maxim, In pari delicto potior est conditio defendentis, applied. Even if the lease were not void ab initio, it became void by the action of the authorities in stopping the further use of the premises as an hotel. *Hickey* v. *Sciutto*, 24 Occ. N. 106, 10 B. C. R. 187.

House not Completed — *Requirements as to Heating.*]—Where in a lease of a house in the course of construction, it is provided that the lessee shall take the house in the condition in which it shall be at the time of delivery over, provided that the work is finished, and the arrangement of the house shews (the owner having placed in it pipes for a system of hot water heating) that the house is to be heated by hot water, the tenant, especially if the house, by reason of its construction, cannot easily be heated with stoves, may require that the owner shall place radiators in every room where the visible indications make it apparent that the intention was to so place them, and a furnace of a capacity sufficient to heat the water for such system. *Bazinet* v. *Collerette*, Q. R. 21 S. C. 508.

Implied Covenant to Crop and Cultivate — *Rent in Kind—Damages for Deterioration.*] — In April, 1898, the plaintiff leased by deed to the defendant's husband a half section of land for 5 years at a rental of one-third of the crop grown on the premises yearly. The lease was on a printed form of a farm lease, and contained covenants by the lessee that he would during the term cultivate such part of the land as was then or should thereafter be brought under cultivation, in a good, husbandlike, and proper manner, and would plough the land in each year 4 inches deep and crop the same during the term in a proper farmerlike manner. Afterwards a new lease of the same land was made by deed, ante-dated so as to bear the same date as the first one, substituting the defendant as lessee instead of her husband. It was intended that the new lease should be a duplicate of the other in all respects except as to the name of the lessee. The new lease, by mistake of the solicitor who prepared it, was written on a printed form of "statutory lease," not containing the special clauses applicable to farm land. It provided for the same rental as the other lease, payable in the same way and at the same times, and contained the same covenant to plough 4 inches deep in each year written into it, but no express covenants to cultivate or crop. By the end of 1901 the cultivated portion of the farm was 117 acres, but in 1902 the defendant only ploughed and cultivated 4 acres out of the 117, and weeds grew up all over the rest. The plaintiff's claim was for damages for breach of covenants to cultivate, crop, and plough in 1902, which he contended should be implied in the lease to defendant in the circumstances:—Held, following McIntyre v. Belcher, 14 C. B. N. S. 654, The Moorcock, 14 P. D. 68, and Hamlyn v. Wood, [1891] 2 Q. B. 491, that such covenants should, in the circumstances, be implied in the lease to the defendant, and that she was liable for the estimated value of one-third of the crop that would probably have been produced on the 117 acres if it had been cropped in that year, and for deterioration in value of the land on account of defendant having allowed it to grow up with weeds. *Dunsford* v. *Webster*, 23 Occ. N. 290, 14 Man. L. R. 529.

Lease by Tenant for Life—Covenant—Emblements. *Gardner* v. *Perry*, 1 O. W. R. 157, 2 O. W. R. 681.

Mining Lease — Reservation of rents—Royalties—Implied condition — Commencement of operations—Costs. *Lafave* v. *Lake Superior Power Co.*, 2 O. W. R. 715.

Option to Purchase — *Revocation of by Death—Specific Performance—Consideration—Tender — Evidence — Declarations against Interest.*]—A provision in a lease, whereby the lessor grants to the lessee an option to purchase the leased property within a limited time, is not a nudum pactum. Such an option is, within the time limited, binding on a deceased lessor's personal representatives, though not so expressed. Statements, whether written or orally made, by the lessor as to the terms of the lease are not after the death of the lessor, admissible as evidence in favour of his successor in title as being declarations against the deceased's interest. Per McGuire, C.J.—Such statements merely amount to statements of an agreement which must be supposed to be made on fair terms, and, consequently, as much in favour of the maker's interest as against it. Where a tender is made in current bank bills, and objection is made only to the amount tendered, the objection cannot subsequently be taken that the tender was not made in "legal tender." The questions of the necessity for a formal tender, a contract under seal importing a consideration, the inadequacy of the consideration in an action for specific performance, discussed. *Yuill* v. *White*, 22 Occ. N. 312, 5 Terr. L. R. 275.

Option of Purchase — *Terms — Construction.*] — S. leased land from F. for a term of 3 years at a rent of $150, payable in advance, with a right to extend the term for a further period of 6 years—that is, two terms of 3 years each—on paying a further sum of $150, in advance, at the beginning of each term of 3 years. The lease also contained a purchase clause, whereby F. agreed to convey to S. the leased premises at any time within the 9 years for the sum of $600, and further agreed that any payment which might have been made on account of the lease rent in advance at the time at which such conveyance might occur should be allowed as part payment:—Held, that in case of a purchase all the advance rent should go on account of the purchase money. Judgment in 1 N. B. Eq. Reps. 365, 451, affirmed. *Freeman* v. *Stewart*, 36 N. B. Reps. 465.

Privileges not Specified—*Injunction.*]—Before the construction of a building by the defendant, the plaintiff agreed to rent a shop in the proposed building. The lease, in the short form made in pursuance of the Leaseholds Act, described the premises by metes and bounds, without specifying any privileges. The plaintiff, after entering, demanded the use of a water-closet and of a place for storing coal, and the defendant conceded the right:—Held, that the plaintiff was entitled to an injunction restraining the defendant from interfering with his right of access to the closet and with his right to store coal in rear of the premises. *Ross* v. *Henderson*, 21 Occ. N. 219, 8 B. C. R. 5.

Produce of Farm — *Agreement as to—Execution against Tenant.*] — The plaintiff leased a dairy farm and thirteen cows, by lease in writing, in which was contained the following clause: "All the hay, straw, and corn stalks raised on the . . . farm to be fed to the said cows on the said . . . farm:"—Held, that, while the property in hay

produced on the farm might be legally in the tenant, yet his contract was to so use it that it should be fed to the cattle and consumed on the premises; he was not to have the beneficial use of it, and could not by his contract take it off the farm, and his judgment or execution creditor had not such power, under cover of an execution; and an injunction restraining a bailiff and purchaser at a bailiff's sale from removing it was granted. *Snetsinger* v. *Leitch*, 21 Occ. N. 137, 32 O. R. 440.

Provisions of — *Damage by Fire—Repairs — Abandonment—Lien of Landlord—Stock-in-trade—Sale en Bloc.*]—1. Where a lease contains stipulations to the effect that the lessee shall deliver the premises at the expiration of the lease in as good order as they were at the commencement of the lease, reasonable wear and tear and accidents by fire excepted, and shall pay extra premium of insurance exacted by insurance company in consequence of the work carried on by the lessee, the effect is to do away with the presumption, which would otherwise exist by law in favour of the lessor, that the fire which occurred in the leased premises was due to the fault of the lessee, or of persons for whom he was responsible, and it is for the lessor to prove fault before he can recover damages. Evans v. Skelton, 16 S. C. R. 637, followed. 2. Damage by fire so inconsiderable in extent that repairs may be made in three or four days does not justify the lessee in abandoning the premises. His remedy is to put the lessor in default to make the necessary repairs, and then, if the repairs be not made, to ask for the cancellation of the lease. 3. The application of art. 1623, C. C., which says that in the exercise of the privileged right the lessor may seize the things which are subject to it, upon the premises, or within eight days after they are taken away, but "if the things consist of merchandise they can be seized only while they continue to be the property of the lessee"—is not restricted to daily sales of merchandise in detail. The article applies to any sale which a merchant may make in the ordinary course of business; and the sale en bloc of a stock which has been damaged by a fire on the premises, is an ordinary and usual transaction; and therefore the lessor is not entitled to seize in recaption, in the possession of the purchaser, a damaged or partly damaged stock bought from the lessee in good faith, even when such merchandise has been sold en bloc. Judgment in Q. R. 14 S. C. 396, affirmed, but damages increased. *Liggett* v. *Viau*, Q. R. 18 S. C. 201.

Proviso for Subletting — *Right of Landlord to Refuse Consent.*] — Action for cancellation of a lease on the ground that the defendant, in violation of one of its terms, sublet the premises without having obtained the plaintiffs' written consent. The defendant pleaded that the plaintiffs refused their consent without cause, being only ready to grant the same upon the condition that the rent should be increased; that the subtenant was solvent and was willing to pay the rent yearly in advance, or to furnish security. Against these allegations the plaintiffs inscribed in law, claiming that they were irrelevant, and that the plaintiffs had an absolute right to refuse consent:—Held, following MacKenzie v. Wilson, 10 L. N. 113, that the clause in the lease being absolute, the plaintiffs had the right to refuse consent, and that, therefore, the grounds urged by the defendant did not constitute any legal justification for his conduct in subletting. Inscription-in-law maintained and paragraphs of plea complained of struck out with costs. *Racette* v. *Carriere*, 23 Occ. N. 117.

Reformation — Injury to demised premises—Waste—Injunction—Damages. *Klees* v. *Dominion Coat and Apron Supply Co.*, 3 O. W. R. 841, 937, 6 O. W. R. 200.

Registered Lease—*Sale of Property by Sheriff under Hypothec—Opposition by Tenant—Security.*] — An hypothecary creditor has a right to demand that a tenant who makes an opposition afin de charge, based upon a registered lease, shall furnish good and sufficient security that the property will be sold at a price sufficient to assure the amount of his claim, and this before the property has been advertised subject to the charge. Semble, that a tenant, whose lease has been registered, has a right to proceed by way of opposition afin de charge. *Desaulniers* v. *Payette*, 5 Q. P. R. 344.

Relief against Forfeiture of Lease —Insolvency—Mistake in telegram. *Smith* v. *Wade*, 1 O. W. R. 549.

Renewal — *Arbitration — Appointment of Arbitrators—Procedure — Interference by Injunction—Jurisdiction.*]—A lease contained an agreement for renewal upon the following terms: the lessors were at liberty to elect either to take the improvements made by the lessees at a valuation or to grant a new lease for a further term at a rent to be fixed by arbitrators, one to be chosen by the lessors, one by the lessees, and a third by the two, provided that if either party refused or neglected to appoint an arbitrator within 7 days after being required in writing by the other to do so, the other might appoint a sole arbitrator, whose award should be final. After the original term had expired, the lessors served upon the lessees a notice requiring them to appoint an arbitrator. The lessees answered by stating that they contended that the lessors had no longer any right to insist upon a renewal and protesting against any arbitration, but at the same time naming an arbitrator. The lessors did not accept this as an appointment of an arbitrator, and assumed to appoint a sole arbitrator as upon default for 7 days after notice:—Held, affirming the judgment of Boyd, C., 5 O. L. R. 105, 23 Occ. N. 13, that the lessees had made a valid appointment of an arbitrator, and the lessors had no right to appoint a sole arbitrator; and that the lessees were entitled to resort to the Court to have the lessors restrained from proceeding before a sole arbitrator and to have a determination of their contention that the lessors had no right to insist upon a renewal. North London R. W. Co. v. Great Northern R. W. Co., 11 Q. B. D. 30, and London and Blackwall R. W. Co. v. Cross, 31 Ch. D. 354, distinguished. Direct United States Cable Co. v. Dominion Telegraph Co., 28 Gr. 648, 8 A. R. 416, followed. Semble, per Osler, J.A., that the lessors could not require the lessees to appoint an arbitrator without having first or at the same time appointed one on their own behalf. *Farley* v. *Sanson*, 24 Occ. N. 303, 7 O. L. R. 639, 1 O. W. R. 738, 3 O. W. R. 460.

Renewal — Arbitration or valuation—Irregularities—Acquiescence—Waiver. *Gray* v. *McMath*, 1 O. W. R. 445.

Renewal — *Construction of Lease—Rent.*]—A clause in a lease providing for a renewal stated that the renewal lease was to be "at such increased rent as may be determined upon, as hereinafter mentioned, payable in like manner and under and subject to the like covenants, provisions, and agreements as are contained in these presents, including the covenant for renewal, such rent to be determined by three indifferent or disinterested persons as arbitrators." The lease further provided for payment of the yearly rent as follows: "For the first ten years of the said term eighty dollars per annum; for the remaining eleven years one hundred dollars per annum; all the said payments to be made half-yearly on the first day of January and July in each year:"—Held, that the proper manner by which the rent should be increased during the renewal term was by adding to each payment during the twenty-one years, that is to say, adding to the rent of $80 per annum for the first ten years of the renewal term and to the rent of $100 per annum for the remaining ten years of the renewal term,—and not by adding together the annual payments for twenty-one years and making an addition to that, nor by adding to the sum payable during the last year before the renewal:—Held, also, that the condition as to the rent for the new term being an increased rent, might be satisfied by making a merely nominal addition, whereas here there was no increase in the rentable value of the premises. *In re Geddes and Garde. In re Geddes and Cochrane*, 20 Occ. N. 455, 32 O. R. 262.

Renewal — *Increased Rent — Arbitration.*]—In a lease for twenty-one years the rent fixed was, for the first year $106.88, for the next four years $130 a year, for the next five years $145 a year, and for the remaining eleven years $178 a year. The lease contained a covenant by the lessor to renew for a further term of twenty-one years, "at such increased rent as may be determined upon as hereinafter mentioned, payable in like manner, and under and subject to the like covenants . . . as are contained in these presents." The lease provided for the appointment of arbitrators to determine the rent to be paid under the renewal lease:—Held, that the arbitrators were bound to award an increased rent under the terms of the reference to them, but they might award a mere nominal increase if they thought proper; the increase was to be based upon the rent reserved for the whole term, and not for any particular year or years of it; it might be upon each year's rent or upon the average of the whole twenty-one years, but so that in the result the average annual rent should be greater for the future term than the past. In re Geddes and Garde, 22 Occ. N. 455, 32 O. R. 262, approved. *In re Geddes and Cochrane*, 22 Occ. N. 54, 3 O. L. R. 75, 1 O. W. R. 15.

Renewal—Subsequent attempt to cancel—Sub-tenant — Payment of rent direct to landlord — Surrender—Release — Estoppel. *Yukon Trust Co.* v. *Murphy* (Y.T.), 2 W. L. R. 298.

Rescission of Lease—Action for—Fraud — Improvidence — Execution — Sunday. *Duprat* v. *Daniel*, 1 O. W. R. 561, 2 O. W. R. 940.

Rescission — *Immoral use of Premises—Knowledge — Costs.*] — The fact that the lessor's auteur, who was also manager of the company appellant, was aware, during several years, that a portion of the leased premises was being used for immoral purposes, and that he acquiesced therein, does not deprive the purchaser and transferee of such premises of the right to demand the resiliation of the lease on the ground of such immoral use of premises. Such knowledge can only affect the question of costs. *Provident Trust and Investment Co.* v. *Chapleau*, Q. R. 12 K. B. 451.

Rescission — *Tenant Quitting Possession—Rent to Fall Due—Damages—Injury to Premises.*]—Where the tenant leaves the demised premises before the expiry of the lease, the landlord cannot claim as damages a sum equal to the rents which would fall due under the lease, unless he also claims cancellation of the lease. 2. The landlord, in these circumstances, cannot, before the expiration of the lease, claim damages for injury done by the tenant to the demised premises. *Amiot* v. *Bonin*, Q. R. 23 S. C. 42.

Shop — *Covenants—Insolvency of tenant*—Assignment for creditors—Election of assignee to retain premises—Rent—Use and occupation. *Lazier* v. *Armstrong*, 5 O. W. R. 596.

Short Forms Act—*Lease—Surrender—Evidence of Destruction of Building by Fire—Obligation of Tenants to Rebuild—Covenants to Repair — Breaches—Assignment of Lease—Assignment of Reversion—Parties—Amendment.*]—The male plaintiff, being the owner of a farm in the township of Pelham, by indenture of lease, dated 29th June, 1891, and expressed to be made in pursuance of the Act respecting short forms of leases, R. S. O. 1897 c. 106, devised it to defendants the Brown Brothers Co. for the term of 12 years, to be computed from 1st April, 1892. The lessees covenanted "to repair," "and that the said lessor may enter and view state of repair and that the said lessees will repair according to notice," "and that they will leave the premises in good repair, ordinary wear and tear only excepted." After the making of the lease, plaintiff Ira Delamatter conveyed the lands demised to plaintiff Emma C. Delamatter, and defendants the Brown Brothers Co. conveyed all their interest under the lease to their co-defendants, who accepted the lease and became liable to all the covenants. In August, 1902, one of the buildings on the demised premises—a barn—was destroyed by fire, and was not rebuilt. The action was brought to recover damages for breaches of covenants on the part of the lessees:—Held, Magee, J., dissenting, that words annexed to the short form which are designed to increase the obligation of the covenantor cannot introduce into the form an exception from it, or to annex to the form a qualification of it, and the covenant must be construed as it stood without the aid of the long form. Therefore the covenant as to damage by fire and tempest did not apply. *Delamatter* v. *Brown Brothers Co.*, 5 O. W. R. 423, 9 O. L. R. 351.

Surrender—*Eviction—Surrender by Operation of Law.*]—The plaintiff let a store to

H. A. & Co., who afterwards executed an assignment for the benefit of creditors to the defendant, who did not take possession of the premises. The plaintiff, on the third day after the assignment, requested and obtained from H. A. & Co. the keys of the premises, which she proceeded to clean up and repair, and she took down a sign board having on it the firm name of H. A. & Co., and painted the name out. The plaintiff afterwards sued for a declaration that she was entitled to a privileged claim against the estate for rent accruing due after the assignment:—Held, that there had been a surrender of the premises to the landlord by act and operation of law. Phené v. Popplewell, 12 C. B. N. S. 334, applied. *Gold* v. *Ross*, 23 Occ. N. 253, 10 B. C. R. 80.

Surrender—*Forfeiture for Breach of Covenant—Eviction by Notice.*]—The plaintiff, tenant of the defendant's farm under a lease for 3 years from March, 1903, containing a covenant by the plaintiff to buy 3 horses and to pay for them by doing certain work on the farm, or in cash at the time of threshing, being embarrassed financially, about the 1st December, 1903, met the defendant and asked him to assist him by guaranteeing certain accounts, in default of which he said he would be unable to go on working the farm, and terms were discussed, on which the plaintiff should abandon the lease and give up possession of the premises. While the defendant was willing to assist the plaintiff, they failed to agree, whereupon the former told the latter that he would cancel the lease for non-performance of covenants, and, on the plaintiff's request for a writing, gave him the following writen notice: "Take notice that I have this day cancelled lease of my farm to you on the grounds of non-fulfilment of terms of said lease." On the same day the plaintiff vacated the premises, after selling to the defendant some oats, barley, and feed he had there. The defendant resumed possession at once. A few days afterwards the plaintiff came back and sold to the defendant his poultry, and then left the farm altogether:—Held, that there had been no surrender of the lease, and that the defendant was liable in damages as for an eviction of the plaintiff. The defendant also contended that he was entitled to terminate the lease for breach of the covenant referred to. As to this, it appeared that the plaintiff had done some of the work stipulated for, and that there was a dispute over their accounts, but that at all events there was not more than about $38 due on the horses:—Held, that there was not such a clear breach of the covenant as to entitle the defendant to declare the lease forfeited on that ground. *Watson* v. *Moggey*, 15 Man. L. R. 241, 1 W. L. R. 438.

Surrender—*Substitution of Tenant—Liability for Rent—Distress—Amendment—Rent Accruing after Action.*]—Where a tenant by arrangement with his landlord secured another occupant for the premises, but was given to understand at the time that he would still be liable for the rent:—Held, that this did not amount to a surrender of the lease. In order to constitute a surrender it must be shewn that the incoming tenant has been expressly received and accepted by the landlord as his lessee in the place and stead of the original lessee by the mutual agreement of the parties:—Held, also, that the fact that the landlord at the request of the tenant has issued a distress warrant against the sub-tenant is not sufficient to constitute a surrender by operation of law. Amendment allowed so as to include a claim for additional rent which fell due after the commencement of the action. *Lougheed* v. *Tarrant*, 2 Terr. L. R. 1, 13 Occ. N. 473.

Tacit Reconduction—*Oral Lease—Mise en Demeure—Damages—Non-repair.*]—Lease by tacit reconduction is not a verbal lease. 2. Under such a lease, a verbal mise en demeure to make repairs is insufficient. 3. A mise en demeure is necessary in order to claim from the landlord damages resulting to the tenant from non-repair of the premises. *Pelletier* v. *Boyce*, Q. R. 21 S. C. 513.

Valuation of Buildings—*Extension of Time for Making Award—Interest.*]—By a lease made on the 1st November, 1879, land was demised for a term of twenty-one years, and it was agreed that all the buildings on the land at the end of the term should be valued by valuators or arbitrators, and that the reference should be made and entered on and the award made within six months next preceding the 1st November, 1900; and it was further agreed that within six months from that day the value of the buildings found by the arbitrators should be paid with interest at the rate of seven per cent. per annum from that day, and that until paid it should be a charge on the land. By deed dated the 23rd October, 1900, the parties agreed that the time for making the award should be extended to the 1st December, 1900, and until such further day as the valuators or arbitrators might extend the same. The time was duly extended until the 30th November, 1901, on which day an award was made fixing the value of the buildings. Possession of the land and buildings was given up by the lessees to the lessors on the 31st October, 1900:—Held, Osler, J.A., dubitante, that, supposing the extension of time and delay to have been agreed to for the convenience of both parties and without the fault of either, the lessees were entitled to interest on the value of the buildings from the 31st October, 1900, to the 30th November, 1901, for the first six months at seven per cent. and for the remainder of the time at the legal rate of five per cent. Judgment of a Divisional Court, 3 O. L. R. 519, 22 Occ. N. 178, 1 O. W. R. 198, varied. *Toronto General Trusts Corporation* v. *White*, 23 Occ. N. 10, 5 O. L. R. 21, 1 O. W. R. 760.

IV. Lien of Landlord.

Notice of Rights of Third Person—*Assigns of Landlord.*]—If notice to the landlord of the rights of property of third persons in the goods upon the demised premises affects a subsequent purchaser of the freehold, it is not so with regard to mere knowledge of the fact acquired by the landlord. Therefore, such purchaser may enforce his lien upon the goods in the possession of the tenant, notwithstanding the knowledge which his grantor had of the rights of third persons. *In re Bolduc*, Q. R. 19 S. C. 524.

Proceeds of Sale of Tavern License—*Assignment for Creditors—Costs—Priorities.*]—The proceeds of the sale of a tavern

license (sold upon an assignment for the benefit of creditors) are not subject to the lien of a landlord. 2. The only costs which have priority over special liens are those incurred in the interest of privileged creditors and for the preservation of their lien. Therefore, in the case of an assignment for the benefit of creditors, the costs of the assignment and of the administration and liquidation of the insolvent estate have not priority over the claim of a landlord, but it is otherwise with the costs of the sale of the articles subject to his lien, of the inventory of such articles, and of the distribution of the proceeds of the sale. *Poulin* v. *St. Germain*, Q. R. 17 K. B. 353.

V. Notice to Quit.

Days of Grace — *Computation—Holidays.*]—The period of three days allowed to a tenant to give up possession, according to Art. 1089, C. P., is a delay in procedure which is extended to the juridical day following, if it expires on a Sunday or a holiday. *Beaudry* v. *Harrigan*, 5 Q. P. R. 99.

Time—*Computation—Non-juridical Day.*]—Article 8, C. P., which says that the day upon which a thing ought to be done being a non-juridical day, the thing may be done with the same effect on the next following juridical day, does not apply to the three days which the landlord may give to the tenant, by virtue of art. 1089, C. P. C.; to leave the demised premises, therefore, when the last day is non-juridical, the tenant cannot delay his removal to the next day. *Beaudry* v. *Hannigan*, Q. R. 23 S. C. 232, 5 Q. P. R. 366.

Time—*Holiday.*]—Where the last of the three days which follow a notice to quit given by a landlord under Art. 1089, C. P. C., is a Sunday or holiday, it is not reckoned, and the tenant has the following day to abandon the demised premises. *Beaudry* v. *Harrigan*, Q. R. 19 S. C. 421.

Waiver.]—A lease at a yearly rent payable in even portions, in advance, on the first day of each and every month, contained a provision entitling the landlord to give the tenant three months' notice to quit in case the landlord received an offer to purchase which he was willing to accept. On the 22nd August the landlord gave the tenant notice to quit three months' thereafter. On the 2nd November the applicant, the original landlord's successor in title, accepted the rent due in advance the previous day, for the whole of the month of November, though the time limited by the notice to quit would expire on the 22nd November:—Held, that the notice to quit was waived.—Held, also, that the acceptance on the 3rd December of a cheque for that month's rent, although it was not presented for payment, would also be a waiver. A notice to quit in pursuance of such a special provision may be given for any broken period of the term, and need not expire at the end of a month of the tenancy. *Smith* v. *MacFarlane* (No. 2), 5 Terr. L. R. 508.

VI. Overholding Tenants.

Acceptance of Rent—Creation of tenancy from year to year—Notice to quit—Forfeiture for non-payment of rent. *Re Hardisty and Bishopric* (N.W.T.), 2 W. L. R. 21.

Application for Possession—*Affidavit—Amendment.*]—On an application by a landlord against his tenant for an order for possession, the applicant was refused leave to amend the allegations of his affidavit upon which the originating summons was issued. *Smith* v. *Macfarlane* (No. 1), 5 Terr. L. R. 491.

Claim for Double Yearly Value — Counterclaim in tenant's action—Lease for one year terminable on one month's notice. *Dundas* v. *Osmont* (N.W.T.), 1 W. L. R. 363.

"Colour of Right."]—An agreement dated the 4th May, 1900, was entered into whereby L. acknowledged that he was a weekly tenant of the premises in question to H., and agreed that his lease might be terminated at any time by "the party of the first part" (evidently an error for "the party of the second part") or by J. O. or J. A. M. A., whom L. acknowledged to be the agents for that purpose of the party "of the first part," meaning H. At that time the property was vested in H., but he was merely a trustee for the railway company. Afterwards the property was conveyed to the company. At the time the notice to quit was served L. was tenant of the premises to the company as landlords under the terms of the agreement of the 4th May, 1900. Notice to quit was served on L. on the 29th June, 1903, and demand of possession was served upon him on the 15th July following. The tenant attempted to prove an understanding with S. A., one of the agents of the landlords, by which he should be permitted to remain on the premises until the company should build on the land. It was urged that the tenant had a colour of right to the possession of the premises, and that his right could not be tried on this application:—Held, that the tenant occupied the premises in question under a lease from week to week, that it was duly terminated by the landlord, and that the tenant continued to overhold without colour of right after written demand of possession by the landlord. Order to issue for writ of possession. No costs. Whether there is colour of right or not, and what constitutes colour of right, are matters of law to be determined by the Judge: Wright v. Mattison, 39 U. S. R. 50. To constitute a colour of right there must be some bona fide question of right to be tried: Price v. Guinane, 16 O. R. 264. The tenant had not shewn any claim which should be construed as a colour of right. *In re Canadian Pacific R. W. Co. and Lechtzier*, 23 Occ. N. 339.

Colour of Right—*Indefinite Promise.*]—In answer to a summary proceeding under the Landlords and Tenants Act, R. S. M. 1902, c. 93, to recover possession of the premises in question, which were held under a written lease creating a tenancy from week to week, the tenant gave evidence tending to shew that agents of the landlords had, prior to and at the time of the execution of the lease, agreed and promised orally that the tenant would not be required to give up possession until the landlords would build on the land. This was denied by one of the agents, and the tenant admitted that that

agent had refused to put such a term in the lease, although requested to do so:—Held, that the alleged promise, if proved, was of too indefinite a character to support the contention of the tenant that he was not holding over without colour of right. Price v. Guinane, 16 O. R. 264, Gilbert v. Doyle, 24 C. P. 71, and Wright v. Mattison, 59 U. S. R. 50, followed. *In re Canadian Pacific R. W. Co. and Lechtzier*, 23 Occ. N. 339, 14 Man. L. R. 566.

Demand for Possession—*Uncertainty—Evidence of Overholding — Writ of Possession.*]—An application was made by the landlord for a writ of possession against a tenant under the Overholding Tenants Act, R. S. N. S. 1900 c. 174, based on a demand for possession, served on the tenant on the 9th March, 1904, as follows:—"Your lease of the premises expired on March 1st last. You are hereby notified to deliver up said premises to me forthwith." The tenant had held under a lease by deed dated in the year 1901 for a term of 3 years, but, owing to erasures and alterations in the indenture, there was some doubt as to whether or not the tenancy terminated on the 1st March, 1904, or the 1st May, 1904. Before service of the demand the landlord had, on the 1st February, 1904, given to the tenant a three months' notice in writing to quit (not called for by lease) on the 1st May, 1904. On hearing it was contended that no evidence had been given that the tenant had refused after the service on the 9th March, 1904, of the above demand in writing, to go out of possession:—Held, that the written demand for possession was bad for uncertainty, and in all the circumstances, following Re Magann and Bonner, 28 O. R. 37, and Re Snure and Davis, 4 O. L. R. 82, as the case was not one clearly coming within the true intent and meaning of the Act, the application should be refused. *In re Myers and Murrans*, 24 Occ. N. 186.

Expiry of Lease—Creation of new tenancy—Increased rent—Presumption—Intention of parties. *Winnipeg Land and Mortgage Corporation* v. *Witcher* (Man.), 1 W. L. R. 551.

Failure to Give Possession — *Holding Over of Previous Tenant.*]—The fact that the previous tenant refused to vacate the premises at the expiration of his lease, and that legal proceedings were necessary to effect his ejection, does not relieve the lessor from a claim for damages by the lessee who was prevented from getting possession at the date stipulated in the lease. *Lanviere* v. *Vinet*, Q. R. 25 S. C. 338.

Forcible Entry—*Costs.*]—In an action for damages for forcibly and unlawfully entering the premises occupied by the plaintiff, as tenant of the defendant, and ejecting the plaintiff therefrom, the trial Judge found that, although the defendant had technically violated the plaintiff's right of possession, the plaintiff was retaining possession in violation of good faith, and that her evidence as to the circumstances and manner of her removal was untrue:—Held, that the trial Judge was justified (following Rice v. Ditmars, 21 N. S. Reps. 140), in depriving the plaintiff of costs. *Russell* v. *Murray*, 34 N. S. Reps. 548.

Negotiation for New Tenancy — *Tenancy at Will — Notice to Quit — Demand of Possession — Jurisdiction of County Court Judge.*]—Upon a review of proceedings taken under the Overholding Tenants Act, R. S. O. 1897 c. 171:—Held, that the evidence sustained the finding of the County Court Judge that no completed agreement for a new lease was ever made, but that the tenant held over expecting an agreement would be arrived at. The tenant, overholding after the 1st March, did so with the consent of the landlord pending negotiations. When the negotiations came to an end, the landlord, on the 19th March, served a notice requiring the tenant to give up possession on the 23rd March. Upon the tenant's failure to give up possession on that day, the landlord took proceedings under the Act without further demand of possession:—Held, that the tenant was after the 1st March, a tenant at will; the notice had the effect of extending his right of occupation till the 23rd March; and a demand of possession after that date was necessary to give the County Court Judge jurisdiction under s. 3 of the Act. *In re Grant and Robertson*, 24 Occ. N. 366, 8 O. L. R. 207, 3 O. W. R. 846.

Notice of Hearing—*Affidavit—Prohibition—Waiver.*]—On an application under the Overholding Tenants Act by a landlord for possession, a copy of the affidavit filed on the application was not served on the tenant, as directed by s. 4 of the Act. Counsel appeared for the tenant on the return of the application and took this objection, and the application was adjourned to enable a copy of the affidavit to be served. After such service the application was proceeded with, and counsel for the tenant examined and cross-examined witnesses and argued the case, when an order for possession was made:—Held, that the failure to serve a copy of the affidavit was an irregularity which could be and had been waived; and prohibition against the enforcement of the order for possession was refused. *In re Dewar and Dumas*, 24 Occ. N. 360, 8 O. L. R. 141, 4 O. W. R. 110.

Order for Possession — *Review by Court — Evidence — Breach of Covenant in Lease — Notice Specifying.*] — Under the Overholding Tenants Act, R. S. O. 1897 c. 171, two things must concur to justify the summary interference of the County Court Judge; the tenant must wrongfully refuse to go out of possession, and it must appear to the Judge that the case is clearly one coming under the purview of the Act. It is only the proceedings and evidence before the Judge, sent up pursuant to the certiorari, at which the High Court may look for the purpose of determining what is to be decided under s. 6 of the Act. Where there was nothing in the evidence to shew that the tenant had violated the provision of the lease for breach of which the landlord clamined the right to re-enter, the Court set aside the order of the County Court Judge commanding the sheriff to place the landlord in possession. Per Boyd, C.:—The whole proceeding was nugatory from the outset for the want of a proper notice specifying the breach complained of, as required by s. 13 of the Landlord and Tenants Act, R. S. O. 1897 c. 170, which is applicable to summary proceedings under the Overholding Tenants Act. *In re Snure and Davis*, 22 Occ. N. 234, 4 O. L. R. 82, 1 O. W. R. 379.

Right to Terminate Lease—Notice to quit—Difficult questions of law—Refusal of certiorari. *Re Clark and Kellett*, 1 O. W. R. 577.

Right of Re-entry — Rent — Set-off — "Clearly." *Re Hooker and Malcolm*, 2 O. W. R. 49.

Summary Ejectment Act — *Purchaser in Default—Tenant at Will.*]—W. went into possession of a lot of land under an instrument in writing whereby it was agreed that the purchase money was to be paid in 4 equal instalments in 6, 12, 18, and 24 months. It was also agreed that W. was to be tenant at will, and that he should remain in possession until default in the payment of any of the instalments:—Held, that W. was not a tenant at will, or a tenant for a fixed term, so as to be subject to the provisions of the Summary Ejectment Act, C. S. N. B. c. 83, or amending Acts. *Winslow* v. *Nugent*, 36 N. B. Reps. 356.

Summary Proceeding — *Forfeiture for Breach of Covenant.*]—This was an application by way of summary proceedings under ss. 11-17 of the Landlords and Tenants Act, R. S. M. 1902 c. 93, as amended by 3 & 4 Edw. VII. c. 29, ss. 1, 2, to recover possession of a hall let to the defendants for 5 years from the 1st November, 1901, at a rental of $15 per month. The lease was in writing under seal, and the lessees by it covenanted that they would not permit the hall to be used for the purposes of dancing, except to lodges renting the hall, and that any breach of that covenant should at once at the option of the lessor operate as a forfeiture of the lease. The lessees having rented the hall to five young men not connected with any lodge for the holding of a dance, the lessor gave them a notice declaring the lease to be forfeited and demanded possession:—Held, following Moore v. Gillies, 28 O. R. 358, that, under the statute as amended, the Judge can now try the right of the tenant to hold over, and that the defendants had forfeited the lease, and that a writ of possession should be issued in the landlord's favour. *In re Ryan and Turner*, 24 Occ. N. 255, 14 Man. L. R. 624.

Summary Proceeding — *Monthly Tenancy—Notice to Quit.*]—1. Where a lease expressly provides that the tenancy created by it shall be a monthly tenancy, the fact that it also provides what rent shall be paid for each of 16 future months, and more for some months than for others, will not enlarge the rights of the tenant in any way, and the landlord may terminate the tenancy at the expiration of any month by giving a month's notice. 2. A notice to quit signed by one of two owners of the property with the approval of the other, such approval being known to the tenant, will be sufficient, although not expressed to be on behalf of any one except the person giving it. Aslin v. Summersett, 1 B. & Ad. 135, followed. 3. To put an end to a tenancy at the end of May, a notice served on 30th April is good, although it be erroneously dated 1st May. 4. A notice to quit on or before the anniversary of the commencement of the tenancy is good: Sidebotham v. Holland, [1895] 1 Q. B. 378; although a notice to quit on the last day of the tenancy would also be good. *In re Burrows and Mickleson*, 24 Occ. N. 326, 14 Man. L. R. 739.

Summary Proceeding by Landlord to Obtain Possession — *Jurisdiction of County Court Judge—Dispute as to Length of Term—Application for Review.*]—Motion by William Howard, the tenant, for an order under sec. 6 of the Overholding Tenants Act, directing the senior Judge of the County Court to send the proceedings, evidence, and exhibits in this matter to the High Court under his hand, and for an order staying all proceedings therein. The application by the landlord, James Lumbers, to the County Court Judge was to recover from the tenant the possession of a shop and dwelling above the shop. It was alleged, the tenant was wrongfully holding possession:—Held, that under sec. 3, sub-sec. 2, of the Act, R. S. O. 1897 ch. 171, the Judge is to "inquire and determine whether the person complained of was tenant to the complainant for a term or period which has expired, . . . and whether the tenant does wrongfully refuse to go out of possession, having no right to continue in possession, or how otherwise." The dispute being as to whether the tenancy was for 3 years or for 5 years, the learned County Court Judge was, on the authority of Moore v. Gillies, 28 O. R. 358, justified in holding that he had jurisdiction to try the right. Having regard to the evidence and the judgment of the learned County Court Judge, this is not a case in which a certiorari should issue, and the motion will therefore be dismissed with costs. *In re Lumbers and Howard*, 5 O. W. R. 721, 772, 9 O. L. R. 681.

Writ of Possession — *Prohibition to County Judge and Sheriff—Certiorari.*]—After an order has been made on the landlord's application under the Overholding Tenants Act for the issue of a writ of possession, but before the writ has been issued, the tenant applied for an order for the removal of the proceedings into the High Court and for prohibition to the Judge of the County Court and the sheriff:—Held, per Street, J., that proceedings under the Overholding Tenants Act can be removed into the High Court only when s. 6 of that Act applies; that that section does not apply until a writ of possession has been issued; and therefore that the applicant was not entitled to relief. Per Britton, J., that whether s. 6 is exclusive or not, it at least amply protects the tenant's rights, and that the applicant was not entitled to relief either under that section or under the general jurisdiction of the Court. *In re Warbrick* v. *Rutherford*, 23 Occ. N. 326, 6 O. L. R. 430, 2 O. W. R. 609, 961.

VII. Rent.

Action for — *Abandonment of Part of Claim—Amendment — Desistment—Rescission of Lease.*]—Where a plaintiff renounces a part of the conclusions of his action, and amends accordingly, such proceeding on his part is in reality a desistment and must be treated as such. 2. An action for the rescission of a lease is of a different nature from an action for rent, and a plaintiff who has at first simply claimed a certain amount of rent, cannot amend his declaration with the object of asking the rescission of the lease, because such amendment would change the nature of his action. *Lachance* v. *Desbiens*, Q. R. 23 S. C. 524.

Action for—Defences — Eviction—Entry by landlord to protect property — Demised premises becoming uninhabitable. *Harrod* v. *Watt* (N.W.T.), 1 W. L. R. 216.

Action for—*Defence — Disturbance of Possession.*]—A tenant being sued for rent may plead that he has not had the peaceable enjoyment of the demised premises, or that he has had only a part enjoyment. *Synod of Diocese of Montreal* v. *Kelly*, Q. R. 20 S. C. 19.

Action for—*Mortgagee in Possession — —Executor de Son Tort.*]—The defendant and her husband resided in a house which he rented from the plaintiff, the rent being payable monthly. At his decease some rent was due, and the defendant remained in the house for another month, when she removed to another house. She was about to take the furniture with her when it was distrained upon for rent due. Under pressure of the distress she paid the rent then due and expenses, and took the furniture, as she said, for the purpose of care and safe keeping, and not as claiming it as her own. No letters of administration were issued. The widow paid the funeral expenses, over $50. The value of the furniture was less than $200. The lease expired on the 1st May, 1900, and it was for the rent which accrued from September, 1899, to the 1st May, 1900, that the plaintiff brought this action. Before the deceased leased the premises they were mortgaged by the plaintiff to a company, which mortgage was then at the time of this action standing on the premises for $2,300. The company on the 27th July, 1899, took possession of the premises as mortgagees, and gave notice to the deceased to pay all future rent to them, which he did. The distress proceedings were taken by the company, and rent collected paid over to the company, and the property was still at the date of the action in the possession of the company, who, as mortgagees, were receiving the rents:—Held, that the company, having entered into possession by collecting and receiving the rents of the premises, alone had the legal right, as mortgagees, to take them or to bring an action for the rents due; and the plaintiff could not therefore recover in this action. *Morrison* v. *Jackson*, 21 Occ. N. 89.

Action for—*Time for Bringing.*]—When a gale of rent is payable on a day certain, the tenant has the whole day to pay, and an action begun on that day is premature. *Robert* v. *Gagnon*, Q. R. 10 K. B. 237.

Agreement for Lease—Refusal to sign — Taking possession—Effect of—Referable to agreement. *City of Toronto* v. *Mallon*, 4 O. W. R. 386.

Agreement for Lease—Possession—Use and occupation. *City of Toronto* v. *Mallon*, 2 O. W. R. 933.

Gale Accruing after Action—Counterclaim—Damages to tenant's crop—Cattle — Fences — Duty of tenant neighbour—Evidence—Leave to adduce on appeal. *Littler* v. *Berlin Acreage Co.*, 2 O. W. R. 1153.

Ground Rent—*Arrears—Movable or Immovable—Promise to Pay—Acceptance.*] — A ground rent established before the coming into force of the Civil Code, even if it were immovable under the law as it existed at the time the rent was settled, has become movable by the operation of the Code, under the provisions of which it is convertible into money, and redeemable, and consequently movable: Arts, 388, 389, 390, 391, C. C. 2. Where there is a personal promise by the purchaser to pay the rent to the vendor at a given date each year, there is a personal liability to pay the amount so soon as the time has elapsed, and the arrears are movable. 3. Acceptance of such promise, by the person by whom the rent was created, is sufficiently established by the fact that he received payments and gave receipts to the purchasers in their own names, and entered them in his books as owing the amount. *Laviolette* v. *Toupin*, Q. R. 21 S. C. 538.

Ground Rent — *Prescription—Renunciation — Acknowledgment—Heirs—Costs.*] — The prescription of five years applies to arrears of a rente foncière. 2. To effect a renunciation of an acquired prescription, both an acknowledgment of the debt and a promise to pay such debt are necessary. 3. The heirs or legal representatives of a party who bound himself by deed to pay a rente foncière, are not jointly and severally liable for the payment of the rent unless expressly declared to be so. 4. Nor are they jointly and severally liable for the costs of an action brought against them in respect of such rent. *Ursuline Reverend Religious Ladies* v. *Lampson*, Q. R. 22 S. C. 7.

Seizure under Execution — *Interpleader.*]—Where goods are seized under execution on leasehold premises and are claimed by a third party, who establishes his title thereto, the 8 Anne c. 14 does not entitle the landlord to be paid rent by the sheriff. Where, however, goods seized by the sheriff were claimed by a third party, and under an interpleader order were sold and the proceeds paid into Court pending the trial of an issue as to the ownership of the goods, and the trial of a second issue had been directed between the landlord and the execution creditor as to the landlord's right to the rent claimed, and the claimants in the first issue consented to the landlord's claim being satisfied, even if they should be successful in the issue, the landlord was held entitled to be paid out of the fund in Court the arrears of rent not exceeding one year's rent, without awaiting the decision of the issue as to the ownership of the goods. *Robinson* v. *McIntosh*, 4 Terr. L. R. 102.

VIII. Other Cases.

Arbitration and Award—*Valuation of Buildings — Interest on Amount Fixed by Award.*]—In a lease of twenty-one years it was provided that the buildings should be valued at the end of the term by three valuators or arbitrators, whose award should be made within the six months next preceding the 1st November, 1900, and the value paid by the lessor within six months from that date, with interest from that date. Valuators or arbitrators were duly appointed, and possession given by the lessees on the 31st October, 1900, the last day of the term, but the award was not made until the 30th November, 1901:—Held, that the lessees were entitled to interest on the value of the buildings, as ascertained by the award, from the 1st November, 1900. *Toronto General Trusts Corporation* v. *White*, 22 Occ. N. 178, 3 O. L. R. 519, 1 O. W. R. 198, 760.

Bonus for Improvements — *Rent by Anticipation—Cancellation of Lease—Recovery of Bonus—Commercial Establishment—Civil Contract.*]—A sum of $300 paid by the tenant to the landlord as a bonus for improvements made to the demised premises, is equivalent to an additional rent paid by anticipation. 2. If the lease is afterwards by a judgment, cancelled at the suit of the tenant, for default of the landlord to make repairs which it is his duty to make, the latter will be ordered to pay back such bonus in the same way as any other rent paid by anticipation. 3. The letting of an immovable for a commercial establishment is a purely civil contract. *Coté* v. *Cantin*, Q. R. 21 S. C. 432.

Claim for Cancellation of Lease — *Questioning Landlord's Title.*] — A tenant who has had peaceable enjoyment of an immovable leased to him, cannot demand the cancellation of the lease and damages on the ground that a third person, who has not disturbed him in his enjoyment, is the owner of a part of such immovable. *Charpentier* v. *Quebec Bank*, Q. R. 21 S. C. 296.

Destruction of Building—*Fire — Accident—Negligence—Presumption of Fault—Burden of Proof.*]—One of the covenants of the lease from plaintiff to defendant provided that the tenant should deliver up the premises, at the expiration of the lease, "in as good order, state and condition as the same may be found in at the commencement of the same, reasonable wear and tear, and accidents by fire, excepted." The building was destroyed by a fire, the origin or cause of which was not definitely determined. In an action by the lessor to recover from the lessee the value of the building destroyed, less the amount of the insurance money received:—Held, affirming the judgment in Q. R. 21 S. C. 1, that a fire in the leased premises, the cause of which is unknown, or not legally proved, is an accident within the meaning of the above-mentioned clause in the lease excepting "accidents by fire." 2. In such case there is no presumption of fault against the lessee, where a fire occurs the origin of which is unknown, but rather a presumption of absence of fault, and the burden of proving fault is on the lessor. 3. Even assuming that the burden of proving absence of fault was on the lessee, he had succeeded in doing so in the present case. *Ford* v. *Phillips*, Q. R. 22 S. C. 296.

Expiry of Term—Ejectment — Right to remove machinery—Trade fixtures—Wooden buildings—Compensation for buildings not removed—Provisions of lease. *Cartwright* v. *Herring*, 3 O. W. R. 511.

Insurance Premium—*Change in use of Building.*]—An action brought by a tenant against his landlord for the recovery of the excess of an insurance premium paid by him, when, in the course of the year for which such insurance was effected, he changed the destination of the building, and gave proper notice of such change. *Bénard* v. *Préfontaine*, 6 Q. P. R. 327.

Repair of Premises—*Injury to Third Person.*]—A tenant, bound by the terms of his lease to make grosses reparations, is not responsible (as between himself and his landlord) for an accident to a third person happening on the premises which he occupies as tenant, when he has not been guilty of negligence on his part, and the accident has happened by reason of faulty construction of a structure upon the premises. *Allan* v. *Fortier*, Q. R. 20 S. C. 50.

Temporary Structure Erected by Tenant—Removal — Oral agreement with landlord—Sale of revision. *Butterworth* v. *Ketchum*, 3 O. W. R. 844.

Trespass to Demised Premises—*Action by Tenant—Assertion of Title by Defendant—Landlord Brought in en Garantie.*] —Where a tenant has sued a third person, in this case one of the other tenants of the same property, for a trespass, and the third person pleads that the tenant has not the right of enjoyment which he claims under his lease, but that he (the defendant) alone has such right, the tenant may call upon his landlord to defend him against this contention of the defendant. *Hamilton* v. *Royal Land Co.*, Q. R. 24 S. C. 411.

Waste — *Cutting Timber—Justification under Oral Agreement — Evidence to Vary Lease—Findings of Judge—Appeal.*] — The plaintiff leased to his sons S. J. M. and W. S. M., for the period of one year, and thereafter from year to year, the farm occupied by him, to be held by them in proportions stated, the consideration being that the sons should reside with their father and pay him a specified sum in money yearly, in addition to furnishing him with sufficient food and clothing, etc., for himself and his wife. In an action against S. J. M. for cutting down trees on the portion of the land held by him, the defendant sought to give evidence of an oral agreement that, in consideration of the transfer of part of his land to W. S. M., he was to have the land upon which the trees were cut during the plaintiff's lifetime and in fee after his death:—Held, that the evidence was inadmissible as varying or contradicting the terms of the lease in writing; and, the trial Judge having found the facts against the defendant, as to the agreement with the plaintiff in relation to the lot of land upon which the cutting took place, and the evidence being of a contradictory character, that there was no good reason for disturbing the findings on this branch of the case. *Meisner* v. *Meisner*, 37 N. S. Reps. 23.

Work Done on Demised Premises — *Materials Furnished to Tenant—Liability of Landlord.*]—A person who furnishes materials to a tenant for additions or improvements to the house upon the demised premises, has no right to bring an action against the owner to recover payment for such materials. *Delisle* v. *Marier*, Q. R. 23 S. C. 521.

LARCENY.

See CRIMINAL LAW—EXTRADITION.

LATENT DEFECTS.

See VENDOR AND PURCHASER.

LAW SOCIETY.

Barrister and Solicitor—*Admission of One from Another Province—Term of Service — Legal Professions Act.*] — To come within the exception in s.-s. 5 of s. 37 of the Legal Professions Act, it is not necessary that the applicant should have been a graduate at the time he commenced to study law, or that his term of study or service was shortened because he was a graduate. An applicant who obtained his degree after call of admission would come within the exception. *Calder* v. *Law Society of British Columbia*, 9 B. C. R. 56.

Barrister and Solicitor — *University Graduate — Legal Professions Act.*] — The applicant matriculated at the University of Dalhousie, Halifax, Nova Scotia, in August, 1892, and an LL.B. degree was conferred on him by the University on the 23rd April, 1895; in March, 1892, he began to study law and signed articles in Nova Scotia, and on the 2nd April, 1895, he was called and admitted there. Subsequently to his call and admission, he was employed two years in the office of a Halifax firm of barristers and solicitors. The term of service under articles in Nova Scotia for call and admission is ordinarily four years, but in case of a college graduate it is three years. In British Columbia, a graduate, in order to have his law course shortened, must be a graduate at the time he commenced to study law:—Held, per McColl, C.J., that the fact that the applicant was graduated after he was called in Nova Scotia precluded the circumstance of his being a graduate from having shortened his term of study. Quære, whether the plaintiff would have succeeded if he had graduated before the 2nd April, 1895. *In re King and Law Society of British Columbia*, 22 Occ. N. 154, 8 B. C. R. 356.

LAW STAMPS.

See COSTS.

LEASE.

See LANDLORD AND TENANT.

LEAVE TO APPEAL.

See APPEAL—EXECUTION.

LEGACY.

See EXECUTORS AND ADMINISTRATORS—WILL.

LEGISLATIVE ASSEMBLY.

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LETTERS OF ADMINISTRATION.

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LIBEL.

See DEFAMATION.

LICENSE.

See COMPANY — CROWN — INTOXICATING LIQUORS—LANDLORD AND TENANT — LIQUOR LICENSE ACT — MUNICIPAL CORPORATIONS — PATENT FOR INVENTION—PAYMENT.

LICENSE COMMISSIONERS.

See LIQUOR LICENSE ACT.

LICITATION.

See OPPOSITION—PARTITION.

LIEN.

Charge on Land—*Beneficial Ownership—Parol Trust—Mortgage—Priorities —Voluntary Conveyances.*]—The defendant, who had been for some years in possession of a farm purchased by his father with the intention of giving it to him, purchased a machine from the manufacturers, giving his notes therefor, and at the same time executed a document (which was registered) in which it was stated that the land had been so "willed" to him that he had a good title thereto, and would not further incumber it, and he thereby charged it with the payment of the notes. The father subsequently conveyed the land to the defendant, but upon the condition of his executing a mortgage, which he did to certain persons who had advanced moneys to him. The defendant, on the ground that the land had been conveyed to him on an alleged trust for his family, conveyed it to his wife, the consideration being $1 and love and affection, and the wife, for the like consideration, conveyed it to an infant son:—Held, that the charge in favour of the manufacturers was enforceable against the defendant and those claiming under him, by the assignee of the manufacturers, but was

subject to the mortgage, and the evidence displacing any trust in favour of the defendant's family, the conveyances by the defendant and his wife must be treated as merely voluntary and subject to the plaintiff's charge. *Abell* v. *Middleton*, 2 O. L. R. 209.

Charge on Land—*Unregistered Documents—Land Held Temporarily by Debtor as Trustee—Subsequent Conveyance to Person Entitled—Notice.*]—J. R., one of the defendants, owned a half section of land which she conveyed to her son, the defendant A. G. R., who mortgaged it to a loan company. While the title was so vested in A. G. R., he purchased a threshing machine and engine from the plaintiff's agent, and signed an unregistered document charging the land for the price, on which this action was brought. Later on A. G. R. mortgaged the half section to another loan company; he paid off the first mortgage and reconveyed the land to J. R. for an expressed consideration of $100; that conveyance was registered. After the reconveyance to J. R. this action was brought for payment by A. G. R. of the balance due on the machine and to have it declared that under the unregistered document the plaintiffs had a charge on the half section for the unpaid purchase money due them for the machines; that J. R. knew of the plaintiffs' lien under the document signed by A. G. R.; and that the conveyance from the latter to her should be set aside and the land sold to satisfy the plaintiffs' claim. The defence set up that A. G. R. was under 21 when he executed the unregistered document in the plaintiffs' favour, that the conveyance from J. R. to A. G. R. was given voluntarily to enable him to raise the money under the first mortgage that he put on it, and on the condition that, when so required by J. R., he would reconvey to her, and that the reconveyance complained of was made pursuant to that understanding and on the actual payment of $100 which A. G. R. exacted before he would reconvey:—Held, on the evidence, that the allegation that A. G. R. was under 21 when he executed the unregistered document, was not proved; also, that J. R. conveyed to her son A. G. R. to enable him to put on the first mortgage and in trust to reconvey to her after so doing; and that she was entitled to the reconveyance from him. Judgment against A. G. R. for the debt, but action dismissed as against J. R. with a declaration that the plaintiffs had no claim on the land. *Fairchild* v. *Ray*, 24 Occ. N. 281.

Goods of Lodger—*Money due for Medical Services.*]—The right of retention of the movable effects of a lodger can only be exercised by the persons specially mentioned in Art. 1816 (a), C. C. 2. One who has made himself responsible to a physician for professional services rendered to a lodger, has not a right of retention of the effects of the latter for the value of such services. *Goulet* v. *Brunelle*, 5 Q. P. R. 223.

Husband and Wife—*Expenses of Last Illness of Wife—Lien of Physician on Property of Husband — Registration—Priorities.*] — A physician has no lien upon the goods of the husband for his charges in respect to the last illness of the wife. 2. A lien the subject of registration does not rank by its registration until after real rights already registered. *Phaneuf* v. *Godin*, Q. R. 10 K. B. 450.

Repair of Ship—Possessory lien—Parting with possession—What amounts to — Floating ships on navigable waters—Caretaker for owner. *Hackett* v. *Coghill*, 2 O. W. R. 1077, 3 O. W. R. 827.

Thresher's Lien on Grain—*Measurements—Weights and Measures Act—Illegality—"Dealing."*]—The defendant contracted with the plaintiff to thresh his grain at a price per bushel. The quantity threshed was not measured with a Dominion standard measure, or weighed, but was subsequently ascertained by the defendant by cubic measurement:—Held, that so measuring the grain was not a "dealing" within the meaning of s. 21 of the Weights and Measures Act, which could relate back and render the contract void, and that the defendant was not therefore disentitled to a lien under the Threshers' Lien Ordinance. Macdonald v. Corrigal, 9 Man. L. R. 284, and Manitoba Electric and Gas Light Co. v. Gerrie, 4 Man. L. R. 210, considered. Judgment of Wetmore, J., 22 Occ. N. 345, reversed. *Conn* v. *Fitzgerald*, 5 Terr. L. R. 346.

Thresher's Lien on Grain—*Price of Threshing other Grain — Seizure of Excessive Quantity — Notice of Claim of Lien.*]—A thresher cannot, under the Threshers' Lien Act, 57 V. c. 36, maintain a lien on grain for the threshing of which he has been paid, to recover the price of a subsequent unpaid threshing. The plaintiff, by his notice put up on the granary, asserted his claim to a lien upon all the grain contained in it, which was worth about $86; but the Court found that the amount of the claim for threshing for which he could, under the Act, at the time of the posting of the notice, enforce a lien on such grain, if the proper steps were taken, was only about $26:—Held, that the quantity of grain which the plaintiff attempted to retain was unreasonably large for the amount owing, and that, under s. 2 of the Act, he had forfeited his right of retention of any of it. *Simpson* v. *Oakes*, 23 Occ. N. 54, 14 Man. L. R. 262.

Woodman's Lien—*Collusion—Fraud — Appeal — Attachment—Demand — Service —Sheriff's Fees.*]—In proceedings under the Woodman's Lien Act, 1894, an order allowing the claimants' lien will be set aside if the evidence discloses an attempt on the part of the claimants acting in collusion with the defendant to defraud the owners, notwithstanding that the Judge in the Court below has found that the evidence established the claimants' lien. Under s. 6 of the Act there must be a demand of the specific amount due before the issue of the attachment. Where attachments for three claims are served by the sheriff at the same time and place, the sheriff is entitled to full fees, including mileage, on each writ. *Murchie* v. *Fraser*, 36 N. B. Reps. 161.

Woodmen's Lien Act — "*Logs and Timber*"—*Contractor—Bond — Estoppel.*] —The appellant, under a contract in writing made by him with the respondent, for an agreed price per thousand, cut upon the land of the respondent a quantity of logs, and hauled them to a portable mill upon the land, where they were manufactured into deals,

planks, &c. The work was performed in part by the appellant himself with his team, though there was no stipulation to that effect between the parties, but chiefly by labourers and teams, by the terms of the contract hired and paid by the appellant. A portion of the amount due to the appellant under the agreement being unpaid, he caused an attachment to be placed upon the above mentioned deals, planks, &c., claiming a lien thereupon by virtue of the Woodmen's Lien Act, 1894: —Held, that the words "logs and timber," as employed in s.-s. 1 of s. 2 of the Act, were not intended to include deals and other manufactured lumber; also, that the evidence shewed the appellant to be a contractor, and not within the class of persons for whose benefit, by s. 3, liens were established; also, per Hanington, J., that the respondent by giving a bond in order to secure the payment of the amount claimed if the lien should prove effectual, and thus obtaining a release of the deals, &c., attached, did not estop himself from disputing the validity of the lien. *Baxter* v. *Kennedy*, 35 N. B. Reps. 179.

Woodman's Lien — *Lumber.*]—By the Woodman's Lien for Wages Act, B. C., no lien is given to saw-mill men, but only to those engaged in getting timber out of the forest. *Davidson* v. *Frayne*, 9 B. C. R. 369.

Woodman's Lien—*Notice of Lien—Effect —Owner of Limits.*]—A person who has done work for the jobber of a lumberman, and given the notice required by art. 1994c, C. C., is a creditor of the latter. *Rhéaume* v. *Batiscan River Lumber Co.*, Q. R. 23 S. C. 71.

Woodman's Lien—*Notice — Necessity for.*]—The notice which a woodman must give to a contractor in order to be able to maintain his lien upon the wood which he has cut, is not necessary when such contractor has recognized in writing the debt due to the woodman, and has given him an order for payment upon the owner of the wood. *Harvey* v. *Harvey*, Q. R. 19 S. C. 153.

Woodman's Lien—*Statute — Limitation to Wage-earners—Exclusion of Contractors—Insolvency—Time for Filing of Lien—Saisie-conservatoire — Identification of Property—Property Passing.*]—The plaintiff, a sub-contractor under the defendant, made a certain number of ties during the winter of 1901-2. The defendant had these ties made for one S. The plaintiff, not having been paid, issued a writ of saisie-conservatoire against the defendant, and seized all the wood which the defendant had in hand for S., which wood was in a boom upon a river, without making S. a party. The latter intervened and contested the seizure:—Held, that the statute which creates a lien constitutes an exception to the common law and must receive a strict interpretation; it is for the person asserting the lien to establish that it exists by reason of the special statute creating it. 2. The lien given by Art. 1994 (c), C.C., applies only to wood-cutters or labourers and extends only to the payment of their wages, and does not apply to contractors or sub-contractors in respect of payment of their contract price or advances or disbursements made by them. 3. One who, under a contract or sub-contract, cuts wood upon his own property, converts it by his work into ties, logs, etc., and delivers it to the person with whom he has contracted, cannot claim in respect of this wood the lien given by Art. 1994 (c), even when the value of the wood is trifling. 4. In the case of insolvency, the lien of the vendor must be asserted within 30 days after the delivery of the wood; a saisie-conservatoire issued after the expiry of this time cannot be maintained. 5. The lien of the vendor can only be exercised when the goods sold remain in the possession of the purchaser in the same state, and when the identity can be stated in a clear and certain manner. 6. The affixing of the trade mark of dealers in wood upon logs which have been got out for them by contractors, is a sufficient taking of possession and a proof of the transfer of the property in the logs. *Dallaire* v. *Gauthier*, Q. R. 24 S. C. 495.

Woodman's Lien—*Subject of Lien — Hire of Horse.*]—The lien given by Art. 1994c, C. C., is given only to a workman who has worked in getting out the wood, and he has it only for his wages; it is not given to one who is merely a creditor for the hire of a horse employed to cart the wood. *Rhéaume* v. *Batiscan River Lumber Co.*, Q. R. 23 S. C. 166.

LIEN CONTRACT.

See SALE OF GOODS.

LIEN NOTE.

See EXECUTION—SALE OF GOODS.

LIEUTENANT-GOVERNOR.

See MUNICIPAL CORPORATIONS — PARTIES.

LIFE ESTATE.

See WAY.

LIFE INSURANCE.

See INSURANCE.

LIFE RENT.

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LIMITATION OF ACTIONS.

I. Claim to Realty, 897.

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I. Claim to Realty.

Acquisition of Title by Possession—Tenancy—Assessment rolls—Rent — Ejectment. *Coulter* v. *Rockwell*, 6 O. W. R. 537.

Agreement to Purchase—Possession of wrong lot—Acquisition of title—Ejectment—Future action. *Ferguson* v. *McNuity*, 2 O. W. R. 657.

Boundary—*Absence of Enclosure—Occasional Acts of Ownership—Evidence—Rejection.*]—In a question of boundary between two persons claiming under a paper title, where there has been no enclosure, occasional acts, which would be merely acts of trespass if done by one not the owner, do not operate to give a statutory title; and evidence of such acts offered by the defendant was in this case properly rejected. *Wason* v. *Douglas*, 21 Occ. N. 521.

Character of Possession—Occupation of house as compensation for services. *Coulter* v. *Coulter*, 4 O. W. R. 65.

Colourable Title — *Possession — Evidence.*]—The possession of a part of land claimed under colour of title is constructive possession of the whole, which may ripen into an indefeasible title, if open, exclusive, and continuous for the whole statutory period. Carrying on lumbering operations during successive winters with no acts of possession during the remainder of each year does not constitute continuous possession. And it is not exclusive where other persons lumbered on the land, continuously or at intervals, during any portion of such period. *Wood* v. *Leblanc*, 24 Occ. N. 266, 34 S. C. R. 627.

Contract for Sale of Land—Covenant for good title—Breach — Action for—Damages—Money charged on land—Written contract—Parol variation—Evidence. *Wilson* v. *Graham* (Man.), 1 W. L. R. 278.

Court of Equity—*Declaratory Decree—Cloud on Title—Injunction.*]—A court of equity will not grant a decree confirming the title to land claimed by possession under the Statute of Limitations, nor restrain by injunction a person from selling land of an other. *Miller* v. *Robertson*, 24 Occ. N. 205, 35 S. C. R. 80.

Covenant in Mortgage — Principal — Acceleration of payment—Commencement of statutory period. *McFadden* v. *Brandon*, 2 O. W. R. 623, 6 O. L. R. 247.

Description — *Possession Beyond Boundaries—Deed—Plan—Length of Possession.*]—In June, 1868, by deed of gift, P. granted to his son F. an emplacement, described by metes and bounds, and stated to have thirty feet frontage, "tel que le tout est actuellement et que l'acquéreur dit bien connaître," declaring, in the deed, that the donation had actually been made in 1860, although no deed had been executed, and that since then F. had been in possession as owner:—Held, that the deed in 1868 operated as an interruption of prescription and limited the title to the thirty feet of frontage as therein described. A similar description in a deed of 1885, by F. to the plaintiff's wife, which made a reference to the number on a plan, thereby implying a greater width, left the true limits of emplacement subject to a determination according to the title held by the plaintiff's auteur, which granted only thirty feet of frontage; that, by the registered title, the plaintiff was charged with either actual or implied notice of this fact; and that, consequently, he had not, in good faith, possessed more than the thirty feet of frontage under this deed, and could not invoke an acquisitive prescription of title to the disputed six feet by ten years' possession thereunder; and further, that no augmentation of the lands originally granted could take place in consequence of the cadastral description of the emplacement in question. The word "tel que le tout est actuellement et que l'acquéreur dit bien connaître," used in the deed of gift, cannot be interpreted in contradiction of the special description that precedes them, and can only be construed as extending "dans les limites ci-dessus décrites." A prescriptive title to lands beyond the boundaries limited by the prescription in the deed of conveyance can only be acquired by thirty years' possession. *Chalifour* v. *Parent*, 21 Occ. N. 332, 31 S. C. R. 224.

Enclosing Wild Land — Occupancy — Knowledge. *Reynolds* v. *Trivett*, 2 O. W. R. 486, 3 O. W. R. 463.

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 in 30 O. R. 504, 19 Occ. N. 169, reversed; Boyd, C., and Street, J., dissenting. *Thuresson* v. *Thuresson*, 21 Occ. N. 550, 2 O. L. R. 637.

Interruption of Prescription—*Action—Want of Jurisdiction—Transfer to Another District.*]—There is no interruption of prescription by an action when the service of process is set aside; but the transfer of the

action to another district for want of jurisdiction does not prevent the action being an interruption of prescription. *Grenier* v. *Connolly*, 7 Q. P. R. 184.

Landlord and Tenant—*Limitation of Actions—Real Property Limitation Act—Tenant Paying no Rent—Payment of Taxes—Insufficiency to Prevent Statute Running—Mortgage—Costs—Counterclaim—Right of Way.*]—The patent from the Crown granting the lands to defendant Finley issued on 5th August, 1870. Thereafter Finley built on the lands a row of 4 houses, one of which, that now in question, defendant Joyce entered into possession of about 1st November, 1875, as tenant of Finley, at a rental of $150 a year. . . . Joyce had been tenant of Finley in another house for some years. . . . He had fallen much in arrear for the rent. . . . These arrears he seems to have been paying up for some years after his removal, but he never, unless by way of paying the taxes and water rates, which are collected as taxes in Ottawa, where the land was, paid any rent for the new house. The payment of taxes being compulsory, it was impossible to attribute their payment over so many years to a casual conversation or temporary arrangement, and could not operate so as to prevent the bar of the Statute of Limitations; see McCowan v. Armstrong, 3 O. L. R. at p. 107, 1 O. W. R. 28. The action as against Joyce dismissed in respect of the land set out in his statement of defence. *Brennan* v. *Finley*, 5 O. W. R. 251, 9 O. L. R. 131.

Mineral Lands—Reservation in deed—Estoppel — Tenancy — Payment of taxes. *Dodge* v. *Smith*, 1 O. W. R. 46, 803, 2 O. W. R. 561.

Mortgage—Interest — Lease — Overholding tenant—Tenancy from year to year—Redemption—Account—Costs. *McWilliam* v. *McWilliam*, 3 O. W. R. 239.

Mortgage — *Payments on — Insurance Premium—Entries in Books—Acknowledgments in Writing—Remedy on Bond—Absentee.*]—A mortgage and bond given by G. to C. to secure the repayment of a sum of money were dated the 7th January, 1877. The last payment of interest was made in September, 1879. C. was absent from the province when the mortgage and bond were given, and did not return until 1880. The plaintiffs, as executors of C., on the 30th June, 1900, brought two actions: (1) to foreclose the mortgage and to recover the amount secured by the mortgage and bond; and (2) to obtain possession of the land. The only defence set up to both actions was that of the Statute of Limitations. Under one of the clauses of the mortgage the mortgagee was empowered to make payment of insurance premiums, in default of payment by the mortgagor, and "to charge such payments with interest at the rate aforesaid upon the mortgaged premises," but there was no provision, in terms, making the advance a part of the principal sum secured by the mortgage; —Held, that the effect of the provision was merely to make the advance a lien upon the land for its payment with interest, and was only in the nature of a further charge or additional mortgage. The repayment by the mortgagor of the amount advanced was not such a payment on account of the principal sum secured as would take the case out of the Statute of Limitations. An entry in the books of the solicitor for the mortgagee shewing the payment of the amount advanced for insurance, and the subsequent repayment of the amount, was not sufficient evidence of an advance by and repayment to the mortgagee, such entries being consistent with the view that the solicitor advanced the money on his own account on the credit of the mortgagor. Renewal receipts for premiums of insurance, taken in connection with a clause in the policy making the loss, if any, payable to the mortgagee, were not acknowledgments in writing within s. 21 of the statute. Held, also, following Sutton v. Sutton, 22 Ch. D. 511, and Steward v. England, [1895] 2 Ch. 820, that the limitation imposed by s. 21 of the Act applied as well to the remedy on the bond as to that under the mortgage against the land. *Cogswell* v. *Grant*, 21 Occ. N. 351; 34 N. S. Reps. 340.

Mortgagee in Possession for 10 Years—Service of notice of sale on mortgagors after 10 years — Acknowledgment—Notice signed by agent — Redemption. *Shaw* v. *Coulter*, 5 O. W. R. 305, 6 O. W. R. 55.

Municipal Corporations—*Cemetery—Deed of Burial Lot—Trespass—R. S. O. 1897, c. 223, s. 577.*]—The plaintiff was the widow of J., who was buried in lot 98, block 1, of the cemetery of the town of Palmerston, in 1884. The defendant municipality held the cemetery under s.-ss. 8 and 9 of s. 490 of 46 V. c. 18 (O.), now R. S. O. 1897 c. 223, s. 577. By deed, dated the 26th August, 1885, the defendant municipality conveyed to the plaintiff lot 98, habendum "to her and her heirs and assigns to and for her and their sole and only use forever." There were no other terms in the deed. In June, 1888, the defendant municipality caused the body to be removed from lot 98 and buried in some lot, now unknown, and sold lot 98 to the defendant H., whose deceased wife was buried in it on the 20th of that month, and the defendants, by deed dated the 19th June, 1888, similar in terms to that given to the plaintiff, conveyed the lot to H., who in June, 1889, erected a monument and put up an iron fence, both of which still remained. This action was brought for damages for trespass and removal of the body of the plaintiff's husband, for a declaration of title, and a mandamus to compel the defendants to remove the body of the wife of the defendant H. and to replace the body of J. At the trial, it having appeared impossible to discover the whereabouts of the body of the deceased J., the relief sought by mandamus was abandoned, the defendants undertaking to supply the plaintiff with another lot:— Held, assuming the deed to the plaintiff to be valid, and that it passed the fee, that the causes of action were barred by the Statute of Limitations, the trespass having been committed more than six years before action, and the defendant H. having been in possession for more than ten years since his erection of the monument and the iron fence, which, within the authorities, were acts of ownership.—Quære, as to the validity of both deeds under the statute (R. S. O. c. 223), because they were simply conveyances in fee, without limitation or restriction, and therefore in violation of its provisions. *Steenson* v. *Town of Palmerston and Hyndman*, 25 Occ. N. 147.

Nature of Possession—Evidence—Exclusive possession. *Sims* v. *Seifert*, 3 O. W. R. 176.

Nature of Possession—*Acts of Ownership.*]—The acts relied on in support of a claim to title by possession were that the claimant had sold the timber off the land in question; had afterwards cleared it, and had sowed and harvested one crop of wheat; had then for some years taken hay from it; and had then used it as pasture land. The land was not wholly enclosed, one end being bounded by a marsh, and through this marsh cattle could and did stray into it:—Held, that there had not been such possession as is necessary to bar the right of the true owner. *McIntyre* v. *Thompson*, 21 Occ. N. 109, 1 O. L. R. 163.

Parent and Child—*Tenancy at Will—Right of Entry—Commencement of Statute—Caretakers—Entry by Consent—Assessment—Agreement—Concealment of Facts—Family Arrangement — Will — Devise — Charge — Election—Mistake.*]—In 1879 the defendant was put by his father in possession of a farm of which the title was in the father, who said he had bought it for the son. The defendant continued in possession until his father's death in 1900, occupying for his own benefit, taking the profits, paying no rent, and giving no acknowledgment of title; he also made improvements at his own expense. There was no evidence that the defendant was a caretaker or servant:—Held, that the father's title was extinguished before his death by the Real Property Limitation Act. The defendant became upon his entry a tenant at will, and that tenancy never having in fact been determined, the father's right of entry first accrued at the expiration of one year, when the defendant became a tenant at sufferance. The effect of s. 5, s.-s. 7, of R. S. O. c. 133, is that it is for the purposes of the statute only that the tenancy at will is to be deemed determined at the expiration of a year. But there was no entry by the father sufficient to prevent the running of the statute; a visit to the son, not being against his consent, would not be such an entry. The assessment of both father and son in 1882, at the request of the son, as freeholders of the farm, was not evidence of a new tenancy at will. Doe d. Bennett v. Turner, 7 M. & W. 226, distinguished. An agreement made a few days after the death of the father between the devisees and legatees under his will, whereby the defendant admitted that the father was the owner of the farm, and agreed to abide by the will, which devised the farm to him charged with a large sum, was not under the circumstances set out in the case, even when viewed as a family arrangement, binding on the defendant. Fane v. Fane, L. R. 20 Eq. 698, applied and followed. Held, also, that if there was any election by the defendant to take under the will, it was made under a mistake as to the defendant's rights; and besides, if the agreement fell, what the defendant did which was relied on as being an election, being a part of the same transaction, must fall with it. *McCowan* v. *Armstrong*, 22 Occ. N. 55, 3 O. L. R. 100.

Possession—*Both Parties Claiming Title by—Findings of Jury.*]—Where each party is seeking to make a title to land by possession, the Court will not interfere with the findings of the jury unless the verdict is one which, the whole of the evidence being reasonably viewed, could not properly have been found. *Wood* v. *Le Blanc*, 36 N. B. Reps. 47.

Possession—*Title.*]—In 1821 M. obtained a grant of land from the Crown, and in 1823 permitted his eldest son to enter into possession. The latter built and lived on the land and cultivated a large portion of it for more than ten years, when he removed to a place a few miles distant, after which he pastured cattle on it and put up fences from time to time. His father died before he left the land. In 1870 he deeded the land to his four sons, who sold it in 1873, and by different conveyances the title passed to P. in 1884. In 1896 the descendants of the younger children of M. gave a deed to B., who proceeded to cut timber from it. In an action of trespass by P.:—Held, that the jury at the trial were justified in finding that the eldest son of M. had the sole and exclusive possession of the land for 20 years before 1870, and that his possession had ripened into a title. If not, the deed to his sons in 1870 gave them exclusive possession, and, if they had not a perfect title then, they had twenty years after, in 1890. *Bentley* v. *Peppard*, 23 Occ. N. 212, 33 S. C. R. 444.

Possession as Against Mortgagee—*Foreclosure Decree.*]—In an action for possession of land the plaintiff's title was derived under a sheriff's deed made under direction of the Court in foreclosure proceedings, and dated 23rd July, 1896. The defendant relied upon the Statute of Limitations, and gave evidence of more than twenty years' possession of the land in dispute without payment of rent or acknowledgment of title. It appearing that the defendant went into possession at a date subsequent to the date of the mortgage under which the plaintiff claimed:—Held, that the defendant could not acquire title by possession against the mortgagee so long as the mortgage was kept alive. It is enacted by the Statute of Limitations, R. S. N. S. 1900 c. 167, s. 23, that "any person entitled to or claiming under a mortgage of land may make an entry or bring an action to recover such land at any time within twenty years next after the last payment of the principal money or interest secured by such mortgage, although more than twenty years have elapsed since the time at which the right to make such entry or bring such action first accrued:"—Held, that the granting of the decree of foreclosure was an adjudication that, at that date, the mortgage was in force, and that, therefore, the plaintiff's title came under the provisions of the section quoted. Held, also, that a third party could not, by a possession of twenty years, acquire title notwithstanding the provisions of the statute, and that plaintiff's title could not be defeated by defendant's possession, even although it were shewn to be of a more definite kind than was disclosed by the evidence. *Archibald* v. *Lawlor*, 35 N. S. Reps. 48.

Possession of Widow of Owner—Oral agreement for occupation of land in lieu of dower—Conduct of parties. *McGleddery* v. *McLellan*, 2 O. W. R. 1097.

Registered Title—Paper title—Ejectment. *Central Canada L. and S. Co.* v. *Porter*, 1 O. W. R. 482, 2 O. W. R. 137.

Tenants in Common—*Death of Co-tenant—Adverse Possession by Survivor.*]—Land was conveyed in fee to two brothers as tenants in common. One brother died on the 9th May, 1876, intestate, leaving him surviving his co-tenant, his mother, and three sisters, of whom the plaintiff was one. The mother died on the 5th September, 1876. The surviving brother had from the time of his brother's death until his own death on the 8th November, 1896, exclusive possession and use of the land, and the receipt of the rents and profits therefrom without accounting. He and his sisters lived together on premises situated elsewhere until his marriage in 1890. He always contributed to their support, but the contributions were not meant, and were not understood, to be a share to the sisters in the rents and profits of the land. In a suit commenced on the 21st September, 1899, by the plaintiff for the partition of the land: —Held, that the plaintiff's title was extinguished by C. S. N. B. c. 84. s. 13. *Ramsay* v. *Ramsay*, 21 Occ. N. 133, 2 N. B. Eq. Reps. 179.

Title—*Cancellation of Deed—Cloud—Plan and Survey—Acts of Ownership—State of Nature—Fences—Commencement of Statutory Period—Knowledge of True Owner.*]—The plaintiff claimed cancellation of a deed as a cloud on his title to 14 acres of land, and an injunction and damages in respect of trespass:—Held, upon an examination of the defendant's title deeds, that they did not in fact convey the 14 acres, nor profess to do so, and the plaintiff was not entitled to cancellation of the deed. Upon the evidence, the plaintiff had established his proper title to the 14 acres, and had sufficiently proved the correctness of a survey and plan shewing that the 14 acres were outside the land covered by the defendant's title deeds. The 14 acres had never been built upon, or cleared, or cultivated, or resided upon. The defendant relied upon the building of a brush fence along the south limit in 1880, by his predecessor in title. At that time, the title was still in the heirs of the patentee, who had never taken possession:—Held, that the building of the fence was of no significance as an act of ownership. Being built on the land while it belonged to the heirs of the patentee, it became their property, and the plaintiff having become the owner, and having entered in 1888, before the statutory period had run, it became his property absolutely. Acts done since 1888, such as cutting and removing wood, and pasturing cattle, being intermittent and isolated, were merely occasional acts of trespass and insufficient to constitute possession of the kind required by the statute to bar the true owner. Semble, also, that the land being in a state of nature, and there being no evidence that the grantee of the Crown, or his heirs or assigns, had taken actual possession, by residing upon or cultivating any portion thereof, until the plaintiff acquired the title of the heirs in 1887, or that they or any of them had any knowledge before that date of the land having been in the actual possession of the defendant or of any one under whom he claimed, even if the defendant's acts amounted to possession, he could not claim to have acquired a title to it, for in such a case time runs from knowledge by the true owner of the entry on his land, and must have run for 20 years to bar his title. Judgment of Teetzel, J., 2 O. W. R. 486, reversed. *Reynolds* v. *Trivett*, 24 Occ. N. 305, 7 O. L. R. 623, 3 O. W. R. 463.

Title—*Conveyance of Fee—Reservation of Life Estate—Possession — Ejectment—Evidence.*]—In October, 1853, D. conveyed to his father and two sisters 6 acres of land for their lives or the life of the survivor. A few days later he conveyed a block of land to M. in fee, "saving and excepting" thereout 6 acres for the life of the grantor's father and sisters, or that of the survivor, or until the marriage of the sisters, on the happening of said respective events, the 6 acres to be and remain the property of M., his heirs and assigns, under said deed. Three months later M. conveyed the block of land to R. M. in fee, and when the life estate terminated in 1903 the latter brought ejectment against the heirs of the life tenants, who claimed the 6 acres, on the ground that the deed to M. contained no grant of the same, and also because the life tenants had had adverse possession for more than 20 years:—Held, that, as the evidence shewed that the life tenants went into possession under R. M., the title of the latter could not be disputed, and the statute would not begin to run until the life estate terminated; — Held, per Idington, J., that R. M. under his deed and that to his grantor had the reversion to the fee in the 6 acres after the life estate terminated. The lease of the life estate was given to R. M. with the other title deeds on conveyance of the land to him, and it was received in evidence as an ancient document relating to the title and coming from proper custody. It was not executed by the lessees, and no counterpart was proved to be in existence:—Held, that it was properly admitted in evidence. *Dods* v. *McDonald*, 25 Occ. N. 117, 36 S. C. R. 231.

Title by Possession—*Real Property Limitation Act—Right of Entry—Mortgagee—Mortgage after Statute has Begun to Run against Mortgagor—Interruption—Registry Act—Notice—Authority of Decisions of English Court of Appeal.*]—Appeal by defendants from judgment of Boyd, C., in favour of plaintiffs (mortgagees) in an action for possession of a farm in the township of Cavan. The farm was conveyed by defendant Rachel Trenouth (formerly Maxwell) to one Southeran, and reconveyed by Southeran to her and her husband (co-defendant). Before the latter conveyance was registered Southeran, as alleged, fraudulently mortgaged to plaintiffs, who registered their mortgage. Defendants set up notice to plaintiffs and title by possession. [Reference to Stephens v. Simpson, 15 Gr. 594; Cameron v. Walker, 19 O. R. 212; Thornton v. France, [1897] 2 Q. B. 143.] If Southeran had never re-conveyed to defendants, his legal right of entry under their deed to him, though no doubt defeasible by their equity to a reconveyance, would also in time be barred by the operation of the Statute of Limitations, upon their continued possession adverse to the legal title he had acquired under their deed. If the deed which was in fact made was avoided by plaintiffs for the purpose of supporting their registered title, and was to be treated as void ab initio, defendants' possession must also be treated as having been adverse to Southeran from the commencement, and plaintiffs, having avoided the deed for one purpose, cannot set it up for another in order to give a character to such

possession which, in the absence of the deed, would not attach to it. The defendants had acquired a good title under the Statute of Limitations before the commencement of the action, and, therefore, with all respect, the appeal should be allowed. *McVity* v. *Trenouth*, 5 O. W. R. 123, 9 O. L. R. 105.

Title by Possession to Undivided Half of Lot—*Husband and Wife—Joint Occupancy—Rights of Husband Surviving Wife—Declaration of Title—Rights of True Owner.*]—On and after 1st March, 1872, defendant Beaque Ruport and one Adam Ruport were the owners as tenants in common of the south-west quarter of the lot, containing 50 acres, and Adam Ruport alone was in possession. He died on 30th March, 1872, having by his will devised his undivided half to his wife Caroline Ruport for life. He made no disposition of the remainder, and died without issue; consequently the remainder descended to his father, Levi Ruport. After Adam's death his widow continued in possession of the whole parcel. On 4th March, 1873, she intermarried with plaintiff, and they continued in sole possession until 24th December, 1887, when they conveyed the south half of the south-west quarter to defendant Beaque Ruport, who entered into possession thereof. Plaintiff and his wife continued in possession of the whole of the north-west quarter during their joint lives. On 3rd March, 1903, plaintiff's wife died without issue, and plaintiff has remained in possession of the whole. Levi Ruport died in the year 1885, leaving a will whereby he devised his undivided estate in remainder to defendant Beaque Ruport. Upon the death of plaintiff's wife, defendant Beaque Ruport became entitled, as devisee of his father, to the undivided one-half of which she was tenant for life, and he claimed that he was the owner of the other undivided half, notwithstanding the possession commencing with that of plaintiff's wife from 30th March, 1872, and continuing until her death on 3rd March, 1903:—Held, Maclennan and Maclaren, JJ.A., dissenting, that the plaintiff's marriage was after the coming into force of the Married Women's Property Act, 1872. His wife was in sole possession, and, as against defendant Beaque Ruport's undivided half, the Statute of Limitations had begun to run in her favour. The possession was in her, and it was such as was capable of ripening into a title under the statute as against Beaque Ruport. It was an interest in real estate which was capable of transmission by will or by transfer inter vivos. As against everybody but Beaque Ruport she was the owner in fee. This interest in real estate was secured to her on her marriage by virtue of the 1st section of the Married Women's Property Act, 1872. She owned it at the time of her marriage, and it was hers to be held and enjoyed for her separate use free from any estate or claim of plaintiff. The marriage did not disturb her right or interest in the estate. Neither could her husband's possession, for she was in possession at the same time. The possession which she had begun against Beaque was continued by her notwithstanding her coverture. She made no assignment or transfer of her rights or interests or any part of them to plaintiff. Plaintiff could not become seised or entitled jointly with his wife, and thus acquire some of her rights, simply because they lived together on the land, any more than he could thus acquire her estate in other lands owned by her at the time of the marriage. But for the fact that there was a lawful marriage, the nature of plaintiff's possession resembles that of the person who had gone through the ceremony with the wife of plaintiff in McArthur v. Egleson, 43 U. C. R. 406, 3 A. R. 577. As against defendant Beaque Ruport, therefore, the possession was that of plaintiff's wife, and, if that possession ripened into a title, it was gained by the wife and during her lifetime. The plaintiff was not entitled to a declaration of title, but he could not be dispossessed by the defendant. *Myers* v. *Ruport*, 4 O. W. R. 365, 25 Occ. N. 8, 8 O. L. R. 668.

Unregistered Deed—*Subsequent Registered Mortgage—Possession—Right of Entry.*]—R. T. in 1891, being about to marry W. T., and wishing to convey to him an interest in her land, executed a deed of the same to a solicitor, who conveyed it to her and W. T. in fee. The solicitor registered the deed to himself, but not the other, forging on the same a certificate of registry, and he, in 1895, mortgaged the land, and the mortgage was duly registered. R. T. and W. T. were in possession of the land all the time from 1891, and only discovered the fraud practised against them in 1902. In 1903 the mortgagee brought action to enforce his mortgage:—Held, affirming the judgment of the Court of Appeal, 9 O. L. R. 105, Davies and Nesbitt, JJ., dissenting, that the legal title being in the solicitor from the time of the execution of the deed to him, the Statute of Limitations began to run against him then, and the right of action against the parties in possession was barred in 1901. *McVity* v. *Tranouth*, 25 Occ. N. 114, 36 S. C. R. 455.

Wild Land — *Boundary—Entry—Occupation — Evidence of Possession—Survey.*]—In an action of trespass the dispute was as to the ownership of a strip of land about 53 links in width, which the plaintiff claimed as part of his lot, 16, and the defendants as part of theirs, 17, or if not, as having become theirs by the operation of the Statute of Limitations. Neither of the lots had ever been cleared or cultivated, and no fence separating them had ever been built. Both parties had cut timber, and that was the only use that had ever been made of either lot:—Held, that the statute did not apply; to render it applicable it would be necessary to shew, if not an entry and cultivation of some part of the land, at least an entry and actual occupation. Semble, that, even if the statute applied, there was not, upon the facts, that clear and unequivocal evidence of possession by the defendants of the strip in dispute which was necessary to bar the right of the true owner. Davis v. Henderson, 29 U. C. R. 344, distinguished. Harris v. Mudie, 7 A. R. 414, and other cases, considered:—Held, however, that the plaintiff's evidence of his title to the land in question as forming part of his lot was not sufficient to establish it. Proper method of ascertaining the true position of the dividing line between lots pointed out. *Huffman* v. *Rush*, 24 Occ. N. 217, 7 O. L. R. 346, 3 O. W. R. 43.

II. Other Cases.

Account — *Co-owners of Land—Partnership — Principal and Agent — Trustee —*

Outlay on Land—Rents.]—The plaintiff sold a half interest in land to the defendant, and they agreed to build houses thereon at their joint cost and to raise part of the money for the purpose by mortgages upon the property, and to contribute the remainder in equal shares. The houses were completed and rented in 1891; the defendant, who was on the spot, the plaintiff living in another province, collected the rents on joint account, and paid out of them the interest on the mortgages and the taxes and other outlays upon the property, sending accounts from time to time to the plaintiff. The plaintiff, alleging that the defendant did not contribute his just share of the cost of the houses, and that he had not properly accounted for the rents, brought an action for an account on the 15th August, 1902:—Held, that the plaintiff was barred by the Statute of Limitations in respect of his claim as to the cost of the houses, and also with regard to the rents except for six years before the commencement of the action; the plaintiff and defendant were not partners; nor was the defendant an express trustee for the plaintiff; he was an ordinary agent without any special fiduciary character. Coyne v. Broddy, 15 A. R. 159, Burdick v. Garrick, L. R. 5 Ch. 233, and Lyell v. Kennedy, 14 App. Cas. 437, distinguished. *Ross* v. *Robertson*, 24 Occ. N. 228, 7 O. L. R. 413, 3 O. W. R. 158, 513.

Account — *Claim against Estate of Deceased Person — Corroboration — Special Agreement — Running Account—Terms of Credit — Demand—Fraud upon Creditors—Pleading.*]—The plaintiff claimed from the executors of his father-in-law payment of a running account for work done and goods supplied to the testator from 1888 till his death in 1895. No demand for payment was ever made upon the deceased, nor was any account rendered until one was sent in to the defendants on the 16th May, 1895. This action was begun on the 4th May, 1901. The plaintiff and his wife gave evidence of an agreement with the deceased that the plaintiff should keep the account separate from his other accounts, that he should try, if possible, to get on without the money, and to leave it in the hands of the deceased, who said he would save it for the plaintiff and put it in a house for him or his wife. The plaintiff did keep the account in separate books, which were produced, as also the general books. A witness said that the deceased told him about a year and a half before his death that he had requested the plaintiff to keep the account between them in a little book at home, not in the regular day book, so that, if anything happened, the account would not go into the wholesale men, and that he intended to buy a house for the plaintiff's wife. Similar evidence, although less distinctly, was given by another witness:—Held, that there was sufficient corroboration of the plaintiff's statement:—Held, also, that the plaintiff was not obliged to prove a definite term for which credit was given; the agreement was in effect one that the testator was to hold the money at least uptil the plaintiff demanded it; and, as there was no demand before the 16th May, 1895, the action was in time:—Held, also, that the agreement was not one which offended against the law relating to frauds upon creditors; and the defendants were not in a position to raise such a question, not having pleaded it. Day v. Day, 17 A. R. 157. *Wilson* v. *Howe*, 23 Occ. N. 137, 5 O. L. R. 323, 1 O. W. R. 272, 2 O. W. R. 52.

Acknowledgment in Writing—*Agent of Executor—Power of Attorney—Letter.*]—A power of attorney from the executor, resident out of the jurisdiction, of a deceased maker of a promissory note to the surviving maker, within the jurisdiction, "to do all things which may be legally requisite for the due proving and carrying out of the provisions" of the will, which, among other things, directs the payment of the testator's debts, does not authorize the surviving maker to bind the estate by an acknowledgment of a debt of which the executor knows nothing, and which is barred at the time. A letter from the executor of one maker of a note to the holder thereof, advising the holder to look to the surviving maker for payment, as he is now doing well, is not a sufficient acknowledgment. A direct acknowledgment of the debt in a letter by the executor of one maker of a note to the surviving maker is of no avail to the holder. Judgment of Boyd, C., 31 O. R. 573, 20 Occ. N. 209, affirmed. *King* v. *Rogers*, 21 Occ. N. 106, 1 O. L. R. 69.

Acknowledgment of Debt — *Interruption—Art. 2264, C. C.*]—An acknowledgment of a debt, not operating as a novation, is prescribed by the same lapse of time as the debt itself, the prescription of which it has interrupted. *Charette* v. *Lacombe*, Q. R. 17 S. C. 539.

Acknowledgment of Debt — *Sealed Instrument — Promissory Note—Period of Limitation.*]—A private writing, described by the parties hereto as an "indenture," and executed under seal, containing an acknowledgment of a personal debt, with hypothec on real property to secure the payment of such debt, is not a promissory note, and the prescription of five years does not apply. *Zampino* v. *Blanchet*, Q. R. 24 S. C. 265.

Annuity — *Will — Charge on Land—Arrears—Lunatic.*]—By a will made in 1872, a testator who died in the same year devised land to two sons, "subject to the payment by my said two sons, of the sum of $200 per annum, for the benefit of my son Thomas Anson, which said sum, or annuity, or so much thereof as shall be reasonably necessary for the support and maintenance of my said son Thomas Anson, shall be paid, yearly and every year for and during the natural life of my said son Thomas, to the person or persons who may be his guardian or guardians." The son Thomas Anson was of age at the time of the testator's death, but was of unsound mind, and he was declared a lunatic in 1898, and the plaintiffs were appointed committee of his person and estate. After the father's death, the son lived with his mother, to whom from time to time till February, 1889, payments were made on account of the annuity:—Held, that the annuity was charged on the land; that it was, therefore, by virtue of s. 2 (3) of the Limitations Act, R. S. O. 1897 c. 133, rent within the meaning of that Act; that the payments to the mother, who was the natural guardian, were good; and that the statute did not begin to run till the last of them were made; that apart from the question of disability the right of action would have been

barred at the expiration of ten years from that time; but that by ss. 43 and 44 the time was extended for five years from the removal of disability, or for twenty years; and that, therefore, an action brought in February, 1900, was in time; and that six years' arrears could be recovered. Judgment in 31 O. R. 504, 20 Occ. N. 120, affirmed. *Trusts and Guarantee Co.* v. *Trusts Corporation of Ontario*, 21 Occ. N. 373, 2 O. L. R. 97.

Assignment of Debt — *Sheriff's Sale—Equitable Assignment—Payment to Stranger—Ratification.*]—In Nova Scotia, book debts cannot be sold under execution, and the act of the execution debtor in allowing such sale does not constitute an equitable assignment of such debts to the purchaser. The purchaser received payment on account of a debt so sold, which, in a subsequent action by the creditor and others, was relied on to prevent the operation of the Statute of Limitations: —Held, that, though the creditor might be unable to deny the validity of the payment, he could not adopt it so as to obtain a right of action thereon, and the payment, having been made to a third party who was not his agent, did not interrupt the prescription. Keighley v. Durant, [1901] A. C. 340, followed. *Moore* v. *Roper*, 25 Occ. N. 55, 35 S. C. R. 533.

Bill of Exchange — *Period of Limitation.*]—A bill of exchange given for a commercial debt is barred by five years' lapse of time. *Guimond* v. *Blanchard*, Q. R. 21 S. C. 106.

Building — *Faulty Construction—Action against Architect or Contractor — Starting Point.*]—The prescription of an action against the contractor or architect for the total or partial loss, within 10 years, of a building constructed by them, has for its starting point the manifestation within the 10 years of the fault in the construction or in the soil, and such right of action endures for 30 years from the time of the manifestation of such fault. *Archambault* v. *Curé and Churchwardens of St. Charles de Lachenaie*, Q. R. 12 K. B. 349.

Contract — *Fraud — Creditor's Action—Knowledge of Fraud—Pleading.*] — Inasmuch as an action by a creditor to set aside a contract for fraud must, under art. 1040, C. C., be brought within one year from the time of his obtaining a knowledge of such contract, and inasmuch as that article is prohibitory in its terms, and denies absolutely the right of action unless exercised within the year, it is essential, whenever the fact does not appear by the dates of the contract attacked and of the institution of the suit of proceeding, that the party seeking the avoidance of the contract should allege and prove that he only obtained knowledge thereof within the year preceding the institution of his suit or proceeding. Where not pleaded, the objection based on the omission of such allegation may be raised at any stage of the case. *Gagnon* v. *Dunbar*, Q. R. 20 S. C. 515.

Debt — *Acknowledgment — To whom Made — Stranger—Vendee of Book Debts—Right of Sheriff to Sell—Absence of Statutory Authority.*] — An acknowledgment or payment, to take a debt out of the Statute of Limitations, must be made to the party legally entitled to receive the same or his agent. An acknowledgment or payment made to a person who occupies the position of a stranger has no binding force or effect whatever. A sale by the sheriff, of book debts, without statutory authority, is void, and confers no right upon the purchaser. *Moore* v. *Roper*, 37 N. S. Reps. 161.

Debt — *Acknowledgment — Writing — Payments — Appropriation.*] — An acknowledgment of a debt or promise to pay, to take such debt out of the law of limitations, must be in writing, and cannot be proved in any other way (art. 1235, C. C.) A payment made before any of the items of an account have been prescribed should be imputed to the earliest item of the account, no item of the account bearing interest and all being of the same nature and equally onerous: art. 1161, C. C. *Beaudoin* v. *Fecteau*, Q. R. 14 K. B. 29.

Goods Sold and Delivered—*Division Court—Amendment of Defence—Misleading Particulars of Claim.*]—Action in a Division Court for the amount of an account for goods sold and delivered to the defendant by the plaintiffs. The particulars attached to the summons gave the dates of sale as in 1896, and the action was brought within six years from the earliest date given. The defendant entered a dispute note, but did not give notice of a defence of the Statute of Limitations. When the plaintiffs' books were produced at the trial, they shewed that the entries were all made in 1895, more than six years before action: — Held, that the defendants should have leave to amend by setting up the statute as a defence, and were entitled upon that defence to defeat the action. *Meehan* v. *Berry*, 22 Occ. N. 237.

Interruption of Statute — *Assignment for Creditors — Claim against Estate.*]—An assignment of property for the benefit of creditors does not interrupt prescription. 2. The lodging of his claim by a creditor in the hands of the curator of the estate of an insolvent, the collocation, and part payment of such claim, by the curator, interrupt prescription. *Carter* v. *McLean*, Q. R. 20 S. C. 395.

Interruption of Statute — *Claim for Services—Gift in Recognition of—Payment—Subsequent Annulment.*]—The defendant had for several years been the agent and solicitor of a lady, and she, to testify her profound gratitude for his services, and as a mark of her affection, made him a gift of $8,000 out of her estate from the moment of her decease and before the division of her property. This gift was annulled by the Court (Q. R. 12 S. C. 162, 13 S. C. 205), upon the ground that it was a donatio mortis causa. The defendant then accounted for the sum which he had received from the executors in respect of the gift, but asserted a set-off of a greater amount as due to him by the estate of the deceased for solicitor's and agent's charges. The plaintiff replied that the defendant's claim was prescribed:—Held, that, although the gift had been declared void, the prescription of the defendant's claim had been interrupted by the recognition and promise to pay which the gift imported, and had been suspended until the decease of the donor, the defendant not being able before that to claim the price of his services; and, moreover, the

prescription had been interrupted by the payment by the executors of the amount of the g ft. *Boucher* v. *Morrison*, Q. R. 20 S. C. 151.

Interruption of Statute — *Proof of Payments — Admissions.*]—In a commercial matter, governed by art. 1235, C. C., proof of payments interrupting prescription may be made by the admission of the defendant: art. 1245, C. C. *Guay* v. *Guay*, Q. R. 11 K. B. 425.

Judgment — *Execution—Part Payment.*] —This action was brought on the 10th January, 1898, on a judgment for $412.69 entered on the 24th November, 1876; the defence was the Statute of Limitations. An execution was issued on the 17th December, 1877, returnable within sixty days. The sheriff on the 31st January, 1878, sold the defendant's land under execution. It was knocked down to the plaintiff for $35, and this sum was credited on the execution:—Held, that this was part payment within the meaning of the statute. Chinnery v. Evans, 11 H. L. Cas. 115, followed. *Hart* v. *Griffin*, 21 Occ. N. 567.

Judgment — *Execution—Part Payment.*] —The plaintiff recovered judgment against the defendant in the Supreme Court on the 18th October, 1875, and recorded the same so as to bind the lands of the defendant. The first execution was issued thereon on the 23rd October, 1875, and returned unsatisfied. The defendant died intestate on the 26th April, 1876. On the 10th September, 1887, another execution was issued, directed against lands of the defendant. A portion of the defendant's lands were sold thereunder, and purchased by the plaintiff, and the amount of the proceeds was credited on the execution. On the 14th July, 1901, one Lefurgey purchased from the heirs the remaining lands that belonged to the defendant. On the 31st August, 1901, the plaintiff obtained leave to issue another execution for the balance due on the judgment, and he proceeded under the execution to sell the lands purchased by Lefurgey. An order was made staying proceedings until an issue should be directed and tried as to the title of the lands. Semble, that proceedings were barred by the Limitations Act, the sheriff not being the agent of the judgment debtor. Chinnery v. Evans, 11 H. L. Cas. 115, distinguished. Hart v. Griffin, 21 Occ. N. 567, referred to. *Harrington* v. *Meloney*, 21 Occ. N. 598.

Mortgage — *Cause of Action — Acceleration.*]—The effect of the usual statutory provision contained in a mortgage, that in default of payment of the interest thereby secured the principal thereby secured shall become payable, is to make the principal at once due, so that the cause of action then accrues under s. 1 of R. S. O. 1897 c. 72. *McFadden* v. *Brandon*, 6 O. L. R. 247.

Mortgage — *Interest — Default — Acceleration.*] — Under a mortgage containing the statutory provision that in default of the payment of the interest the principal shall become payable, default in payment of interest has the effect of making the principal payable as if the time for payment had fully come, and a right of action therefor then arises, and the Statute of Limitations then begins to run. Judgment of Street, J., 6 O. L. R. 247, 2 O. W. R. 623, affirmed. *McFadden* v. *Brandon*, 24 Occ. N. 393, 8 O. L. R. 610, 4 O. W. R. 349.

Mortgage—*Payment of Insurance Premium — Interest — Bond — Absentee.*]—J. G. borrowed money from C. in 1877, and gave as security therefor his own bond and a mortgage made by A. G. An action on the bond and for foreclosure and ejectment in respect of the mortgaged premises was begun in 1900. The last payment of interest on the bond and mortgage had been made in 1879, and no payment of principal was ever made. The insurance clause in the mortgage was in the usual terms, and concluded as follows: "And in default thereof that the said (mortgagee), his heirs, executors, administrators, and assigns, shall and may as required, effect, renew, and continue such insurance, and charge all payments made for or in respect thereof, with interest after the rate aforesaid, upon the said mortgaged premises." On the 5th September, 1883, B., the mortgagee's agent, paid to an insurance company $5, being the premium due on the 12th February, 1883, on a policy of fire insurance covering the premises, and charged the same to A. G., who in January, 1887, repaid it to B. There was no insurance on the property when this policy was taken out, nor was there any other insurance afterwards:—Held, that, when B. paid the $5, it became, under the terms of the mortgage, a part of the principal, and as such a charge on the land, and the subsequent payment by A. G. was a payment on account of principal within twenty years, and it was not necessary for the mortgagee to do any act indicating an intention to add it to the principal. 2. That the plaintiffs were entitled to only six years' interest. 3. As C. was not in the province when the right of action accrued on the bond, he was entitled to the additional period allowed by s. 25 of R. S. N. S. c. 112 for one absent. *Cogswell* v. *Grant*, 21 Occ. N. 351.

Personal Injury — *Second Action — Right Reserved.*]—In 1895 the plaintiff sustained bodily injuries through negligence on the part of the city, and recovered judgment for $1,000 damages therefor, recourse being reserved for any further action she might have for future damages which might result from the same accident. On the 3rd December, 1897, she brought a second action for further damages said to have been ascertained since the institution of her first action, and recovered $5,000 additional damages:—Held, that at the time the second action was brought any right that the plaintiff may have had was barred by the limitation declared in art. 2262, C. C., which commenced to run from the day on which the right of action accrued; that the Courts should, of their own motion, take notice of prescriptions acquired in such cases, as provided by art. 2188, C. C., and dismiss the action; that tacit renunciation of such acquired prescription cannot be presumed from the failure of the defendant to plead the limitation that the reservation in the first judgment did not constitute a judicial condemnation within the meaning of art. 2265, C. C., for the purpose of interrupting prescription already acquired or causing a new prescription to begin; and that there could be no reservation of an action the right to which is absolutely denied by the provisions of the Civil Code. Such a reservation amounts merely to a de-

claration that, in a second action, such judgment could not be pleaded as chose jugée, provided the future damages so reserved did not appear to be included in the demand by the first action; and could have no effect after the expiration of one year. *City of Montreal* v. *McGee*, 21 Occ. N. 3, 30 S. C. R. 582.

Personal Injury — *Second Action—Right Reserved.*]—The plaintiff was employed by the defendant as a stevedore. On the 20th September, 1898, he was injured by some sacks of sugar falling on him. About a month later he brought action for $1,999 damages, alleging that he had suffered permanent injuries and that the accident was caused by the negligence of the defendant. On the 16th March, 1899, the plaintiff obtained judgment for $300 for damages sustained up to that date, the Court reserving the right of the plaintiff to bring another action for future damages. This judgment was satisfied by payment of the amount awarded. The present action, brought under the reserve contained in the first judgment, was for $4,700 additional damages. It was only commenced on the 12th October, 1899, more than a year after the date of the accident; but it was contended that the prescription which would otherwise apply was interrupted by the reserve in the first judgment, and that the year should be calculated from that date; —Held, following City of Montreal v. McGee, 21 Occ. N. 3, 30 S. C. R. 582, that the first judgment had not the effect of the interrupting prescription. *Ferns* v. *Racicot*, 21 Occ. N. 81.

Principal and Agent—*Reformation of Agent's Account.*]—An action for the reformation of an agent's account is prescribed by a period of five years. *Grange* v. *Sauvé*, 5 Q. P. R. 100.

Promissory Note — *Acknowledgment—Interest.*]—After the expiration of six years from the making of certain promissory notes, the maker wrote to the payee's solicitor stating that he acknowledged his indebtedness on the notes so as to prevent the operation of the Statute of Limitations, and that in no event would it have made any difference, for, statute or no statute, the debt was one he would pay, if it took his last penny. He enclosed a letter to the payee himself, stating that he thereby begged to acknowledge his liability to him on the notes, and that the acknowledgment was made by him to prevent the running of the Statute of Limitations. The maker died a couple of years afterwards:—Held, that the claim was taken out of the operation of the statute, both as to principal and also the interest due, not only at the maturity of the notes, but also after maturity, by way of damages. *In re Williams*, 24 Occ. N. 91, 7 O. L. R. 156, 1 O. W. R. 534, 2 O. W. R. 47, 3 O. W. R. 251.

Promissory Note — *Acknowledgment after Period of Prescription—Conditional Renunciation.*]—A promissory note signed by the defendant in favour of the plaintiff had been barred by the Statute of Limitations since 1897. In 1902 the defendant wrote to the plaintiff: "You ask me for money; at this moment I have none. I have bought land and paid all I had; but I am negotiating for the sale of my land and I will pay you as soon as I sell it." The plaintiff, contending that this letter constituted a renunciation of the prescription acquired, sued the defendant for the amount of the note and interest without waiting for the sale of the land:—Held, that this letter did not amount to a renunciation of the rights acquired, but only to a conditional offer to renounce the prescription acquired; and therefore the creditor, in order to acquire again the right of action which he had lost, should have waited for the fulfilment of the condition. *Perrier* v. *Perrier*, Q. R. 25 S. C. 183.

Promissory Note — *Collateral Security by Mortgage—Period of Prescription—Interest—Commencement of Period—Acknowledgments—Interruption of Prescription — Renunciation.*] — Prescription of 5 years and not 30, applies to a promissory note, notwithstanding that part thereof was for money lent, for securing which hypothec was given. Interest on demand note runs from the date thereof. Prescription begins to run from the date thereof and not from the date of demand of payment. Acknowledgments made by one party to a note interrupt prescription as to the others. Acknowledgments can be proved by the oath of one of the parties defendant. A transfer of property by one defendant to the plaintiff, though signed by the defendant before the consideration was filled in, and imperfect in form, when coupled with the admission of the defendant that the consideration, whatever it was, was to be placed to the credit of the said note, is a "reconnaissance par écrit" at the date of the transfer, and sufficient to interrupt prescription. The oath alone of one defendant is in itself enough to interrupt prescription. While it requires a new promise to pay, clearly expressed, to renounce a prescription acquired, the sole acknowledgment of a debt is sufficient to interrupt prescription, while running. *Bank of Ottawa* v. *McLean*, Q. R. 26 S. C. 27.

Promissory Note — Covenant in mortgage—Foreign lands — Sealed instrument—Foreign law—Foreign judgment—Jurisdiction—Defendant resident in territories—Subject of foreign state—Allegiance — Natural justice—Purchase by mortgagee at judicial sale. *Dakota Lumber Co.* v. *Rinderknecht* (N.W. T.), 1 W. L. R. 481, 2 W. L. R. 86, 275.

Promissory Note — *Joint Note—Statute of Limitations—Payments by one Maker—Agency—Evidence of—Costs.*]—Action upon a joint promissory note made by W. W. Greenwood, deceased, and his wife, defendant Mary J. Greenwood. The defence chiefly relied upon was that of the Statute of Limitations, in reply to which plaintiff proved several payments on account by W. W. Greenwood within six years of the commencement of the action, and plaintiff sought to establish that these payments were out of money to which defendant Mary J. Greenwood was entitled, and were made by her husband with her authority:—Held, that the evidence fell short of establishing either that the payments or any of them were made out of the wife's money with her knowledge and consent, or that in making any of the payments the husband was acting as her agent. The fact that the husband had general authority to collect certain assets belonging to the wife, and was allowed by her to apply the same either for his own benefit or for hers as he saw fit, would not constitute him her

agent so that by payments (out of the money so collected) on account of the note he could either continue or renew her liability upon a joint note which but for such payments would be barred by the Statute of Limitations. Payments made by one of two joint makers will not take the case out of the statute as against the other unless made expressly as his agent and by his authority: Creighton v. Allen, 26 U. C. R. 627. See also Paxton v. Smith, 18 O. R. 178. While the husband did make collections for the wife and did not account to her fully for the same, there is no evidence that any part of such collections was ever specifically applied by him upon the note. It was clear that, if he did so apply the money, it was without her knowledge or express consent. While this note was outstanding the husband caused to be conveyed to the wife several parcels of incumbered real estate, the equity of redemption in which would have been available in his hands to pay plaintiff. The action as against defendant Mary J. Greenwood, dismissed. *Harris* v. *Greenwood*, 4 O. W. R. 140, 25 Occ. N. 72, 9 O. L. R. 25.

Promissory Note—Lien on land—Right to redeem—Tender—Sale — Confirmation—Costs. *Re Hardaker* (N.W.T.), 1 W. L. R. 161.

Promissory Note—Payment on account—Conflict as to source of payment—Evidence—Inference. *Gerolamy* v. *Cameron*, 6 O. W. R. 425.

Promissory Notes — Commencement of statute—Absence of defendant from province—Return. *Moore* v. *Balch*, 1 O. W. R. 824.

Promissory Note — *Commencement of Statutory Period.*]—The last day of grace upon a promissory note was the 19th September, 1894, on which day it was presented for payment and dishonoured; — Held, that an action thereon begun on the 19th September, 1900, was one day too late to save the Statute of Limitations. Sinclair v. Robson, 16 U. C. R. 211, followed in preference to Kennedy v. Thomas, [1894] 2 Q. B. 759. *Bank of Toronto* v. *McBean*, 21 Occ. N. 44.

Sale of Goods — *Action to Set aside—Period Allowed for—Pleading—Costs.*]—An action to set aside a contract for the sale of machines, begun more than a year after the making of the contract, cannot be maintained in face of art. 1530, C. C.; but, if the defendant does not set up this ground until the hearing, after having specially pleaded that the machines were good and such as were warranted to do the work for which they were sold, which has not been established, the purchaser having on the contrary proved that they were worth nothing, the defendant, while successful in having the action dismissed, will nevertheless be ordered, on account of his pleading, to pay the costs of his trial, including witnesses, etc. *Vallière* v. *Patent Development and Manufacturing Co.*, Q. R. 21 S. C. 826.

Simple Contract Debt—*Conversion into Specialty Debt—Payment or Acknowledgment of Debt — Evidence of.*] — Two promissory notes payable to a bank not having been paid, a trust deed was entered into, to which the defendant, the maker of the notes, the defendant's father, an agent of the bank as trustee, and the bank itself, were parties. The deed recited the defendant's indebtedness to the bank and also to his father, and that the father held certain lands as security therefor, and the father thereby conveyed the same to the trustee as security, in the first place for his indebtedness, and then for that of the bank, power being given to the trustee to sell the lands on one month's default in payment and notice in writing of the trustee's intention to sell. The deed contained an acknowledgment by the defendant of his indebtedness, but there was no covenant by him to pay the same. In 1893, on the bank pressing for payment, deeds of release were executed by the defendant and the other heirs and next of kin of the father, who was then dead, on the understanding that the father's debt had been paid, whereby, after referring to the recitals in the deed of 1884, and reciting that the releases were given to save the expense of a sale, they released to the bank all their interest in the said lands, and subsequently $5,500 was realized by the bank from a sale of a portion of the lands or the timber thereon:—Held, that the effect of the deed of 1884 was not to convert the debt into a specialty debt, nor did the reference to the recitals in a deed of 1884 or the deed of 1893 so incorporate them in the latter as to amount to an acknowledgment of the debt; nor did such deed operate as a transfer or assignment of the interest, if any, which the defendant had in his father's estate, as one of his personal representatives; nor did the receipt by the bank of the $5,500 constitute a payment by the defendant on account of the debt; so that no bar was created by the running of the Statute of Limitations, and it could, therefore, be validly set up by the defendant as a defence to an action brought by the bank in 1902; Maclennan, J.A., dissenting. Judgment in 2 O. W. R. 332, affirmed. *Bank of Montreal* v. *Lingham*, 24 Occ. N. 123, 7 O. L. R. 164, 3 O. W. R. 182.

LIQUIDATION.

See BANKRUPTCY AND INSOLVENCY.

LIQUIDATOR.

See COMPANY—DISCOVERY—PARTNERSHIP — PROHIBITION

LIQUOR ACT OF MANITOBA.

See CONSTITUTIONAL LAW.

LIQUOR ACT OF ONTARIO.

Conviction — *Removal by Certiorari — Commitment—Invalidity—Amendment — Act Relating to Justices—Irregularities—Names—Sentence—Adjudication—Fine.*]—The defendant was convicted on the 3rd February, 1903, before a Judge designated under s. 91 of the Ontario Liquor Act, 1902, of an illegal act within the meaning of that section, and was sentenced to be imprisoned for one year and

to pay a penalty of $400. On the same day a warrant was issued by the Judge committing the defendant to gaol in pursuance of the conviction, and under this warrant he was arrested and lodged in gaol. On the 30th January, 1903, a writ of certiorari was issued to the Judge and a County Crown attorney commanding them to send to the High Court of Justice all summonses, proceedings, etc., had before the Judge against the defendant and two others. This was served on the Judge on the 2nd February, before the date of the conviction and before the issue of the warrant:—Held, that the proceedings against the defendant were removed from the Court below by the issue and service of the certiorari, and that the subsequent proceedings were void. By 2 Edw. VII. c. 12, s. 15 (O.), the provisions of the Criminal Code respecting amendment of proceedings before justices of the peace are made applicable to all cases of prosecutions under Provincial Acts:—Held, not to apply to proceedings under the Liquor Act, 1902. Semble, that, in a conviction of this kind, it was no objection, on habeas corpus, that the name of the informant did not appear, nor that the prisoner was prosecuted under the name of "Foster," whereas his name was "Forster." Semble, also, that there was a sufficient sentence and adjudication, although the particular language which might have been necessary in a conviction by a magistrate was not made use of in the record of the proceedings; but, at all events, there was no reason why the sentence of imprisonment should not stand good, even if the adjudication of the fine were objectionable. *Rex* v. *Foster*, 23 Occ. N. 228, 5 O. L. R. 624, 2 O. W. R. 312.

Procuring Personation of Voter — *Ontario Election Act, 1902, ss. 167, 168—Procuring Person to Vote Knowing that he has no Right.*]—The defendant was convicted of having unlawfully induced and procured another person to vote at a certain polling place on a certain day, upon the question of bringing into force the Ontario Liquor Act, 1902, well knowing that such other person had no right to vote at the said time and place upon the said question:—Held, that the conviction was justified under s. 168 of the Ontario Election Act, R. S. O. 1897 c. 9 (made applicable by s. 91 of the Liquor Act), although the evidence shewed that the defendant's offence consisted in inducing one R., who was himself a voter, but had no vote at the polling place mentioned, to personate a voter at such polling place. Section 167 (1) makes the counselling or procuring of personation a corrupt practice, but does not provide a punishment; and s. 168 is in terms wide enough to cover the offence. *Rex* v. *Coulter*, 23 Occ. N. 280, 6 O. L. R. 114, 2 O. W. R. 523.

Referendum—*Voting—Corrupt Practices—Place of Trial—Jury—Conviction—Sentence—Imprisonment—Penalty—Costs—Form of Conviction—Habeas Corpus—Warrant of Commitment.*]—The provisions of s.-ss. (2) and (3) of s. 91 of the Ontario Liquor Act, 1902, are amplifications of the provisions of the Ontario Election Act which are incorporated in the Liquor Act; and the Judge (appointed under s. 91 (4) in this case did not exceed his powers in sentencing the accused, whom he found guilty of personation, to one year's imprisonment in addition to the payment of a penalty of $400 and costs. The jurisdiction is to try at any place in Ontario, and, it appearing in the order of conviction that the trial was held under the Act, and that the offence was committed at the city of Toronto, and the prisoner being sentenced to be imprisoned in the common gaol of the county of York, at the city of Toronto, the order shewed jurisdiction, although it did not specify that place of trial. It was immaterial that the order of conviction was intituled in the High Court of Justice, and that it did not shew the informer's name, the County Crown Attorney of the county of York being shewn to be the prosecutor. Nor was it material that the date of the offence was not shewn, the time for conviction not being limited by statute. The prisoner was in custody under an order for his imprisonment for one year. In addition to this he was ordered to pay a penalty of $400 and costs within thirty days, and in default to imprisonment for three months unless sooner paid:—Held, that upon habeas corpus proceedings within the year, the objections that the costs were not ascertained or stated in the order, and that the warrant of commitment erroneously stated that the time for payment of the penalty and costs had expired, could not be considered, but the right should be reserved to the prisoner to apply again for his discharge at the expiration of the year. The amount of the costs should have been fixed by the Judge and inserted in the order, instead of being left to be ascertained by a taxing officer. *Rex* v. *Carlisle*, 23 Occ. N. 321, 6 O. L. R. 718, 2 O. W. R. 905.

See CONSTITUTIONAL LAW—MANDAMUS.

LIQUOR LICENSE ACT.

I. BRITISH COLUMBIA, 918.
II. MANITOBA, 919.
III. NEW BRUNSWICK, 919.
IV. NORTH-WEST TERRITORIES, 920.
V. NOVA SCOTIA, 922.
VI. ONTARIO, 924.
VII. QUEBEC, 927.

I. BRITISH COLUMBIA.

Wholesale License—*Alien—Mandamus—Change in Membership of Licensing Board.*]—The Vancouver licensing board refused to consider an application for a wholesale liquor license because the applicant was a Japanese. An application for a mandamus was refused by a Judge. Applicant appealed to the full Court, and at the time of hearing of the appeal the personnel of the board had been changed:—Held, that the board should have considered the application regardless of the fact that he was a Japanese, but, as the personnel of the board had been changed, no order would be made. *In re Kanamura*, 10 B. C. R. 354.

Wholesale License—"*Person*"—*Firm*—*Statutes.*] — Unless specially provided, the word "person" does not include a firm; and s. 171, s.-s. 4, of the Municipal Clauses Act, authorizing the issue of wholesale liquor

licenses and to levy fees therefor from any "person," etc., does not include a firm. *In re Wah Yun & Co.*, 11 B. C. R. 154.

II. Manitoba.

Local Option By-law — *Changes in Name and Boundaries of Municipality—Mandamus—By-law in Part Bad.*]—The Act 53 V. c. 52, assented to 31st March, 1890, making changes in names and boundaries of the municipalities into which the province was divided, provided, by s. 81, that if, in any of the territory changed as to its municipal situation by the provisions of the Act, a by-law under the local option clauses of the Liquor License Act should be in force at the time of the coming into force of the Act, such by-law should continue to affect such territory as if the Act had not been passed. The village of Napinka was in 1890 part of the rural municipality of Brenda, in which a local option by-law had been passed forbidding the receiving of any money for licenses under the Liquor License Act; but, by 53 V. c. 52, the village became part of the newly created municipality of Winchester, and again in 1896 it was made part of a municipality then created under the old name of Brenda:—Held, that the local option by-law was still in force in that village, notwithstanding the changes in name and boundaries of the municipalities referred to. Doyle v. Dufferin, 8 Man. L. R. 286, followed. Held, also, that the by-law was valid, although it contained an additional provision unauthorized by the statute, purporting to prohibit the granting of any licenses within the limits of the municipality. The King v. The Fishermen of Faversham, 8 T. R. 352, The King v. Bumstead, 2 B. & Ad. 699, and Re Fennell and Guelph, 24 U. C. R. 238, followed. Application for mandamus to license commissioners to grant a license to sell liquor in Napinka refused without costs. *Rex* v. *License Commissioners for License District No. 1. In re Anderson*, 23 Occ. N. 270, 14 Man. L. R. 535.

III. New Brunswick.

Certiorari — *Conviction — Improper Arrest.*]—The fact that the defendant was arrested and brought before the magistrate who made the conviction, by a constable who was not qualified as required by C. S. N. B. c. 99, s. 69, is no ground for a certiorari under the Liquor License Act, 1896. The improper arrest does not go to the jurisdiction of the convicting magistrate. *Ex p. Gibberson*, 34 N. B. Reps. 538.

Conviction—*Minute—Period of Imprisonment—Seizure of Liquor—Disposal of Proceeds.*]—A conviction will not be quashed because the minute awarded an imprisonment of thirty days, while the section of the Act under which the conviction was made limited the time of imprisonment to one month. Under 60 V. c. 6, s. 12 (N. B.), it is not necessary for the magistrate to specify in his order any particular public hospital in which the proceeds derived from the sale of liquor seized by reason of its being illegally kept for sale, are to be paid. *Rex* v. *McQuarrie. Ex p. Rogers*, 36 N. B. Reps. 39.

Wholesale License—*Special Meeting of Commissioners—Absence of Notice—Revocation.*]—A wholesale license to sell liquor, granted under the Liquor License Act, 1896, at a special meeting of the license commissioners held after the regular meeting for the issue of licenses, when a license was refused to the applicant, and the license for the previous year was extended to the 1st August then next, of which special meeting no notice had been published, and no proof on oath of any special grounds why the license should issue had been shewn, and the commissioners had refused to hear evidence in proof of objections to the license being granted, is a license issued contrary to the provisions of the Act, and should be revoked on an application to a Judge under s. 31. *Miles* v. *Rogers*, 36 N. B. Reps. 345.

IV. North-West Territories.

Conviction—*Appeal—Condition Precedent—Affidavit—Validity of Territorial Ordinance Requiring.*]—A Territorial Ordinance enacting that no appeal shall lie from a conviction under the Liquor License Ordinance, unless the appellant shall, within the time limited for giving notice of appeal, make an affidavit before the convicting justice that he did not, by himself or otherwise, commit the offence, is not ultra vires of the Legislative Assembly. The omission to make such affidavit within the time prescribed is fatal to the jurisdiction of the Court to which the appeal is given, and is an omission which cannot be waived so as to confer jurisdiction. *Cavanagh* v. *McIlmoyle*, 5 Terr. L. R. 235.

Conviction—*Appeal — Forum — Contravention of Ordinance by Agent—Presumption—Intra Vires—Forfeiture of License.*]—Notice having been given of an appeal from a conviction or an infraction of the Liquor License Ordinance (a consequence of which conviction was a forfeiture of the license of the person convicted), to "the presiding Judge sitting without a jury at the sittings of the Supreme Court for the Judicial District of Western Assiniboia, to be holden at the town of Regina, on Tuesday, the 25th day of March, 1902," the Attorney-General applied to a Judge under Ordinance 1901, c. 33 (amending the Liquor License Ordinance), s. 21, s.-s. 3, to expedite the hearing:—Held, that the appeal was to the Supreme Court for the Judicial District named, generally, and not merely to a Court coming into existence only on the day mentioned, and that a Judge had jurisdiction to hear the application. Held, on the hearing of the appeal, that s. 64, s.-s. 5, of the Liquor License Ordinance (declaring that a contravention by a servant or agent shall be presumed to be the act of the licensee) was intra vires, although the effect might be to inflict imprisonment (on non-payment of fine) upon a person who had not personally violated the Ordinance. Held, also, that forfeiture of license results under s. 82 from a second or any subsequent offence against s. 64, notwithstanding that the convictions occurred in different licensing years. *Rex* v. *McLeod*, 5 Terr. L. R. 245.

Conviction—*Appeal—Necessity for Affidavit — Statute — Jurisdiction of Legislative Assembly.*]—Section 2 of c. 32 of Ordinances

of 1900, amending the Liquor License Ordinance (C. O. 1898 c. 89), requires that a special affidavit of the party appealing shall be transmitted with the conviction to the Court to which the appeal is given:—Held, against the contentions (1) that this provision is applicable only where the appeal is based on a denial of the facts established in evidence, and not where a question of law arising on such facts is involved; and (2) that the provision is ultra vires of the Legislative Assembly of the Territories—that there was no jurisdiction to entertain an appeal where this provision had not been complied with. *Rex* v. *McLeod*, 4 Terr. L. R. 513.

Conviction for Illegal Sale of Liquor — Motion to quash — Penalty less than prescribed — Invalidity — Saving enactment — Criminal Code, s. 896—Application of conditions—Appeal. *Rex* v. *Hostyn* (N.W.T.), 1 W. L. R. 113.

Conviction — *Jurisdiction—Single Justice of the Peace—"May"—Criminal Code.*] — The Liquor License Ordinance (No. 18 of 1891-92) provides by s. 105 that "all informations or complaints for prosecution of any offence against this Ordinance, except as herein specially provided, shall be laid or made before a justice of the peace," and by s. 106, that "such prosecution may be brought for hearing and determination before any two justices of the peace." The Criminal Code, part LVIII. (Summary Convictions), which has been made applicable to summary proceedings under the Liquor License Ordinance, provides (s. 842) that "every complaint and information shall be heard, tried, determined and adjudged by one justice or two or more justices as directed by the Act or law upon which the complaint or information is framed or by any other Act or law in that behalf," and that, "if there is no such direction in any Act or law then the complaint or information may be heard, tried, determined and adjudged by one justice:"—Held, on an appeal from a conviction, that s. 106 constituted a "direction" that prosecutions should be heard, etc., before two justices of the peace, and that, therefore, one justice had no jurisdiction to convict, except in the certain cases specially provided for in the Ordinance. *Regina* v. *Wilson*, 2 Terr. L. R. 79.

Conviction—*Prohibited Hours—Proof of Liquor License.*] — A conviction under the Liquor License Ordinance against a hotelkeeper, for allowing his bar to be open during prohibited hours, is invalid, if the informant does not allege, nor is proof made, that the accused held a liquor license for the hotel premises. *Regina* v. *Henderson*, 4 Terr. L. R. 146; *Regina* v. *Davidson*, 21 Occ. N. 98.

Conviction—*Supplying Liquor to Interdict—Forfeiture of License—Appeal—Stay of Proceedings.*]—Held, that where a licensee is convicted under s. 122 (3) of the Liquor License Ordinance, of supplying liquor to an interdicted person, with a knowledge of such interdiction, the effect of such conviction being that "his license shall be forfeited," an appeal from such conviction is a stay of proceedings and suspends all the consequences of the conviction, including the forfeiture of the license. *Simington* v. *Colbourne*, 4 Terr. L. R. 372.

Selling Liquor in Forbidden Houses — *Proof of License.*] — Upon a charge of having had a bar-room open and sold liquor during prohibited hours the prosecution must either allege or prove that the defendant was a licensee. *Regina* v. *Davidson*, 21 Occ. N. 98, 4 Terr. L. R. 425.

V. Nova Scotia.

Conviction—*Certiorari—Affidavit — Constitutional Law.*]—The judgment in 31 N. S. Reps. 436 vacating an order for a certiorari to remove a conviction against the appellant under the Nova Scotia Liquor License Act, on the ground that the affidavit required by s. 117 had not been produced on the application for the certiorari, was affirmed for the reasons given in the Court below, Gwynne, J., dissenting. *Bigelow* v. *The Queen*, 31 S. C. R. 128.

Conviction — *Sale of Liquor — Place of Sale—Evidence.*]—The defendant's clerk received, at Truro, N.S., an order, addressed to Bigelow & Hood, Ltd., Halifax, for one bottle of whiskey. The order was sent to Halifax, and was returned the following day, indorsed "Deliver this order from our Truro warehouse, and charge," etc. Bigelow & Hood rented from the defendant, who was president of the company, premises at Truro, which they used as a bonded warehouse; but the evidence shewed that the order in question was filled, not from the bonded warehouse, but from an open case in the defendant's cellar, which was kept there for that purpose, and that the money received by the clerk was put in the defendant's till, and a memorandum of it entered in the cash book, as a sale:—Held, that the evidence shewed a sale, by the defendant, in Truro. *Rex* v. *Bigelow*, 36 N. S. Reps. 559.

Conviction — *Third Offence — Proof of Previous Convictions — Procedure before Magistrate.*] — Previous convictions may be used as evidence upon which to base a conviction for a third offence against the provisions of the Liquor License Act, as often as such offence is charged and proved. It is not now necessary, under the statute (s. 131) to ask the defendant whether he has been previously convicted, unless he is present in person. Where at the conclusion of each of several cases tried before him, the magistrate decided to convict, but, at the instance of the defendant's counsel, refrained from imposing sentence and drawing up the formal conviction, until the County Court Judge should have decided a question, raised on the trial, as to the use of previous convictions:—Held, that the magistrate was not precluded from proceeding with the convictions at a later stage. The Queen v. McBerney, 29 N. S. Reps. 327, distinguished. *Rex* v. *Bigelow*, 36 N. S. Reps. 554.

Offence—*Time of Committing — Information—Conviction — Warrant of Commitment —Discharge.*]—To an order in the nature of a habeas corpus for the discharge of the defendant, a prisoner confined in the common gaol at H., the gaoler returned a warrant signed by the stipendiary magistrate for the county of H., reciting a conviction under the Liquor License Act made against the defendant "for that he, the said L. B., within the

space of six months last past, and previous to the information herein, which information is dated and laid on the 22nd day of April, A. D. 1904, did sell liquor by retail without the license therefor by law required," etc.:—Held, that the defendant was entitled to his discharge, it not appearing fom the warrant that the offence charged was committed within six months before the laying of the information. *Rex* v. *Boutillier*, 24 Occ. N. 240.

Prosecution—*Witness for Defence—Compelling Attendance — Fees — Jurisdiction of Magistrate—Habeas Corpus.*]—On a prosecution before the stipendiary magistrate for the city of Halifax, for a violation of the Liquor License Act, proof was given of service of a summons on M., who it was asserted, was a material witness for the defendant, but without tendering witness fees, and an application was made to the magistrate for a warrant to compel the attendance of the witness, the fees being at the same time tendered to the magistrate. The application was refused on the sole ground that fees were not tendered in the first instance to the witness, and the trial was proceeded with, and the defendant convicted. On application for a writ of habeas corpus:—Held, Weatherbe, J., dissenting, that the question whether, in a case under the Liquor License Act the witness could be compelled to attend, or the party was entitled to a warrant, unless the fees had been paid, was open to debate, but that, even if the decision of the stipendiary magistrate was erroneous, it could not be reviewed upon habeas corpus; and the application must be dismissed. *Rex* v. *Clements*, 34 N. S. Reps. 443.

Sale by Agent—*Conviction—Service of Minute—Burden of Proof—Occupant.*]—The Liquor License Act, R. S. N. S. 1900 c. 100, s. 111, provides that "the occupant of any house, shop, room, or other place in which any sale has taken place, shall be personally liable to the penalty, notwithstanding such sale was made by some other person who cannot be proved to have so acted under or by direction of such occupant:"—Held, that the defendant was properly convicted for sales made by his son, who lived with him in a house occupied by the defendant and his family. Per Ritchie, J., that the service, upon the persons convicted, of an incorrect copy of the minute of conviction, followed by service of a correct one, would not invalidate the proceedings, or prevent the magistrate from preparing a conviction in accordance with the original minute made by him, and issuing process to enforce the penalty or imprisonment. Per Graham, E.J., that the son living with his father was a person "suffered to be or remain" on the premises within the meaning of the Act, s. 111, s.-s. 2; that the burden was on the defendant of proving that the sales were made without his authority; and that the defendant was an "occupant" within the meaning of the Act. *Rex* v. *Conrod*, 35 N. S. Reps. 79.

Summary Conviction—*Evidence—Third Offence — Proof of Previous Convictions — Trial on Three Separate Charges—Evidence in One Affecting Decisions in Others.*]—Motion to quash three convictions for offences against the Liquor License Act, R. S. N. S. c. 100, all being convictions for a third offence committed on different days. It was contended that the previous convictions could not be used more than once as evidence of previous offences for the purpose of convicting the defendant a third time:—Held, that such previous convictions may be used as evidence on which to base convictions for a third offence as often as one is charged and proved. It was also urged that, the defendant being before the magistrate charged with three separate offences, the magistrate should dispose of one first before entering upon the trial of the others: Regina v. McBurney, 29 N. S. Reps. 327. The magistrate and the prosecutor's counsel produced affidavits shewing that the magistrate decided to convict at the conclusion of the evidence in each case, and that he simply refrained from imposing the sentence and drawing up the formal conviction. The magistrate also stated in his affidavit that he was not influenced by the evidence in one case in making up his judgment in the other:—Held, that Regina v. McBurney was not, therefore, applicable. *Rex* v. *Bigelow*, 24 Occ. N. 141.

Witness—*Conviction for Non-attendance—Proof of Tender of Witness Fees.*]—The defendant was summoned to appear as a witness on behalf of the prosecution at the trial of a complaint under the Liquor License Act, R. S. N. S. 1900 c. 100. He did not appear, and afterwards a summons was issued requiring him to appear to answer to the charge of refusing or neglecting to attend as a witness. He appeared, and, after hearing evidence in support of the charge, the justices convicted the defendant, and imposed a fine of $5 and costs:—Held, setting aside the conviction with costs, that the defendant could not be made liable for the penalty imposed by the Act, s. 161 (2), in the absence of proof that the proper fees were tendered to him before he was required to give evidence. *Rex* v. *Chisholm*, 35 N. S. Reps. 505.

VI. Ontario.

Conviction—*Third Offence—Evidence of Previous Convictions—Improper Reception—Subsequent Deletion.*]—A conviction of the defendant for a third offence against the Liquor License Act, R. S. O. 1897 c. 245, was quashed, on the ground that the convicting magistrate had improperly admitted evidence of previous convictions before the determination of the defendant's guilt upon the charge against him of a third offence, contrary to s. 101 of the Act. Regina v. Edgar, 15 O. R. 142, approved. Dictum of Armour, C.J., in Regina v. Brown, 16 O. R. 41, 48, disapproved:—Held, also, that the jurisdiction of the magistrate was gone when he admitted the improper evidence and his competence was not restored by its deletion. *Rex* v. *Nurse*, 24 Occ. N. 222, 7 O. L. R. 418, 3 O. W. R. 224,

Conviction—*President of Club—Keeping Liquor for Sale—R. S. O. c. 245, ss. 50, 53 — Intra Vires—Penalty.*]—Where intoxicating liquor was kept by the president of an incorporated whist club in the club's room for intended consumption by the members of the club, and was in fact consumed and paid for by them, although neither the club nor any member of it was licensed under the Liquor License Act:—Held, having regard to the provisions of s. 53 of the Act, that the defendant should be convicted of a violation

of s. 50. The provisions of s. 53 are intra vires of the Legislature of Ontario. Section 86, and not s. 72, provides the penalty applicable to such a case as this. *Regina* v. *Lightburne*, 21 Occ. N. 241.

Delivery of Intoxicating Liquor to Person after Notice—Licensed seller — Service of notice on barman—Sufficiency — Damages—Costs — Notice coming to knowledge of seller. *Middleton* v. *Coffey*, 5 O. W. R. 18, 336.

Execution—*Fieri Facias — Liquor License—Assignment of—Covenant by Lessee to Re-assign License.*]—A license under the Liquor License Act cannot be seized by a sheriff under a writ of fieri facias. The piece of paper upon which it is printed and written ceases to be seizable as an ordinary chattel when it is converted into such a license. The right to sell liquor at a particular place under such a license is a personal one, and is not assignable by the holder of it unless he obtain the consents and comply with the conditions of s. 37 of the Liquor License Act, R. S. O. c. 245. A covenant in the lease of an hotel by the lessee, that at the expiration of the lease he will assign to the lessor the license, if any, then held by him, is not a covenant binding upon the assignee of the term as such. It is a merely personal covenant, having nothing to do with the land or its tenure. *Walsh* v. *Walper*, 22 Occ. N. 49, 3 O. L. R. 158.

Permitting Intoxicating Liquors to be Consumed on Unlicensed Premises—House of public entertainment—Lodging house. *Rex* v. *Cretelli*, 3 O. W. R. 176.

Powers of License Commissioners—*Resolution Prohibiting Games of Chance in Licensed Premises — "Euchre"—Knowledge of Licensee—Conviction—Form — Distress—Imprisonment—Costs.*]—A board of license commissioners, under the authority of the Liquor License Act, R. S. O. 1897 c. 245, s. 4, s-s. 4, passed a resolution "that no gambling or any game of chance whatever for gain or amusement or for any other purpose whatever shall be played about any licensed tavern or other house of public entertainment . . . or on the premises:"—Held, McMahon, J., dissenting, that the powers of the commissioners under s. 4 were not restricted by s. 81, and that the resolution was within their power. Four persons played "euchre" for amusement in a room behind the bar of the defendant's hotel, the cards used being the property of one of the players, a boarder in the hotel:—Held, that "euchre" is a game of chance, and that the defendant was properly convicted of an infraction of the resolution by reason of the game having been played in his premises, though without his knowledge:—Held, also, that s. 100 of the Act should be read into the resolution providing for the recovery of the fine imposed upon a conviction, and that the direction of the conviction for recovery by distress and in default of distress imprisonment was authorized:—Held, also, that where the license inspector attends Court as prosecutor he is to be allowed certain expenses by way of costs, as provided in s. 117, and there was nothing wrong in the amount ($4.20) allowed for costs in this case. If it were wrong, it was severable, and could not affect the conviction. *Rex* v. *Laird*, 23 Occ. N. 281, 6 O. L. R. 180, 2 O. W. R. 667.

Transfer of License—*Premises to be Made Suitable—Powers of Commissioners—Injunction — Costs.*]—License commissioners appointed under the Ontario Liquor License Act have no power to say to an applicant for a transfer of a license that, if he will put certain premises into a suitable state for compliance with the law in the future, they will transfer a license to such premises; they are entitled to act under the statute only with regard to the existing state of facts, not to make promises as to the future, in such cases. O'C., having no interest in the premises proposed to be licensed, and having no valid license at all, presented a petition to the commissioners for the transfer to these premises of a license standing in his name for other premises in which he had no longer any real interest. The commissioners decided that they would allow the transfer of O'C.'s license to the new premises when they should be made suitable; but before that time arrived O'C., whose fitness for the transfer was one of the subjects of the petition, had ceased to have any interest in the matter, and was allowed to make over his right to K., who in this way escaped the necessity of obtaining the certificate of the ratepayers as to his fitness:—Held, that this was illegal, and if the plaintiff had asked promptly for an injunction to prevent O'C., when he had no valid license and no interest in the new premises, from obtaining rights by asserting that he had, he might have obtained some relief; but at the trial it was too late to interfere, for K. had obtained rights which could not be interfered with in his absence, and the license commissioners whose conduct was in question had ceased to hold office:—Held, also, that an offer made by the defendants to submit the question of the costs of the action to be disposed of in Chambers should have been accepted by the plaintiff, and, as it was not, the plaintiff was not entitled to costs against O'C.; and the license commissioners should not have costs against the plaintiff. *East* v. *O'Connor*, 21 Occ. N. 498, 2 O. L. R. 355.

Transfer of License to New Premises—Notice—Report of Inspector — Injunction. *Stephens* v. *O'Connor*, 1 O. W. R. 241.

Will—*Devise of Hotel Premises to Widow—Benefit of Children——Division of Income—Transfer of License to Widow—Creditors—Receiver.*]—A testator by his will devised hotel premises to his wife during her widowhood, for the benefit of herself and four children, the income to be applied for their support and maintenance until the children became of age, and in case of daughters until marriage. On the widow marrying, the property was to go to children, the widow being paid $1,000. On the testator's death in 1896, the widow applied to the license commissioners and obtained a transfer of the license to her for the remainder of the year; and for the subsequent years until 1900 the license was granted to her, she carrying on the business and maintaining herself and the children thereout, no money of the estate going into the business:—Held, that, after the testator's death, the license and goodwill of the hotel business belonged to the

widow personally, and formed no part of his estate; and apart therefrom the income was divisible amongst the widow and children as in Allen v. Furness, 20 A. R. 34:—Held, also, that creditors of the widow were entitled to attach the widow's interest in the property, which could be reached by the appointment of a receiver. *Taylor* v. *Macfarlane*, 22 Occ. N. 325, 4 O. L. R. 239, 1 O. W. R. 283.

VII. QUEBEC.

Confirmation of Licenses — *Necessity for Notice—Imperative Statute.*]—The Liquor License Act of Quebec requiring on the part of a municipal council, at the time of the confirmation of certificates of license, a preliminary notice, is imperative and of public order, and the absence of such notice will justify any one interested in demanding the setting aside of the confirmation of such certificate within the time and in the manner indicated by the Municipal Code. *Village of Plessisville* v. *Moffet*, Q. R. 12 K. B. 415.

Conviction — *Payment of Costs — Suspended Sentence—Mandamus.*]—In a prosecution under the Quebec License Act, 63 V. c. 12, in which the defendant pleaded guilty, a judgment by the magistrate suspending sentence on payment of costs, is illegal and ultra vires. Had the magistrate merely suspended sentence, a writ of mandamus would lie against him ordering him to proceed to adjudicate under s.-s. 3 of Art. 992, C. P. *Lambe* v. *Lafontaine*, Q. R. 26 S. C. 132.

Conviction — *Sentence—Changing—Payment of Costs only—Certiorari.*]—Under the Liquor License Act of Quebec a Judge has no discretion to change his sentence for the offence of keeping liquors for sale without license into a sentence imposing payment of costs only, and a certiorari will be granted to remove a conviction so drawn up. *Lambe* v. *Desnoyers*, 6 Q. P. R. 439.

License Commissioners—*Prohibition to—Deposit — Absence of—Preliminary Exception—Grant of License—Discretion — Opposition—Petitions—Enquête.*] — 1. The absence of the deposit required by law with the application for a writ of certiorari or prohibition should be pleaded by preliminary exception. 2. License commissioners, although not among the infertor courts mentioned in Arts. 59, 63, 64, and 65, have duties of a judicial character which, on proper occasion, subject them to the superintending authority of the Superior Court; and the proper remedy is a writ of prohibition. 3. The only proof required, or admissible, on a writ of prohibition against the license commissioners is such as would go to establish want or excess of jurisdiction. 4. When Art. 836, R.S.Q., may be invoked, the license commissioners can no longer grant a license as a matter of discretion; but their judgment is none the less final as to whether majority oppositions, or two previous oppositions, really exist. 5. The refusal of the commissioners to re-open the enquête after both parties had formally declared their respective enquêtes closed is not sufficient to support a writ of prohibition. 6. The refusal of the commissioners to count on the opposition signatures of duly qualified electors, for the reason that the same persons had also signed in support of the application, was a decision on an issue within their jurisdiction, and was, moreover, a proper decision. *Kearney* v. *Desnoyers*, Q. R. 19 S. C. 279.

License Fee—*Amount of—Fees Fixed by Municipal Charters—Conflict.*]—The statute amending the Liquor License Act of Quebec, 54 V. c. 13, which enacts that the municipal councils of cities, towns, villages, and other municipal local authorities cannot impose by by-law, resolution, or otherwise a tax, impost, or fee, exceeding in any year the sum of $50, upon a person holding a license under that statute, whether for a confirmation or a certificate to obtain the license, or otherwise, for the object for which he possesses such license, has not the effect of abrogating the provisions of particular charters permitting municipal corporations to impose a higher tax. *Town of Farnham* v. *Roy*, Q. R. 12 K. B. 237; *Hogan* v. *City of Montreal*, *ib.* 251.

Municipal Council—*Confirmation of License — Affidavit — Irregularities — Certificate.*]—The function of a municipal council, when it is called upon to confirm a certificate for a hotel license, is limited to examining, verifying, and confirming such certificate; and irregularities contained in the affidavit of the petitioner, required by Art. 11 of the License Act of Quebec, do not effect the validity of the resolution of the council confirming the certificate, such affidavit being required only for the satisfaction of the collector of the revenue of the province. 2. It is not necessary that the oath required by Art. 21 of the License Act should be set forth in writing. Therefore, in this case, the deponent having actually taken the oath before the council in session, although an affidavit was prepared of which the jurat was signed by the secretary-treasurer, instead of by a member of the council, proof of the authenticity of the signatures affixed to the certificate was held to have been regularly made. Judgment in 19 S. C. 162, affirmed. *Duhaime* v. *Parish of St. Francois du Lac*, Q. R. 21 S. C. 89.

Offence — *Conviction—Suspended Sentence—Quashing.*] — A magistrate has no discretion to suspend sentence upon conviction of an offence against the Quebec License Law, but must impose the fine therein prescribed; a judgment suspending sentence will be quashed on certiorari. *Lambe* v. *Lafontaine*, 6 Q. P. R. 422.

Personal Character of License—*Conviction—Disorderly House—Proof of — Confirmation of License — Commissioners.*] — There are objections to the personal character of a licensee, within the meaning of Art. 27 of the Quebec Liquor License Act, if she has been convicted of a violation of the provisions of the Act, and has tolerated disorderly conduct in a restaurant for which she holds a license, though it is not actually kept by her, even if she does not know of such conduct. 2. Proof of such disorderly conduct need not be made according to the strict rules of evidence; it is sufficient if, in whatever manner it is made before the license commissioners, it convinces them of the existence of disorder. 3. The license commissioners cannot be forced to confirm the certificate which a person against whom

such facts have been established to their satisfaction has obtained for a hotel license. *Dagenais* v. *Desnoyers*, Q. R. 18 S. C. 16.

Sale to Drunkard — *Action by Wife—Petition for Authorization—Notice Forbidding Sale*]—A married woman does not need judicial authorization to ester en justice under the provisions of s. 149 of the License Law of Quebec, 63 V. c. 12. 2. A notice forbidding the sale of liquor to the plaintiff's husband, not strictly according to the provisions of s. 147 of the same Act, is null and of no effect. *Faulkner* v. *Faulkner*, 4 Q. P. R. 173.

Sale to Minor—*Indirect Sale.*]—Article 91 of the License Act must be interpreted strictly. To hold the license holder responsible in law, the sale must be made directly to the person under 18 years of age. *Perkins* v. *Brais*, Q. R. 20 S. C. 536.

LIQUOR TRAFFIC REGULATION ACT.

See MUNICIPAL CORPORATIONS.

LIS PENDENS.

Action to Cancel—*Contract for Sale of Land—Interest of Vendor—Instalments — Notice—Land Registry Act — Declaratory Judgment—Cause of Action—Perfecting after Commencement of Action.*]—In 1894 a husband conveyed certain lands to his wife, and from her by writing dated in October, 1896 (registered in March, 1897), the plaintiff contracted to purchase one parcel of the land; the agreement provided that the purchase money should be paid by instalments, which were paid until November, 1898, when the wife conveyed to the plaintiff and took his note in payment of the balance. In August, 1897, the defendant company commenced an action against the wife to set aside the conveyance to her from her husband as a fraud on his creditors, and registered a lis pendens on the 24th September, 1897, and by the final judgment in that action the wife was directed to do all acts necessary to make the lands comprised in the impeached conveyance available to satisfy the claims on her husband's estate. The plaintiff on applying to register his title first learned of the action and the lis pendens. In an action for cancellation of the registry of the lis pendens:—Held, that the estate acquired by the conveyance to the plaintiff from the wife remained subject to the rights of the company, as they should be determined by the result of its action against the wife. (2) The plaintiff in order to get a title should not be compelled to pay again that portion of the purchase money which he had paid since the registration of the lis pendens. (3) Notice of the company's adverse claim was not imputed to the plaintiff by reason of the registration of the lis pendens. (4) Sections 85-88 of the Land Registry Act, providing for the cancellation of a lis pendens, are not available in practice where, as in this case, the nature and extent of the interest affected by the lis pendens are not ascertained. (5) The plaintiff was entitled to a declaration of right only, and the Court declared that he was within his rights in making the payments before notice of the adverse claim; that the lis pendens did not affect the interest acquired by the plaintiff under his contract; and that the defendant company had a charge on the lands for the amount of purchase money unpaid. So long as there remains anything to be done to work out the judgment in an action, the action is pending. Upon a contract for the sale of land, purchase price of which is payable by instalments, the vendor retains an interest in the land proportional to the amount of purchase money unpaid, which interest is capable of being affected by lis pendens. Semble, generally a cause of action imperfect at the issue of the writ is not perfected, either at law or in equity, by subsequent events. *Peck* v. *Sun Life Assurance Co. of Canada*, 11 B. C. R. 215, 1 W. L. R. 302.

Cancellation of — *Security—Speeding Trial*] — On a summons to cancel lis pendens, the Judge being of the opinion that the plaintiffs could not succeed in the action, ordered that the lis pendens be cancelled on the applicants giving the nominal security of $1:—Held, that it was not a case for cancellation of the lis pendens, but that the plaintiffs should be put on terms to speed the action. *Merrick* v. *Morrison*, 7 B. C. R. 442.

Lease—*Damages—Breach of Covenants—Cancellation.*]—The defendant in an action for damages for breaches of covenants in a lease cannot plead as lis pendens the pendency of an action for damages arising from the cancellation of the lease. *Larue* v. *Couture*, 5 Q. P. R. 460.

Motion to Vacate—Action by simple contract creditor to set aside waiver of agreement for sale of land—Attachment of debts—Discontinuance of action — Costs. *Green* v. *Temple*, 6 O. W. R. 15.

Motion to Vacate—Action for equitable execution—Notice of execution in sheriff's hands—Delay in prosecution of action—Costs of motion. *Barwick* v. *Radford*, 6 O. W. R. 583.

Motion to Vacate—Delay in prosecuting action — Special circumstances. *Bank of Hamilton* v. *Grose*, 3 O. W. R. 218.

Motion to Vacate—Tying up land pending result of another action—Summary dismissal of action. *Knapp* v. *Carley*, 2 O. W. R. 1186, 3 O. W. R. 187, 940.

Pleading — *Exception.*] — Lis pendens must be set up by preliminary exception, and allegations of lis pendens in a plea will be struck out on motion. *Pulos* v. *Scroggie*, 6 Q. P. R. 205.

Promissory Note — *Revendication* — *Action for Account and Partition.*]—It is not a ground for staying an action en revendication of a promissory note, that an action for account and partition of property, of which this note is a part, is pending at the time. *Legault* v. *Legault*, 6 Q. P. R. 32.

Vacating—*Ex Parte Application—Registration.*]—The plaintiff having registered a lis pendens, a local Judge, on the plaintiff's ex parte application, made an order vacating it, and the plaintiff registered the order within 14 days of its being made:—Held, that ss. 98 and 99 of the Judicature Act, giving a Judge the power to vacate a certificate of lis pendens where the plaintiff or other party at whose instance the certificate was issued does not in good faith prosecute the litigation, and allowing registration of the vacating order only, on or after the fourteenth day from the date of the order, are applicable only when the party seeking to vacate the certificate is not the person by whom and for whose benefit it has been registered. Where a party to an action registers a lis pendens for his own benefit, he may get an order vacating it at any time, and register the same. *McGilliviay* v. *Williams*, 22 Occ. N. 373, 4 O. L. R. 454, 1 O. W. R. 510.

LITIGIOUS RIGHTS.

Purchase of — *Action by Assignee — Pleading—Inconsistent Defence.*]—A defendant sued by the assignee of litigious rights may in his defence contest the claim and at the same time invoke the benefit of art. 1582, C. C., and deposit the amount which he alleges to be the price paid on the sale of such rights to the plaintiff, in view of the fact that by such deposit he offers to take the plaintiff's bargain, and thereby ceases in effect to contest. *Crevier* v. *Evans*, 4 Q. P. R. 133.

LIVERY STABLE KEEPER.

See MUNICIPAL CORPORATIONS.

LOAN ASSOCIATION.

See MORTGAGE.

LOCAL BOARD OF HEALTH.

See MUNICIPAL CORPORATIONS.

LOCAL COURTS ACT.

See REGISTRY LAWS.

LOCAL IMPROVEMENTS.

See ASSESSMENT AND TAXES—MUNICIPAL CORPORATIONS.

LOCAL JUDGES AND MASTERS.

High Court—*Barrister—Deputy Judge—Jurisdiction.*]—A barrister appointed by a local Judge of the High Court as his deputy has no jurisdiction to made an order in an action in the High Court. *Denny* v. *Carey*, 21 Occ. N. 581; *Webb* v. *Nickel Copper Co. of Ontario*, 21 Occ. N. 592.

Jurisdiction in Chambers—Reference of motion to Master in Chambers. *Mahoney* v. *Welsh*, 6 O. W. R. 18.

See REFERENCE AND REPORT.

LOCAL OPTION.

See MUNICIPAL CORPORATIONS.

LOCAL REGISTRAR.

See PARLIAMENTARY ELECTIONS.

LOCATION TICKET.

See CROWN.

LODGING HOUSE KEEPERS.

See MUNICIPAL CORPORATIONS.

LORD CAMPBELL'S ACT.

See DAMAGES.

LORD'S DAY.

See SUNDAY.

LOST DEED.

See DEED.

LOST DOCUMENT.

Debenture — Action on—Indemnity — Costs — Tender. *Cusack* v. *Southern Loan and Savings Co.*, 2 O. W. R. 179.

LOST NOTE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

LOST PROPERTY.

Rights to Finder—*Third Person—Master and Servant—Property Found by Servant on Master's Premises.*]—The defendant was a shop-keeper, and the plaintiff a salesman

in the employment of the defendant in the shop. One day the plaintiff picked up from the floor of the shop a roll of bank-notes, and handed it to the defendant, who caused inquiry to be made for the owner, and put the notes in his till for safe-keeping. No claim was made, and the defendant kept the notes:—Held, that the property in question was "lost," in the legal sense of the word; and in such a case, as against all other persons than the owner, the finder becomes the substantial owner of the thing found by him, and may maintain trover or other appropriate action to enforce such right of ownership. Bridges v. Hawkesworth, 15 Jur. 1079, 21 L. J. Q. B. 75, and South Staffordshire Water Co. v. Sharman, [1896] 2 Q. B. 44, referred to. And the plaintiff was not, by reason of being in the employment of the defendant, deprived of his rights as a finder. McDowell v. Ulster Bank, 60 Alb. L. J. 346, distinguished on the ground that it was the duty of the porter of the bank who found the lost property in that case, to pick up such articles and hand them over to the bank, and his possession was the possession of the bank itself. *Haynes* v. *Mundle*, 22 Occ. N. 152.

LOST WILL.

See WILL.

LOTTERY.

See ASSESSMENT AND TAXES — CONSTITUTIONAL LAW—CRIMINAL LAW.

LUNATIC.

Action Brought in Name of—Benefit of lunatic's executors—Payment into Court—Amendment. *Ramsay* v. *Reid*, 2 O. W. R. 720, 4 O. W. R. 113, 6 O. W. R. 114.

Commitment — *Documents Required — Documents Authentiques—Attack by "l'inscription de fausse."*[—The documents required by art. 3196, R. S. Q., for the confinement of the insane, although made under oath before a justice of the peace, are not authentic documents liable to be attacked by "l'inscription de fausse." *Rousseau* v. *Sisters of Charity*, Q. R. 27 S. C. 166.

Commitment to Asylum—*Certificate of Mayor—Facts to be Shewn.*]—The mayor of a municipality cannot be compelled to sign the certificate (form E.) provided for by the statute concerning asylums for the insane, except upon sufficient proof that the person whose confinement in an asylum is sought has had his domicil in the municipality during at least 4 months, that he is insane or idiotic, and that he or the persons bound by law to maintain him have or have not property available. *Torrance* v. *Weed*, Q. R. 24 S. C. 364.

Committee—*Funds in Hands of—Payment into Court—Reference — Report of Master—Revision of Costs.*]—The rule has for many years been that when the Court intervenes in respect to the property of persons not sui juris, the money shall not be left to private investment, but shall be paid into Court, and become subject to its general system of administration by which the interest will be punctually paid and the corpus will always be forthcoming when needed. The general rule to be observed by local officers, when it is advisable that the estate should be realized and turned into money, is, that the fund so realized shall be paid into Court; and when part of the estate is converted and part kept for the abode of a lunatic or otherwise, the scheme for dealing with the whole shall be reported to the Court, that proper directions may be given. In two cases where local Masters had reported schemes for the maintenance of lunatics, and made provision for the moneys of the estates being collected by the respective committees, and thereafter for their investment by the committees on securities of different kinds at their discretion, and in one case had taxed the costs and inserted the amount in the report:—Held, that it is imperative that the costs in lunacy matters be revised by the proper officer in Toronto; and that the moneys in the hands of the committees and to be collected from debtors or by the sale of the land must be forthwith paid into Court. *In re Norris, In re Drope*, 23 Occ. N. 49, 5 O. L. R. 99, 1 O. W. R. 817.

Confinement in Asylum—*Certificates—Municipal Officers—Mandamus.*]—The father of an insane person, who has not the means to pay the whole cost of the lodging, maintenance, and treatment of such person in an asylum for the insane, may by mandamus compel the mayor and the secretary-treasurer of the municipality in which such person lives to sign and attest the certificates required by art. 3195a et seq., R. S. Q. (added by 55 & 56 V. c. 30), for the confinement of such person in an asylum for the insane; and the provision of art. 3228b, R. S. Q., which renders such officers liable to a penalty of $20 in case of their refusing to sign and attest such certificates, does not exclude recourse by mandamus to compel them to do so. *Cournoyer* v. *St. Martin*, Q. R. 21 S. C. 305.

Death of—*Confirmation of Report—Discharge of Committee.*]—Before the confirmation of the Master's report appointing a committee of the person and estate of a lunatic and propounding a scheme for her maintenance, the lunatic died:—Held, notwithstanding the death, that an order should be made (the executors of the deceased consenting) confirming the report and for the discharge of the committee and the surrender of his bond. *In re Garner*, 21 Occ. N. 240, 1 O. L. R. 405.

Domicil — Residence abroad—Money in bank in Ontario—Right of foreign committee to—Change of domicil—Private international law—Costs. *Falls* v. *Bank of Montreal*, 1 O. W. R. 538.

Interdiction—*Conseil Judiciaire — Appeal.*[—The prothonotary or the Judge may, upon a petition for interdiction for lunacy, do no more than appoint a conseil judiciaire for the respondent. 2. An appeal lies to the Judge from the decision of the prothonotary so naming a conseil judiciaire. *Ledoux* v. *Meunier*, 5 Q. P. R. 249.

Interest under Will—Advice to trustees —Right of appointment by lunatic—Payment into Court — Maintenance of lunatic. *Re Faulkner*, 3 O. W. R. 391.

Party to Cause—*Curator—Appointment of New One—Appeal—Stay of Proceedings.*]—If, while a cause is standing for judgment, one of the parties, an interdict, is relieved from interdiction, and subsequently is again made an interdict, and a new curator is appointed for him, an appeal, in case of a judgment unfavourable to him, cannot be brought by the old curator; and a stay of proceedings will not be ordered to allow the new curator to obtain the authorization required by law. *Leduc* v. *Parish of St. Louis de Gonzague*, 5 Q. P. R. 446.

Petition for Declaration—Evidence — Interest of alleged lunatic. *Re Connell*, 4 O. W. R. 95.

Plaintiff Becoming Insane after Judgment—Proposed appeal—Appointment of next friend—Inspector of prisons and public charities. *Holness* v. *Russell*, 1 O. W. R. 655, 774, 2 O. W. R. 334.

Proceedings to Set Aside Interdiction—*Recovery of Costs—Solicitor—Effect of Judgment.*]—An advocate or notary, acting upon the instructions of an interdict for insanity, and in good faith believing that the cause of interdiction had ceased, but acting without the consent and contrary to the instructions of the curator, is not entitled to recover from the curator in his said quality the costs of such proceedings, which were unsuccessful because it was held that the cause of interdiction had not ceased. Semble, a judgment setting aside the interdiction would have a retroactive effect to the date of the cessation of the cause of interdiction, and would necessarily validate an agreement by the interdict to pay the costs of the proceedings to obtain the removal of the interdiction. Judgment in Q. R. 16 S. C. 565, affirmed. *Bouchard* v. *Bastien*, Q. R. 19 S. C. 507.

Responsibility for Tort — *Damages — Intervention of Statutory Guardian.*]—Under the common law, a lunatic is civilly liable to make compensation in damages to persons injured by his acts, though, being incapable of criminal intent, he is not liable to indictment and punishment. In this case, however, where the defendant had burnt a barn, and lunacy was set up, the evidence went to shew that, while not responsible, perhaps, to the extent of an ordinary man, he was not utterly unconscious that he was doing wrong:—Held, therefore, that the defendant was liable at least to the extent of the damage done, taken, however, at rather a low than a high estimate. It was ordered that, before execution issued, notice should be given to the Inspector of Prisons and Public Charities. *Stanley* v. *Hayes*, 24 Occ. N. 289, 8 O. L. R. 81, 3 O. W. R. 784.

Senile Decay—*Appointment of Guardian —Provisions of Order.*]—W. was about 85 or 90 years of age. He was not of unsound mind in the usual sense, but from extreme age and physical weakness was incompetent to manage his affairs, and required constant care and attention. An order was made appointing two of his children to act "in the nature of a guardian or committee of his person and estate." Form of order given. There was no fund in Court, nor did the order provide for payment in of any fund. Vane v. Vane, 2 Ch. D. 124, and In re Brandon's Trusts, 13 Ch. D. 773, followed. *In re W.*, 21 Occ. N. 340; *In re B.*, *ib.* 341.

Tort Committed by—*Responsibility of Parent.*]—Where a lunatic has attained his majority, but is living in his father's house, the father is not responsible for damage caused by the lunatic, although the father has failed to procure an interdiction of the son as such, if it appears that the son has for a long time been withdrawn from the authority of his father, and it is not proved that the father knew the dangerous character of his son's malady, or that the damage complained of would be the consequence of his imprudence or negligence. *Theroux* v. *Currier*, Q. R. 21 S. C. 156.

MAGISTRATE.

See CRIMINAL LAW—JUSTICE OF THE PEACE —POLICE MAGISTRATE.

MAINTENANCE.

See CHAMPERTY AND MAINTENANCE—WILL.

MALICE.

See ARREST—DEFAMATION—FALSE ARREST—MALICIOUS PROCEDURE—PARLIAMENTARY ELECTIONS.

MALICIOUS PROSECUTION.

Arrest and Trespass—*Reasonable and Probable Cause—Malice—Post Office—Letter with Fictitious Address.*]—The plaintiff, a letter carrier employed by the post office department at Montreal, was intrusted with the delivery of two decoy letters for the purpose of testing his honesty. Each of the letters contained a small sum of money. One of the letters bore a non-existent address, the other a real address. The latter was delivered, but the former, under the rules of the department, should have been entered in the book kept at the post office for that purpose, and the letter returned. There being no entry of this letter, after the usual time for making such entry had elapsed, the plaintiff was detained and searched by the defendant, a peace officer acting under the instructions of the department. The letter not being found on the plaintiff he was released. On the following day the letter was returned to the post office:—Held, that the plaintiff having violated the rules of the department, there was reasonable and probable cause for detaining and searching him, and that his action for damages against the officer, who acted without malice, could not be maintained. 2. A letter is a post letter, although

directed to a fictitious address. *Mayer* v. *Vaughan*, Q. R. 20 S. C. 549.

Constable—Good faith—Warrant—Notice of action—Fine—Municipal corporation—Resolution—Ultra vires—Members of council—Justice of the peace. *Gaul* v. *Township of Ellice*, 1 O. W. R. 119, 3 O. L. R. 438.

County Courts Act, B. C., ss. 23, 31—*Waiver of Objection to Jurisdiction—False Imprisonment—Interference by Complainant.*]—The plaintiff took possession of the defendant Mason's float, which he found adrift on a lake. Mason, although aware that the plaintiff claimed a lien for salvage, made no move towards recovering the float until after three weeks, when he, in company with a constable, demanded it, and on the plaintiff refusing to give it up without compensation, he was arrested without a warrant and taken to gaol, and subsequently an information laid against him under s. 338 of the Code for taking and holding timber found adrift, was dismissed. Mason provided the tug which got the float and carried the plaintiff to gaol, and accompanied the constable with the plaintiff to the gaol:—Held, on the facts, that the arrest was the joint act of Mason and the constable, and that Mason was therefore liable for damages for false imprisonment. An action for malicious prosecution was tried in a County Court, which has no jurisdiction to try such an action unless signed agreement consenting thereto is entered into by the parties. No signed agreement was shewn, but the action was tried without objection by either party, and judgment was given in favour of the plaintiff:—Held, that the question of the jurisdiction of the County Court could not be raised on appeal. *Robitaille* v. *Mason*, 23 Occ. N. 205, 9 B. C. R. 499.

Criminal Prosecution — *Pleading — Statement of Defence—Embarrassment.*]—1. In the statement of defence in an action for malicious prosecution, a simple traverse of the plaintiff's allegation of the want of reasonable and probable cause is sufficient. 2. In such an action, when the defendant in separate paragraphs of his statement of defence alleges certain facts tending to show reasonable ground for his belief in the plaintiff's guilt, but leaves it open for himself to prove other and distinct facts for the purposes of this defence at the trial, so that the plaintiff might be misled into assuming the allegations on the record to be all he has to meet, such paragraphs should, under Rule 318, Queen's Bench Act, 1895, be struck out as embarrassing. 3. In such a defence it is not sufficient to allege that the defendant received certain information, without shewing the source, or that it was reliable, or to allege possession by the plaintiff of the animals which he had been accused of stealing, without shewing that it was recent possession, or that all the information received had been laid before the magistrate before whom the charge had been laid and before counsel who advised the prosecution complained of, without shewing what facts had been laid before them; and paragraphs of the defence setting up such matters without shewing absolutely reasonable and probable cause should be struck out. *Rogers* v. *Clark*, 20 Occ. N. 419, 13 Man. L. R. 189.

Criminal Prosecution—*Reasonable and Probable Cause—Nonsuit.*]—The defendant had the plaintiff arrested on a charge of fraudulently disposing of her property to defeat the defendant's claim for money due. The plaintiff was acquitted. She was a married woman, carrying on business for herself, her husband driving a delivery waggon for her. She denied that she owed the defendant anything. The defendant supplied goods for the plaintiff's business to the husband, who, according to the plaintiff's story, was given the cash for each purchase. Apparently he did not pay it over, as the defendant charged the price of the goods to the plaintiff. She said she had told the defendant not to give her husband any goods for her unless for cash. The defendant told the constable not to arrest the plaintiff if she would pay the amount due, but she refused to do so:—Held, that the plaintiff's evidence, if believed, would go to shew the absence of reasonable and probable cause on the part of the defendant. The credibility and effect of that evidence was for the jury, and the trial should have proceeded in the ordinary way, and the case should not have been withdrawn from the jury. *Burns* v. *Clark*, 21 Occ. N. 24.

Criminal Prosecution—*Evidence—Record of Acquittal—Clerk of the Peace—Fiat of Attorney-General.*]—The books, indictments, and records of the Court of Quarter Sessions, which are in the hands of the clerk of the peace, are public documents which everyone who is interested has a right to see; and a defendant who has been tried and acquitted at the Sessions is entitled to a copy of the record of acquittal, and it is not necessary to obtain the fiat of the Attorney-General therefor. Regina v. Ivy, 24 C. P. 78, and Hewitt v. Cane, 26 O. R. 133, distinguished. *Rex* v. *Scully*, *Scully* v. *Peters*, 21 Occ. N. 432, 2 O. L. R. 315.

Damages—*Charge of Theft—Permission to Take Property.*]—The plaintiff was committed for trial on a charge of stealing two loads of wheat straw, the property of defendant, but was afterwards acquitted, and sued for damages for malicious prosecution:—Held, that the evidence strongly supported plaintiff's contention that defendant gave him permission to take the straw, and that the damages were properly assessed at $400. *Hulme* v. *Chant*, 22 Occ. N. 216.

Dismissal of Action—Delay in proceeding—Leave to proceed. *Scheeman* v. *Dundas*, 2 O. W. R. 184.

False Arrest and Imprisonment—County constable—Absence of malice and of notice of action—Responsibility for arrest—Special employment and payment of constable—Labour troubles—Picketting. *O'Donnell* v. *Canada Foundry Co.*, 4 O. W. R. 402, 5 O. W. R. 215, 477.

Findings of Jury—*Damages—Issue of Warrant—Absence of Malice — Evidence—Misdirection—Mistake of Magistrate.*]—The mere finding by the jury, in an action for malicious prosecution, that the plaintiff did suffer damages, and fixing the amount of the damages, is not a ground for a condemnation to pay such damages. And where the jury find, in addition, that the warrant of arrest was issued by the magistrate as being, in his opinion, the proper means of giving effect to the information, and in accordance

with the practice of the police office; that the complaint was not dismissed on the merits, but because the case was not in the opinion of the magistrate, one in which the law allowed the issue of a warrant; that the facts alleged in the information and complaint were not true, but that the defendants (complainants) used proper care to inform themselves of the facts of the case, honestly believed the same, and were not actuated by malice—the verdict is really a verdict for the defendant. 2. Complaint of rejection of evidence is not well founded where the record shews that proof of the facts desired to be proved by the evidence alleged to have been rejected has really been made in the cause. 3. A direction by the Judge presiding to the effect that "if the magistrate made a mistake, the defendants, unless they acted maliciously and without probable cause, could not be held, because it would be preposterous to suppose that a person applying in proper form for a remedy should be responsible for the mistake of a magistrate," is well founded in law. 4. The Judge at the trial is not bound, and is right in refusing, to instruct the jury when they come in with their verdict, that it is their duty to find the defendant at fault on some one of the special facts, before they can award damages. *Martin* v. *Montreal Gas Co.*, Q. R. 23 S. C. 222.

Illegal Arrest—*Joint Conviction—Invalid Warrant—Constable — Resolution of Municipal Council—Ultra Vires.*]—The three plaintiffs were summoned before a magistrate to answer a charge of interfering with and spoiling a spring by the side of a highway, but did not attend, and in their absence were convicted and fined, the conviction imposing one fine on all three. A resolution having been passed by the township council indemnifying the magistrate against costs, he issued a warrant, directed "to all or any constables," following the form of the conviction, and this warrant was handed to a constable, who got the defendant M., one of the informants and also a constable, to assist him, and arrested the plaintiffs and kept them in gaol until the fine and costs were paid. In an action against the township corporation and M. for maliciously enforcing an invalid conviction:—Held, that M. acted as a constable in the execution of the warrant, and was entitled to protection as such: he was, by virtue of s. 21 of the Code, exempt from criminal prosecution; and in a civil action was entitled to the protection of R. S. O. c. 88, ss. 1 (2), 13, 14, as to notice of action and time of commencing action. Ex p. McCleave, 35 N. B. Reps. 100, distinguished. 2. That there was no proof of knowledge by the council that the conviction and warrant were illegal, and no proof of malice, that the resolution was ultra vires, and the legal consequences were to be visited, not on the municipality, but (if at all) upon the offending members. McSorley v. Mayor, &c., of St. John, 6 S. C. R. 531, distinguished. *Gaul* v. *Township of Ellice*, 22 Occ. N. 157, 3 O. L. R. 438.

Information for Theft—Acquittal — Want of reasonable and probable cause—Malice—Damages. *Colwill* v. *Johnson* (N. W.T.), 1 W. L. R. 218.

Issue of Injunction—*Action for—Particulars—Costs and Damages.*]—A plaintiff who seeks to recover costs and damages caused to him by the issue of a writ of injunction will be ordered, under penalty of dismissal of his action, to indicate, within a fixed period, the amount which he claims for costs and that which he claims for damages, and the general nature of such costs and damages. *Sabiston* v. *Montreal Lithographing Co.*, 3 Q. P. R. 393.

Issue of Warrant for Arrest—*Advice of Advocates—Malice—Reasonable and Probable Cause—Bailiff—Notice.*]—Even assuming that a bailiff is a public officer within the meaning of art. 88, C. P., in this case the bailiff had no right to the notice required by that article, inasmuch as what he did was not done in the exercise of his public functions. 2. The responsibility of the informant who causes a warrant to be issued against a person, is not removed by the fact that he acted on the advice of his advocates, even when the facts of which he informs his advocates, and which thereby become the basis of the warrant, are true; if they are false, it must be inferred that there was malice and absence of probable cause. *Lachance* v. *Casault*, Q. R. 12 K. B. 179.

Justice of the Peace—*Action against—Notice of Action—Malice — Jurisdiction—Trespass.*]—The plaintiff caused to be served upon the defendant, a justice of the peace, notice of action claiming damages for maliciously, and without reasonable and probable cause, causing plaintiff to be arrested and confined in the common gaol under a warrant issued in a civil action, brought and tried before the defendant, in which one C. was plaintiff, and the present plaintiff defendant, said warrant having been issued without authority, and after the debt for which said suit was brought, and said warrant issued, was satisfied. The plaintiff's statement of claim was framed on the theory that the justice had jurisdiction, but that he acted maliciously and without reasonable and probable cause. There was no count or paragraph founded on want or excess of jurisdiction. Held, per Graham, E.J., and Meagher, J., that it was not necessary under the circumstances to consider whether the justice had exceeded his jurisdiction or not; and the warrant having been properly issued, and the only question being whether or not it could be enforced after the debt was paid, that this question was not covered by the notice, and that the action must be dismissed: R. S. N. S. c. 101, s. 12. Per Weatherbe, J., that the plaintiff could not succeed, the jury having found that the defendant acted in good faith, and that he had reasonable and probable cause for directing the arrest of the plaintiff, and that he was not actuated by malice; and quære, whether, after the warrant was issued, plaintiff could adjust the debt by giving new securities. Per Ritchie, J., that the plaintiff could not succeed, the notice of action being defective; and quære, whether the plaintiff could not have succeeded if trespass had been alleged. *Hennessey* v. *Farquhar*, 35 N. S. Reps. 22.

Malice—*Prosecution Before Interested Magistrate—Town Councillor—Duties of—"Person"—By-law—"Excavation."*]—A member of a town council, who is also chairman of the road committee of the town, has a right and is in duty bound to make himself acquainted with the details of municipal administration, and does not exceed the limits

of his duty in causing the snow to be temporarily removed from some of the manholes, for the purpose of having the depth of the drains at these points measured. 2. The word "person" in a municipal by-law enacting that no person shall cause any excavation to be made in the streets without the permission in writing of the council and payment of a fee, does not include a member of the council acting within his administrative rights, and the word "excavation" does not include the removal and replacing of snow by him, to obtain information necessary to guide him in the performance of his municipal duties. 3. A member of the council who had seconded a resolution ordering the prosecution of a fellow member for the act above mentioned, had no jurisdiction as a magistrate to summon and try him, and the taking by the council of such proceeding before a person so disqualified was an element of malice, and the circumstances above stated established want of probable cause. *Therrien* v. *Town of St. Paul*, Q. R. 23 S. C. 248.

Mandamus—*Record of Acquittal—Clerk of the Peace—General Sessions—Fiat of Attorney-General.*]—The judgment of a Divisional Court, 2 O. L. R. 315, 21 Occ. N. 432, affirmed; Armour, C.J.O., dissenting. *Rex* v. *Scully*, 22 Occ. N. 360; *Attorney-General* v. *Scully*, 4 O. L. R. 394.

Pleading—Defence in bar—Acquittal—Certificate—Grounds for prosecution. *Goldberg* v. *Doherty Mfg. Co.*, 2 O. W. R. 251.

Proof of Favourable Termination of Prosecution—*Informal Abandonment—Reasonable and Probable Cause—Findings of Jury—Costs.*]—Information laid by Hannah Beemer against plaintiff for unlawfully setting fire to dwelling-house on 18th September, 1902, and warrant of same date to arrest issued. Under this plaintiff was arrested and brought before the police magistrate (since dead), and was let out on bail. That was on Saturday, and she says she was to return on Monday before the magistrate, but did not do so, and heard no more of the matter. Tisdale, the high constable of Oxford, who arrested the plaintiff, said the case did not come on for trial, but he did not know why. He served 11 summonses for the Crown preparatory to the hearing. Before the day of trial the prosecutrix obtained information which caused her to believe the plaintiff could not have set the fire in question. The proceedings were dropped owing to some instructions given by the magistrate to the chief constables, the result of which was that no witnesses appeared. The prosecutrix or her mother paid the costs and nothing more was done in the matter. Three months later the plaintiff brought this action for malicious prosecution:—Held, Meredith, J., dissenting, the evidence shewed by the questions of counsel for defendants — that the summons was not prosecuted by defendants before the magistrate, but that the costs were paid and the matter was allowed to drop. No written termination of the proceedings is needed in such a preliminary investigation, and the death of the magistrate precluded his being called. Enough was shewn here, under the authority of Reid v. Maybee, 31 C. P. 392, to justify the jury and the Court in assuming that the prosecution had terminated favourably to the accused before the action was brought. *Beemer* v. *Beemer*, 4 O. W. R. 540, 25 Occ. N. 37, 9 O. L. R. 69.

Reasonable and Probable Cause—*Arrest by Constable Paid by the Defendants—Responsibility for.*]—In an action for malicious prosecution and false imprisonment, it was proved that the plaintiff and one L. were fellow-passengers on the defendants' road. L. complained to an officer of the defendants that a revolver had been stolen from his valise. The plaintiff had been seen by an official of the defendants at one of the stations to take something from L.'s valise. L. made a charge of theft against the plaintiff, and he was arrested by a constable appointed by the government on the recommendation of the defendants, and employed by them for duty on their road and paid by them. The prosecution was carried on by L., but at the instance and with the assistance of the officer making the arrest and other constables in the employment of the defendants. After an investigation by a magistrate the plaintiff was discharged:—Held, that the evidence shewed probable cause for the arrest and prosecution, and the defendants were not liable: that if there was want of probable cause the evidence failed to connect the defendants with the prosecution and imprisonment so as to make them responsible. *Dennison* v. *Canadian Pacific R. W. Co.*, 36 N. B. Reps. 250.

Reasonable and Probable Cause—Bank—Customer—Warehouse receipts—Nonsuit. *Pearen* v. *Merchants Bank of Canada*, 1 O. W. R. 277.

Reasonable and Probable Cause—Case for jury—Search warrant—Theft—Information—Crime—Amendment. *Pring* v. *Wyatt*, 2 O. W. R. 22, 321, 5 O. L. R. 505.

Reasonable and Probable Cause—Functions of Judge and jury—Trial. *Peters* v. *Whyte*, 1 O. W. R. 26.

Reasonable and Probable Cause—Interference in prosecution—Evidence shewing. *Hunter* v. *Boyd*, 1 O. W. R. 79, 2 O. W. R. 724, 1055.

Reasonable and Probable Cause—*Functions of Judge and Jury—Actual Malice—Inference—Conviction of Plaintiff Quashed on Grounds of Law—Evidence—Decease of Witness—Depositions Before Magistrate.*]—In an action for malicious prosecution the question of reasonable and probable cause is for the Judge. The jury may be asked to find on the facts, from which reasonable and probable cause may be inferred; but the inference from the facts found must be drawn by the Judge. Actual malice need not be proved, but may be inferred from the absence of probable cause. It is no answer to an action for malicious prosecution, that the conviction against the accused (plaintiff) was quashed by reason of a proviso in the statute creating the offence excusing the act charged. The evidence of a witness taken before a magistrate on a criminal charge is admissible in an action for malicious prosecution founded on that charge, where the witness, at the time of the trial, is dead. *Peck* v. *Peck*, 35 N. B. Reps. 484.

Reasonable and Probable Cause—*Malice—Information Bad in Law—Assistance*

in Prosecution for Criminal Offence—Special Damages.]—The defendant went before a justice of the peace with the intention of laying an information against the plaintiff for stealing. The justice prepared, and the defendant swore to, an information for "unlawfully taking the defendant's calf into his (plaintiff's) possession." The plaintiff appeared before the justice and was held to bail to appear for trial. The defendant honestly believed the calf to be his, but not that plaintiff was guilty of a theft; he believed him guilty of some criminal offence. The Crown prosecutor examined the papers sent up by the magistrate, and, without having had an interview with defendant, laid a charge of theft. The defendant, then becoming aware that the charge was theft, assisted in endeavouring to secure a conviction, but the plaintiff was acquitted. The Judge trying an action for malicious prosecution found that the defendant was actuated by malice both in laying the charge and in aiding in the prosecution:—Held, that the defendant without reasonable and probable cause laid the information before the justice as for an indictable offence, and procured the plaintiff to be prosecuted for theft before the Court, and was liable in damages to the plaintiff. 2. That an action will lie where the procedure is criminal in form, though the charge be bad in law. 3. That the defendant was liable for the part he took in prosecuting the charge before the Court. Fitzjohn v. MacKinder, 9 C. B. N. S. 505, followed. 4. That the defendant, having "set the stone rolling," was responsible for the consequences, inasmuch as he had not, as he should have voluntarily done, informed the Crown prosecutor of the facts. 5. That amounts paid by plaintiff to witnesses attending the trial of the criminal charge, for subpœnas and serving, for counsel fees, for expenses of himself and wife attending such trial, for expenses of himself and his servant attending the preliminary examination, should be allowed as special damages. *Powell* v. *Hiltgen*, 5 Terr. L. R. 16.

Reasonable and Probable Cause—*Nonsuit—Search Warrant—Theft—Information—Amendment.*]—A dog having been claimed by the plaintiff and taken from the defendant, the latter stated the facts to a magistrate, who drew an information that plaintiff did "unlawfully have and keep in his possession and take away a black collie dog, the property of the complainant," which was sworn to by the defendant. The magistrate issued a search warrant, under which a constable took the dog out of the plaintiff's possession. The constable then laid an information against the plaintiff in the same terms as the former one, and the plaintiff was summoned. Before the magistrate the plaintiff's counsel objected that the information and summons did not charge the plaintiff with any offence, and at the request of the defendant and his counsel the information was amended by inserting the words "steal and take away." The magistrate dismissed the charge. In an action for malicious prosecution:—Held, that the defendant, having fairly stated the facts to the magistrate, was not liable in damages for the erroneous view of the magistrate that he had jurisdiction to issue the search warrant, nor for summoning the plaintiff apparently to dispose of the question as to the property in the dog:—Held, also, that there was evidence that the defendant assented to the alteration charging the plaintiff with the crime of theft and his prosecution on that charge, and that the defendant was not justified in charging the plaintiff with having stolen the dog, because he believed the dog was his own; that the real question was not whether he believed that the plaintiff had stolen him, that is, taken him without any belief that he had the right to take him; and that the trial Judge should have left the case to the jury, telling them that, if they found that the defendant had authorized the charge of theft and honestly believed when the amendment was made that the plaintiff had stolen his dog, they should find for the defendant; otherwise they should find for the plaintiff; the case should not have been taken from the jury upon the ground that reasonable and probable cause for a criminal prosecution had been shewn; and a new trial was ordered. *Pring* v. *Wyatt*, 23 Occ. N. 191, 5 O. L. R. 505, 2 O. W. R. 22, 321.

Reasonable and Probable Cause—Question for Court—Evidence—Reasonable belief in truth of charge—Malice—Motive—Honest attempt to ascertain true facts. *Wainwright* v. *Villetard* (N.W.T.), 2 W. L. R. 242.

Reasonable and Probable Cause—*Statements of Witness in Court—Defamation—Malice—Termination of Prosecution.*]—The defendant and a companion were occupying a bed room in the plaintiff's hotel. During the night, the plaintiff entered the room and searched the pockets of both defendant and his companion, and then took the defendant's pocket book from his coat pocket and commenced to examine the papers contained therein. The defendant got up and accused the plaintiff of robbing him, and he afterwards laid a complaint to that effect before a justice of the peace. The criminal case had not terminated when the plaintiff brought the present action of damages for malicious prosecution:—Held, that the defendant had reasonable and probable cause for laying the complaint, and acted in good faith and without malice. A person cannot be sued for damages by reason of anything said by him while testifying as a witness before a court of justice, when he states, in answer to questions put to him, what he honestly believes to be true, and is acting in good faith. To establish a cause of action for malicious prosecution, it must be shewn that the prosecution has terminated. In an action for damages for malicious prosecution it is for the plaintiff to prove want of reasonable and probable cause, and malice, which he had not done in the present case; on the contrary, the defendant had proved that there was reasonable and probable cause. *Renaud* v. *Guenette*, Q. R. 25 S. C. 310.

MALICIOUSLY KILLING CATTLE.

See CRIMINAL LAW.

MALPRACTICE.

See MEDICINE AND SURGERY—PLEADING.

MANDAMUS.

County Court Judge — *Appeal from Conviction—Decision on Legal Merits—Refusal to Hear Evidence.*]—A conviction was made by two justices of the peace, under the Summary Convictions Act of British Columbia and amending Acts, for a breach of the Highway Regulation Act. An appeal was taken from the conviction to the County Court of Yale, and the appeal came on to be heard before the Judge. The amendment to the Summary Convictions Act passed in 1901 provides that "in every case of appeal from any summary conviction or order made before any justice, the Court to which such appeal is made shall, notwithstanding any defect in such conviction or order, and notwithstanding that the punishment imposed or the order made may be in excess of that which might lawfully have been imposed or made, hear and determine the charge and complaint upon which such conviction has been made upon the merits," etc. The conviction in question was hopelessly bad on its face, and on the appeal coming on to be heard a motion was made to quash it. For the respondents it was argued that the Judge under the section above quoted must hear evidence and try the case de novo in any event. After hearing argument on this question, the Judge gave judgment on the legal merits, allowing the appeal and quashing the conviction with costs. Application was thereupon made to the Supreme Court to grant a mandamus to the Judge to enter continuances, hear evidence, and determine the appeal on the merits:—Held, following Regina v. Justices of Middlesex, 46 L. J. M. C. 225, 2 Q. B. D. 516, that the Court had no power to interfere by mandamus, there having been a decision by the County Court Judge on the legal merits; that, as the Judge had heard argument on the question, and given a decision on the legal merits, the Court had no right to decide, or inquire whether such decision was right or wrong. In re *Strange and Gellatly*, 24 Occ. N. 199.

Court Stenographer—Copy of evidence taken at criminal trial—Allegation that copy furnished incomplete. *Rex* v. *Campbell* (Y. T.), 2 W. L. R. 223.

Election Act, R. S. M. 1902 c. 52—*Revising Officer—Duties—Board of Registration Functus Officio.*]—A revising officer appointed to revise and close the lists of electors under the Manitoba Election Act, R. S. M. 1902 c. 52, although directed by the board of registration to hold his sitting for that purpose on a certain day and between certain hours, has power to continue the sitting to a later hour and on a subsequent day or days if necessary, to enable him to hear and dispose of all applications brought before him. Where, however, it was shewn that, before the hearing of the application for a mandamus to the revising officer to compel him to re-open his court for the purpose of hearing further applications to be placed on the lists, he had, pursuant to s. 92 of the Act, transmitted the list of electors and all books and papers to the chairman of the board of registration, and that, before the final argument of the motion, the chairman had, pursuant to s. 97 of the Act, sent the revised lists to the King's printer, and the books, documents, and other papers to the clerk of the executive council:—Held, that the issue of a mandamus to the revising officer as asked for should be refused, as it would be fruitless and futile, and both he and the board of registration were functi officio. Rex v. Bishop of London, 1 Wils. 11, Rex v. Bishop of Exeter, 2 East 466, and Rex v. Bateman, 4 B. & Ad. 553, followed. *In re Bonnar*, 23 Occ. N. 251; *Rex* v. *Bonnar*, 14 Man. L. R. 467.

Municipal Corporation — *Statutory Duty—Prerogative Writ—Summary Application—Action—Affidavits.*]—When a public body is required to perform a statutory duty at the instance of one entitled to call for such performance, the practice in England is to move summarily for the prerogative writ of mandamus, according to the prescribed procedure in the Crown office. But in this province all the divisions have co-ordinate jurisdiction; and the practice in cases of the prerogative writ is assimilated to that in ordinary applications of a summary nature: see Rules 1084, 1090, 1091, 1092. And where a meritorious application was made, in an action for a mandamus to compel a city corporation to levy a special rate for library purposes under the Public Libraries Act, R. S. O. c. 232, it was directed that the affidavit should be re-sworn and intituled as in an application (not in an action) for the prerogative writ. *Toronto Public Library Board* v. *City of Toronto*, 21 Occ. N. 79, 19 P. R. 329.

Police Magistrate—Jurisdiction—Information—Criminal offence—Municipal election—Offence at. *Re Rex* v. *Mehan*, 1 O. W. R. 136, 248, 3 O. L. R. 567.

Police Magistrate—*Sentence—Ontario Liquor Act, 1902—Voting on—Personation—Information—Deputy Returning Officer—Prosecutor—Applicant for Mandamus—Status.*]—At the voting upon the Ontario Liquor Act, 1902, the defendant presented himself at a polling place and asked for a ballot in the name of another person, whereupon before the defendant had left the polling place, one Stewart laid an information before the deputy returning officer charging the defendant with personation, and on this information the deputy issued his warrant, under which the defendant was arrested and brought before a police magistrate. The deputy then laid an information against the defendant for personation, and the defendant was tried by the magistrate, convicted and sentenced:—Held, that, having regard to the provisions of R. S. O. 1897 c. 10 (made applicable by s-s. (5) of s. 91 of the Ontario Liquor Act, 1902), the information which gave the magistrate jurisdiction was that laid by Stewart; and the deputy returning officer had no status to apply for a mandamus to the magistrate to impose a different sentence. Per Britton, J., that a mandamus could not be granted for that purpose. *In re Denison, Rex* v. *Case*, 23 Occ. N. 279, 6 O. L. R. 104, 2 O. W. R. 152, 512.

To County Court Judge—*Judgment Debtor—Arrest—Disclosure—Order for Discharge.*]—The order provided for by 60 V. c. 28, s. 15, is a substitute for the remedy by writ of mandamus, and it will therefore be granted only in cases where mandamus will lie. In discharging or refusing to discharge a debtor who has made a disclosure under 59 V. c. 28 s. 7, the Judge or

other officer is acting judicially and not ministerially; therefore the Court refused to make an order under s. 15 commanding the Judge of a County Court to discharge a debtor who had made a disclosure before him. *Ex p. Keerson*, 35 N. B. Reps. 233.

To Municipal Corporation—*Projection over Highway—Demolition—Discretion.*]—A mandamus to order the demolition of a projection over a city street should be asked against the city corporation, and not against one of its officers. 2. To justify the issuing of mandamus in a similar case, the complainant must shew a particular act of neglect of duty on the part of the city, involving a real injustice and damage to him. 3. Mandamus is not strictly demandable as of right, but may be issued or withheld in the discretion of the Court. *Pettigrew* v. *Baillargé*, Q. R. 20 S. C. 173.

MANDATE.

See BANKRUPTCY AND INSOLVENCY—BROKER—COURTS

MANITOBA ELECTION ACT.

See MANDAMUS.

MANITOBA GRAIN ACT.

Application for Cars—*Order Book—Distribution of Cars—Elevators—Loading Platforms.*]—The Dominion statute 63 & 64 V. c. 25, amending the General Inspection Act, R. S. C. 1886 c. 99, enacts (schedule) that the whole of Manitoba and the North-West Territories, and that portion of Ontario west of and including the then existing district of Port Arthur, should be known as the Inspection District of Manitoba. The Manitoba Grain Act (the short title of 63 & 64 V. c. 39, intituled "an Act respecting the grain trade in the Inspection District of Manitoba"), contains, as indicated by subheadings, provisions respecting a warehouse commissioner—elevators and terminal warehouses—country elevators, flat warehouses, and loading platforms — commission merchants—general provisions. This Act is amended by 2 Edw. VII. c. 19:—Held, on admission of counsel, where a farmer who is not an elevator owner, lessee, or operator, has grain stored in a special bin in a farmers' elevator at a railway station where grain is shipped and has also grain stored in another elevator at the same point in common with other grain, for which he holds storage tickets, that it is not a violation of the Manitoba Grain Act for the station agent to refuse to recognize such farmer as an applicant, or to recognize his order in the order book for a car or cars to ship his grain. (2) Where a farmer has made order for cars in the order book at the station, and all applicants for cars who had made order prior to his order in such book, had each obtained one car, but the cars so distributed were not sufficient to fill the orders of such prior applicants, while the farmer had not yet been allotted a car by reason of the shortage, and the agent, out of the next lot of cars which arrived, refused to award the farmer a car, but there being a sufficient number of prior applicants, whose orders had not been entirely filled, to exhaust such next lot of cars, awarded out of such cars one to each of such prior applicants, who had already received one car—that this was a violation of the Act. (3) If each of the prior applicants as above mentioned had been supplied with one car at the time when the farmer gave his order, but on the day previous to the farmer's application there had been a surplus of cars after each prior applicant had been given one car, and the agent, in the distribution of the surplus cars had begun with the first applicant and distributed the cars so far as they would go, giving two or three to each of the prior applicants, but their order nevertheless remained unfilled, and if on the day of the farmer's application additional cars arrived to be loaded, and the agent declined to allot a car to the farmer, but allotted a car to each of the prior applicants, thus exhausting the supply—that this was not a violation of the Act. (4) Where a farmer having grain to ship made order for one car in the order book, requiring it to be placed at the loading platform for the purpose of being loaded, and the agent allotted a car to each of the elevator companies having elevators at the same station, but whose orders were subsequent to those of the farmer—that this was a violation of the Act. *Rex* v. *Benoit*, 5 Terr. L. R. 442.

See CRIMINAL LAW.

MANSLAUGHTER.

See CRIMINAL LAW.

MARINE INSURANCE.

See INSURANCE.

MARITIME LAW.

See SHIP.

MARKET FEES.

See CRIMINAL LAW.

MARRIAGE.

Competency of Protestant Minister to Marry two Roman Catholics — *Invalidity of Ecclesiastical Decrees.*] — The plaintiff, who had been baptized and had made his first communion as a member of the Roman Catholic church, was married to the defendant, who, at one time at least, had also professed the same religious belief, by a minister of a Protestant denomination, by virtue of a license issued in the regular form

under the hand and seal of the Lieutenant-Governor. Subsequently the plaintiff applied to the ecclesiastical court of the diocese in which he resided for a decree pronouncing the marriage null, on the ground that according to law two Roman Catholics could only be married by a Roman Catholic priest. This decree was granted, and the decision of the court was confirmed on appeal to Rome. The plaintiff asked by this action that the pretended marriage should be declared null as to its civil effects; and that the Court should recognize and affirm, and give full force and effect to, the ecclesiastical decree:—Held, that, even if both parties were Roman Catholics at the date of the marriage ceremony in question, yet, according to law, their marriage could be validly solemnized by a Protestant minister; and (2) that, according to law, the sentence of the ecclesiastical tribunal, so far as it pretended to annul the marriage in question, was void, as no ecclesiastical court had competence or jurisdiction to pronounce the annulment of a marriage tie. *Delpit* v. *Coté*, 21 Occ. N. 307, Q. R. 20 S. C. 338.

Declaration of Nullity—*Evading Laws of Province of Quebec—Celebration by Person not Authorized—Church Law.*]—A marriage celebrated by a priest or minister professing a faith other than that to which the parties belong, is void. 2. If, before the coming into force of the Civil Code, any church whatever has established for its members a rule in restraint of marriage, and a marriage is celebrated contrary to the law decreeing such restraint, the Court must, upon an action brought to declare the marriage void, and upon proof of such restraint, declare the marriage void for civil purposes only. 3. In this case the parties (Roman Catholics) having, during their minority, and without the consent of their parents or the publication of banns, left their domicil in the province of Quebec in order to go to be married before a Protestant minister in the United States of America, such marriage is void on account of having been contracted in fraud of the law and before a functionary who was not a curé of the domicil of either of the parties. *Durocher* v. *Degré*, 21 Occ. N. 303, Q. R. 20 S. C. 456.

Ecclesiastical Laws—*Judicial Notice—Action for Separation — Plea of Nullity of Marriage.*]—Where the defendant, by his plea to an action for separation from bed and board, alleges the nullity of his marriage with the plaintiff, but does not ask that the nullity be judicially pronounced, the Court cannot take his allegations into consideration. 2. The recognition, by art. 127, C. C., of certain impediments to marriage, has not the effect of obliging the Courts of the province of Quebec to take judicial notice of the ecclesiastical laws which establish them, and therefore the existence of such laws must be alleged and proved by those who desire to take advantage of them. De Grandmont v. La Société des Artisans Canadiens-Francais de la Cité de Montréal, Q. R. 16 S. C. 532, followed. *Smith* v. *Cook*, Q. R. 24 S. C. 469.

Legitimacy of Offspring — *Condition of Territories in 1878—Presumption of Marriage—Evidence.*]—In the year 1878 a white man and an Indian woman, domiciled in the North-West Territories, entered into a contract of marriage per verba de præsenti in the Territories, without a cermony of any kind, and cohabited as man and wife until the former's decease:—Held, in view of the legal provisions for the organization of the Territories and the actual condition, with reference to the facilities for the solemnization of marriage, at least in the portions of the Territories in the vicinity of the contracting parties' place of residence, that there was not a legally valid marriage. In bigamy cases, strict proof of marriage is required; a different rule prevails in legitimacy cases, where strict proof of the marriage of the parents is not required, but may be presumed from cohabitation and repute; but where the evidence shews the actual terms upon which the parents were cohabiting and the facts relied upon as constituting the marriage, no such presumption can arise. *Re Sheran*, 4 Terr. L. R. 83.

Officer Competent to Celebrate—*Power of Court to Order.*]—The Court, or a Judge, has no authority to order an officer competent to celebrate a marriage to do so, unless such officer is properly brought before the Court or Judge. *Ex p. Fiset*, 6 Q. P. R. 42.

Widow of Deceased Brother—*Validity — Legitimacy — Presumption — Will.*]—The testator was married on the 30th June, 1855, to the widow of his deceased brother; she survived the testator. In 1884 and 1885 the testator was living with another woman as his wife:—Held, that the validity of the marriage between the testator and the widow of his deceased brother could not be disputed after the death of the testator; and the presumption arising from the testator's relationship with another woman was rebutted by the fact of his lawful wife being then alive; and the appellants, the children of the testator and the other woman, were not legitimate and had no locus standi to appeal from a judgment establishing a document as the will of the testator. Hodgins v. McNeil, 9 Gr. 305, and Re Murray Canal, 6 O. R. 685, approved. *Kidd* v. *Harris*, 22 Occ. N. 25, 3 O. L. R. 60, 1 O. W. R. 141.

MARRIAGE SETTLEMENT.

See HUSBAND AND WIFE—PARTITION.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MARRIED WOMAN'S PROPERTY ACT.

See DISTRIBUTION OF ESTATES — HUSBAND AND WIFE—LIMITATION OF ACTIONS.

MARRIED WOMAN'S REAL ESTATE ACT.

See DOWER.

MASTER AND SERVANT.

I. Contract of Hiring and Dismissal of Servant, 951.

II. Injury to Servant by Negligence of Master, 955.

III. Wages, 992.

IV. Injury to Third Person by Servant, 993.

V. Secret Profits of Servant, 997.

VI. Other Cases, 998.

I. Contract of Hiring and Dismissal of Servant.

Absence of Notice — *Misconduct—Prejudice.*]—In order that an employee may be discharged without notice, his conduct must be such as to cause a prejudice to his employer, or to give the latter reasonable cause to fear that he will suffer a prejudice by reason of the acts of the former. *Millan* v. *Dominion Carpet Co.*, Q. R. 22 S. C. 234.

Agent of Crown — *Liability of—Evidence.*]—The defendant, the principal of an industrial school, an employee of the Dominion Government, entered into and signed in his own name a written agreement engaging the plaintiff for a certain period in a certain employment. The factory in which the plaintiff was employed being destroyed by fire, and the plaintiff thrown out of employment, he sued the defendant for wrongful dismissal:—Held, that evidence of the capacity in which the defendant entered into the agreement and the other surrounding circumstances was admissible. It appearing that the defendant acted merely as agent for the government:—Held, that the defendant was not liable. *Bocz* v. *Hugonnard*, 4 Terr. L. R. 69.

Breach—*Damages — Action before Expiration of Term—Pleading — Condition Precedent.*]—The plaintiff, who had been engaged from one year from August, 1902, by the defendants, at a monthly salary, was dismissed wrongfully, as the jury found, in December. He sued for damages for breach of contract, and the action was tried in May, 1903:—Held, that the plaintiff was entitled to recover damages covering the unexpired term of his engagement. The statement of claim alleged a contract of hiring the plaintiff as superintendent of a mill, arising from two letters, without setting them out and without alleging the continuance of the construction of the mill, which was one of the conditions stated by the defendants in their second letter. The defence denied the allegations in the statement of claim and alleged that the contract was contained in the second letter:—Held, that it was not necessary for the plaintiff to prove the continuance of the construction of the mill. *Hopkins* v. *Gooderham*, 24 Occ. N. 104, 10 B. C. R. 250.

Breach — Servant leaving—Consent of master—Servant inducing master's customers to leave him—Improper use of books—Inducing workmen to leave—Conversion of goods—Money advanced by master on faith of continuance of employment—Set-off. *Trebilcock* v. *Burton*, 3 O. W. R. 314, 679.

Contract — Jury—Damages—Nondirection. *Smith* v. *Bloomfield*, 2 O. W. R. 481.

Damages—*Future Commissions.*] — The plaintiff was engaged by the defendants to act as their selling agent for a defined term, and he was to receive a defined salary and commission at a defined rate upon sales effected. Before the expiration of the term he was dismissed without cause, sales to a large amount having up to that time been effected by him:—Held, that, in estimating the damages to which he was entitled, the commission on sales which there was reasonable grounds to think might have been effected during the unexpired portion of the terms, should be taken into consideration. Judgment of Ferguson, J., 4 O. L. R. 350, 22 Occ. N. 372, 1 O. W. R. 566, reversed. *Laishley* v. *Goold Bicycle Co.*, 23 Occ. N. 304, 6 O. L. R. 319, 2 O. W. R. 780.

Dismissal without Notice — Proof of custom—Damages—Costs. *Gould* v. *Michigan Central R. W. Co.*, 5 O. W. R. 583.

Election to Treat Contract as Rescinded—Previous action for wages—Judgment—Estoppel. *Doherty* v. *Vancouver Gas Co.* (B. C.), 1 W. L. R. 252.

Findings of Jury.]—*Wiswell* v. *Inglis*, 3 O. W. R. 477.

Grounds for Dismissal.] — *French* v. *Lawson*, 5 O. W. R. 217.

Grounds for Dismissal — Justification. *Gourmany* v. *Manitoba Club* (Man.), 1 W. L. R. 175.

Justification — Incompetency—Master of ship—Damage to ship—Employment of pilot. *McMaugh* v. *Hamilton and Fort William Navigation Co.*, 3 O. W. R. 791.

Justification—*Neglect of Duties—Insolent Language — Condonation—Evidence.*]—The notice of appointment of plaintiff as janitor of a public school provided for payment of the stipulated salary monthly, on presentment of a certificate from the principal of the school that the duties of the janitor had been satisfactorily performed:—Held, that a certificate from the principal of the satisfactory performance of duties condoned any previous irregularity, misconduct, or neglect of plaintiff which properly came under the cognizance of the principal. Nevertheless, evidence of such previous acts might be given to shew that the act which led directly to the dismissal was not a solitary instance, but that the employee had been habitually guilty. Non-compliance with the printed regulations furnished the plaintiff as to the duties required of him in respect to sweeping, dusting, etc., and impertinent and insulting language used towards members of the board of school commissioners, afforded sufficient ground for the immediate dismissal of the plaintiff from his position. *Cook* v. *Halifax School Commissioners*, 35 N. S. Reps. 405.

Justification — *Wrongful Accusation — Knowledge of.*]—Where a servant, upon unfounded suspicion, endeavoured to make his fellow-servants believe that his master had committed a criminal offence:—Held, that the master was justified in dismissing his servant. Held, also, that though the master

may have been unaware of these acts of his servant at the time of dismissing him, he was entitled to rely upon them as a defence to an action for wrongful dismissal. Semble, it was sufficient to justify the dismissal that the servant falsely informed customers of the master that he, the servant, had been placed in his position by other persons for the purpose of "straightening out the business." *McGeorge* v. *Ross*, 5 Terr. L. R. 116.

Manager of Restaurant — *Length of Notice—Reasonable Notice—Damages—Other Employment.*]—The rule requiring a month's notice to be given to terminate the engagement of a domestic servant does not apply to the case of the manager of a restaurant. The latter is only entitled to reasonable notice, having regard to the nature of the employment and the surrounding circumstances, and to entitle him to recover damages for dismissal, it must appear that he not only endeavoured to get similar employment elsewhere and failed, but that he acted reasonably in that behalf. *Lamberton* v. *Vancouver Temperance Hotel Co.*, 11 B. C. R. 67.

Master and Servant Ordinance—*Improper Dismissal of Servant — Additional Wages for—Justice of the Peace — Jurisdiction.*]—A bar-tender employed by an hotelkeeper at a monthly salary from the 1st December, became temporarily incapacitated through illness on the 5th June, and, procuring a substitute, left the hotel, returning to work again on the 10th, whereupon he was discharged by his employer, being paid $10 for wages up to the time he left. He claimed the balance of two months' wages for improper dismissal, and on an information before a justice of the peace under the Master and Servant Ordinance (C. O. 1898, c. 50, s. 30), was awarded five days' further wages from the 5th to the 10th, the date of dismissal, and an additional month's wages expressed to be in lieu of notice: —Held, on appeal from this order, that the hotel-keeper was not entitled to discharge the bar-tender, under the circumstances, without notice; also that the latter was entitled to be paid wages up to the time of his dismissal. But held further, that the justice had no jurisdiction under the Ordinance to order payment of the additional month's wages, which could not be said to be wages due, but damages for improper dismissal. *Goode* v. *Downing*, 5 Terr. L. R. 505.

Publication of School Books by Master—Production and adaptation by servant—Original work—Property and benefit of master—Conflicting evidence—Profits. *Campbell* v. *George N. Morang & Co. (Ltd.)*, 4 O. W. R. 321, 6 O. W. R. 901.

Rescission — Continuance in employment —Abandonment—Part payment of commission. *Banfield* v. *Hamilton Brass Co.*, 1 O. W. R. 293.

Servant Leaving Employment—*Wages — Breach — Damages.*] — A servant whose wages are payable periodically and who is dismissed from his master's employment for good cause, or leaves without justifiable cause, after one of such periods has passed, is nevertheless entitled to recover any unpaid wages accrued up to the end of the last of such periods; a right of action accrues at the lapse of each of such periods. The master has only the right to recover damages against the servant for breach of his contract. *Taylor* v. *Kinsey*, 4 Terr. L. R. 178.

Share of Profits of Business—*Sale of Business.*]—The plaintiff and the defendant entered into a contract of hiring and service, which was to continue for a year unless the plaintiff's business was disposed of before that time, and the defendant was to be paid a certain sum each week, and also, at the end of the year, a percentage of the net profits of the business:—Held, that the sale of the business before the expiration of the year did not deprive the defendant of his right to the percentage of the net profits up to that time, but that he had no interest in the assets of the business, and therefore no right to a percentage of the profits made by the plaintiff on the sale of the assets. *In re Sims and Harris*, 21 Occ. N. 230, 1 O. L. R. 445.

Statute of Frauds—*Quantum Meruit—Dismissal.*] — Held, following Giles v. McEwen, 11 M. L. R. 150, that where a contract of hiring is not enforceable by reason of the Statute of Frauds, inasmuch as it is not to be performed within a year of the making thereof, the servant is entitled to recover on a quantum meruit where he is dismissed without justifiable cause. Justifiable grounds for dismissal discussed. *Rose* v. *Winters*, 4 Terr. L. R. 353.

Termination by Notice—*Incapacity of Servant—Permanent Disability—Findings of Jury—Weight of Evidence.*]—Where a contract for service provided that it could be terminated by either party giving the other a month's notice therefor, or by the employer paying or the employee forfeiting a month's wages:—Held, reversing the judgment in 36 N. S. Reps. 158, that illness of the employee by which he is permanently incapacitated from performing his service would itself terminate the contract:—Held, also, Killam, J., dissenting, that an illness terminating in the employee's death, and during the whole period of which he is incapacitated for service, is a permanent illness, though both the employee and his physician believed that it was only temporary. By a rule of the employer an employee was only to be paid for the time he was actually on duty. One of the employees had accepted and signed a receipt for a month's wages, from which the pay for two days on which he was absent from duty was deducted, and his conversations with other employees shewed that he was aware of the rule, but no formal notice of the same was ever given him. He died after a long illness, and his executrix brought an action for his wages during such period, and the jury found on the trial that he did not continue in the employ after notice of the rule and acquiescence in the terms thereof:—Held, that such finding was against evidence and must be set aside. *Dartmouth Ferry Commission* v. *Marks*, 24 Occ. N. 167, 34 S. C. R. 366.

Wages—*Monthly Rate — Entire Contract — Servant Leaving Employment — Justification.*]—It was found as a fact, on contradictory evidence, that the plaintiff hired with the defendant at $18 for the first month, and, if each party was satisfactory to the other, for $20 for the whole working season including the first month, and that the wages, though

fixed with reference to the months, were payable only at the end of the period of hiring. The plaintiff after working for some months left, and sued for the wages for the number of months he had worked, less the wages for the first month, which had been paid:—Held, that the contract was an entire one and that the plaintiff could not succeed. Nature of behaviour of master towards servant justifying the servant in leaving, discussed. *Owen* v. *James*, 4 Terr. L. R. 174.

Wrongful Dismissal — Contract of hiring — Construction — Statute of Frauds. *Glenn* v. *Rudd*, 1 O. W. R. 116, 3 O. L. R. 422.

Wrongful Dismissal of Servant — *Justification—Grounds—Misconduct — Solicitor's Letter—Negligence or Incompetence—Condonation.*] — Plaintiff entered into an agreement with defendants containing a clause permitting the defendants to instantly dismiss the plaintiff from their employment if he was found guilty of disobedience to orders, theft, drunkenness, or other misconduct. Plaintiff did a particular job so imperfectly that it was unmerchantable. Defendants made him do the job over and deducted $1.45 from his wages, being 6 hours' pay. Plaintiff employed a solicitor to write defendant a letter demanding repayment of the $1.45. Defendant requested plaintiff to withdraw the letter. Plaintiff refused. Defendant thereupon paid the $1.45 and discharged him:—Held, it was not disobedience to orders to complain through his solicitor, and was awarded damages. *Clarke* v. *Capp*, 5 O. W. R. 174, 9 O. L. R. 192.

II. Injury to Servant by Negligence of Master.

Action under Workmen's Compensation Act—Defence—Particulars. *St. Amand* v. *Interstate Consolidated Mineral Co.*, 2 O. W. R. 252.

Breach of Factories Act—Questions for jury — Costs. *Ackernecht* v. *McBrine*, 6 O. W. R. 720.

Building—*Defective Condition of Appliances — Knowledge of Master — Company—Officer of—Admissions by—Evidence—Onus —Nonsuit.*]—The plaintiff was a labourer working for the defendants in the erection of an elevator. He was directed by a superintendent of the work, to go upon a planking which answered the purpose of a scaffolding in an excavation made for the purpose of placing therein the leg of the elevator. The planking gave way while the plaintiff was on it, and he was precipitated to the bottom of the excavation, sustaining injuries. It was contended that the plaintiff had knowledge of the defective construction and unsafe condition of the scaffolding through J., their secretary-treasurer. It was not shewn that J. assumed to give orders to the men, or directions as to the practical work which was going on; but there was evidence that he was standing, with his hands in his pockets, looking down into the excavation on the morning of the accident, and that on former occasions he had been seen to call D. on one side and say something to him, which no one overheard. There was no evidence that the persons employed by the defendants were not proper and competent persons, or that the materials used were faulty or inadequate; nor was there any evidence that the defendants had any better means of knowing of the danger than the plaintiff:—Held, that the onus was on the plaintiff, and he had not made out a case to be submitted to the jury. Evidence was given of an admission made by J. to the plaintiff, after the accident, as to the defective condition of the scaffolding and the defendants' knowledge of it:—Held, that he had no authority to make admissions on behalf of the defendants, an incorporated company. *Wilson* v. *Botsford-Jenks Co.*, 22 Occ. N. 95.

Canal works—Dangerous place—"Way"—Workmen's Compensation Act—Negligence of superintendent — Workman conforming to orders—Contributory negligence. *Birmingham* v. *Larkin*, 5 O. W. R. 549.

Cause of Accident—*Injury to Servant—Evidence—Negligence.*]—Administrator of the estate of John Wilson the younger, brought action to recover damages for the death of the latter from injuries received by him while in the employment of defendants at Merritton, owing, as alleged, to the unsafe and defective condition of a hoist in defendants' mill. The jury found that the deceased came to his death through a defective elevator; that there was negligence of defendants in not having a guard and not having sufficient light; that the deceased was not guilty of any act which contributed to his death; and assessed plaintiff's damages at $700. There was evidence that the approach to the hoist shaft was unguarded, and that the hoist was defectively constructed in that it had no catch:—Held, that defendants were liable, notwithstanding that there was no direct evidence of how the deceased was injured. Kerwin v. Canadian Coloured Cotton Mills Co., 28 O. R. 73, 25 A. R. 36, 29 S. C. R. 478, distinguished. Groves v. Wimborne, [1898] 2 Q. B. 402, followed. *Wilson* v. *Lincoln Paper Mills Co.*, 4 O. W. R. 521, 25 Occ. N. 14, 9 O. L. R. 119.

Collapse of Building—*Liability—Owner —Tenant.*]—The plaintiff was employed by the defendant as a storeman. The building in which the latter carried on his business collapsed, and the defendant was carried down in the debris and was severely injured. He brought this action for $3,000 damages, claiming that the defendant knew of the faulty construction of the building, and that he had overloaded it. The defendant denied that he knew of any defect, or that he had overloaded the building. Both parties admitted that the building collapsed because of inherent defects:—Held, that the defendant had not overloaded the building; and that, therefore, since under art. 1055 the owner of a building is responsible for damages caused by its defects, the action should have been brought against the proprietor of the building, and not against the defendant, who was only a lessee. *Dulude* v. *Benoit*, 21 Occ. N. 82.

Common Law Liability—Defective system—Findings of jury—Workmen's Compensation Act. *Graham* v. *International Harvester Co.*, 5 O. W. R. 613.

Condition of Elevator—Jury. *Traplin* v. *Canadian Woolen Mills (Limited)*, 2 O. W. R. 380.

Contract as to Liability — *Railway Company — Provident Society — Release of Claim — Rights of Widow — Nullity — Indemnity or Satisfaction — Motion for Judgment — Peremption.*]—1. The provisions of art. 494, C. C. P., are not on pain of nullity, and failure to move for judgment in accordance with the verdict of a special jury until after the lapse of the time prescribed by this article, does not deprive the party of the right to a judgment, unless the action itself has been declared perempted for failure to proceed there during two years. 2. A railway company cannot, under a contract between their employee and an insurance and provident society, in consideration of an annual subscription to such society, be exempted from responsibility for damages caused by neglect and failure on their part to comply with a duty imposed on them by law for the safety of passengers and employees, e.g., equipment of the cars with efficient brakes, such stipulation being without effect under s. 243 of the Railway Act of Canada, 51 V. c. 29. 3. The right of the widow and other relatives under art. 1056, C. C., is not a representative one, but is independent of that of the injured person, and, therefore, even if an agreement stipulating immunity from responsibility for damages caused by faute lourde were valid as regards the injured person, it would be without effect as regards his widow or other persons having rights under art. 1056, C. C. 4. An agreement exempting a party from responsibility for damages caused by his gross negligence, or faute lourde, is null and void, as being contrary to public order. 5. The words "indemnity or satisfaction," in art. 1056, C. C., imply compensation by the person responsible for the damage suffered, and not a payment made under a contract with an insurance society. Judgment in Q. R. 21 S. C. 346 affirmed. *Grand Trunk R. W. Co. v. Miller*, Q. R. 12 K. B. 1.

Contributory Negligence — *Action by Widow — Pleading — Reply — Railway.*] — In an action for damages by the widow of a railway company for the death of her husband, where the defendants plead that the victim took no steps to protect his own train, as required by the rules and regulations of the company, and that such negligence was the determining cause of the accident, it is not legal for the plaintiff to reply that the deceased "had done all that was customary for the employees of the said railway company defendant," and such allegation being too vague will be rejected on an inscription in law. *Leahey v. Grand Trunk R. W. Co.*, 5 Q. P. R. 350

Contributory Negligence — *Evidence — Mine.*]—In an action to recover damages for negligence causing the death of the plaintiff's son, a workman employed in defendants' mine, the defence of contributory negligence was raised. The cause of death was the breaking away from its fastening of a car, used for the purpose of hauling coal up a slope leading from the mine. The evidence shewed that the fastening used to attach the car to the rope was fit for the purpose for which it was employed, and that it was in good condition; also that the deceased was on the "haulage way," where the accident occurred, contrary to orders, there being a "travelling way" by which workmen were required to go up and down:—Held, that the plaintiff could not recover. *Howie v. Dominion Coal Co.*, 37 N. S. Reps. 111.

Contributory Negligence — Proximate cause — Voluntary incurring of risk—Workmen's Compensation Act—New trial—Jury. *Cameron v. Douglass*, 3 O. W. R. 35.

Contributory Negligence—Volenti non fit injuria — Findings of jury — Nonsuit. *Keiller v. John Inglis Co.*, 6 O. W. R. 334.

Contributory Negligence—*Pleading — Particulars—Damages—Allegations Concerning.*]—A master who alleges that an accident caused to a workman in his employment is due to the latter's own want of care, attention, and skill, may be ordered to give particulars shewing in what such want of care, attention, and skill consists. 2. A plaintiff claiming damages for an injury may allege that he is married and the father of a family, since his obligations to his wife and children must be taken into consideration in assessing the damages. *Labossière v. Montreal Light, Heat, and Power Co.*, 6 Q. P. R. 410.

Contributory Negligence—*Railway — Workman on—Neglect of Rules—Cause of Injury.*]—A rule of the defendants required the display of a blue signal (blue flag by day and blue light by night) while a car was being repaired on the track. Solely in consequence of the failure of the plaintiff, an employee of the defendants, to comply with this rule a train backed down while he was working at a car on the track, and he was injured:—Held, that the plaintiff had no claim for compensation under the circumstances. *Coutlée v. Grand Trunk R. W. Co.*, Q. R. 23 S. C. 242.

Contributory Negligence — Unsatisfactory verdict—New trial. *Reid v. Paul*, 3 O. W. R. 821.

Damages—*Pleading — Financial Circumstances of Parties.*] — A plaintiff claiming damages from his employers, on account of an accident while at work, may allege his poverty and the illness of his wife, but not the pecuniary standing of his employers. *Desrosiers v. Wighton*, 6 Q. P. R. 429.

Dangerous Machine—*Absence of Guard — Contributory Negligence.*] — The plaintiff was employed by the defendant to "edge" boards at a machine known as a jointer, which consisted of two revolving knives about sixteen inches wide driven by steam power, set in and projecting slightly above the surface of an iron table about three feet high and eight feet long. The knives were not guarded, and it was proved that a guard could have been used; that without one the machine was dangerous; and that the defendant's foreman knew this. The workman as he edged each board stood it on end against the table at his left hand for removal by other workmen. One of the boards, owing either to the vibration of the machinery, or to a knock given to it by another workman, fell upon the plaintiff's arm and forced his hand upon the knives, and he was seriously injured:—Held, that the absence of a guard was a defect in the machine; that the foreman's knowledge of this defect and failure to remedy it constituted negligence for which the defendants were liable; that the absence of the guard and not the placing of the board against the table was the proximate cause of the accident;

and therefore that the plaintiff was entitled to damages. *Godwin* v. *Newcombe*, 21 Occ. N. 228, 1 O. L. R. 525.

Dangerous Machine—*Absence of Guard Required by Law — Order of Factory Inspector—Damages—Quantum.*] — The owner of a factory who, contrary to law and the directions of the factory inspector, fails to guard a dangerous machine with appliances which will protect the operator thereof, is guilty of negligence, and, if this negligence is the cause of an accident, is liable to the person injured in damages for the injury. An assessment of $1,000 damages for an injury consisting in the loss of three fingers and the stiffening of the index finger of one hand, in the case of a workman aged 20, is not excessive. Judgment in Q. R. 26 S. C. 535 affirmed. *Desrosiers* v. *St. Laurence Furniture Co.*, Q. R. 27 S. C. 73.

Dangerous Machinery—Precautions — Negligence of fellow workmen—Jury — Damages. *Myers* v. *Sault Ste. Marie Pulp and Paper Co.*, 1 O. W. R. 280, 3 O. L. R. 600.

Dangerous Objects — *Precautions—Notice of Action—Time—Knowledge.*] — Any person who uses dangerous objects in any industry or manufacture must take the greatest possible care to prevent accidents by adopting all the means and inventions known; and where it is proved that such precautions have not been taken, the owner of the industry is responsible for injuries to workmen arising from the dangerous machinery. 2. The notice required in certain cases previous to the bringing of an action for a tort or quasi-tort is in time and will be considered sufficient if it has been served as soon as the plaintiff has knowledge of the facts which give him a right of action. *City of Montreal* v. *Gosney*, Q. R. 13 K. B. 214.

Dangerous Place—Cause of death—Inference—Negligence—Jury. *Griffiths* v. *Hamilton Electric Light, etc., Co.*, 2 O. W. R. 594, 6 O. L. R. 296.

Dangerous Place—Guard—Factories Act —Defect in way — Workmen's Compensation Act—Jury. *Colbourne* v. *Hamilton Steel and Iron Co.*, 2 O. W. R. 548.

Dangerous Ways, Works, Etc. — *Inspection—Evidence—Presumptions — Appeal —Reversal of Findings of Fact.*]—While at work in the pit of an asbestos mine, the pit foreman was killed by a loose rock falling upon him from the wall of the pit. Some time before the accident, after setting off a blast, the wall had been inspected by a competent person under the personal direction of the pit foreman himself, and the particular spot from which the loose rock fell tested by sounding and prying with a crowbar, and judged to be safe. In an action to recover damages the Courts below inferred from the evidence that the wall of the pit had been allowed to remain in an unsafe condition, and held the defendants responsible on account of negligence in this respect. On appeal to the Supreme Court of Canada:—Held, reversing the judgment appealed from, Girouard, J., dissenting, that, as an inspection had been duly made by competent persons using their best judgment in the honest discharge of their duty, who reported the wall to be secure, there could be no negligence imputed to the company in that respect, although it afterwards appeared that there had been error in judgment or in the manner in which the inspection was performed:—Held, also, Girouard, J., dissenting, that where there is evidence that makes it unnecessary to draw inferences or rely upon presumptions from facts proved, the findings of two Courts below which have acted upon such inferences or presumptions, should be reversed. *Girard* v. *Canadian Asbestos Co.*, 25 Occ. N. 96; *Canadian Asbestos Co.* v. *Girard*, 36 S. C. R. 13.

Dangerous Work — *Accident—Inexperienced Workman — Infant—Superintendence—Instruction.*] — The employer owes to his workman, in the execution of his work, all the protection which a father owes to his child, and ought to take the necessary precautions to avoid accidents which may happen to his workmen, even by reason of their imprudence, inexperience, and want of skill; he is liable not only as regards habitual dangers, but also as regards possible accidents, and is responsible for an accident which happens to a workman in the course of dangerous work, which he has ordered him to do, especially when the workman is an infant, ignorant of the danger which he incurs, and having neither the prudence nor the experience necessary to protect himself. Therefore, in this case, the foreman of the defendant company having ordered the plaintiff's son (aged sixteen) to do a dangerous piece of work, without having instructed him sufficiently as to the mode of doing it without danger to himself, and without having superintended the work or caused the workman to be assisted by an experienced person, the defendant company were liable for the consequences of the accident which happened to the plaintiff's son by reason of his inexperience and his want of skill, known to the foreman. *McCarthy* v. *Thomas Davidson Mfg. Co.*, Q. R. 18 S. C. 272.

Dangerous Work — *Precautions — Liability.*] — Judgment of the Court of King's Bench, Quebec, affirming the judgment of the Court of Review. Sub nom. Fournier v. Lamoureux, Q. R. 21 S. C. 90, reversing judgment in Q. R. 21 S. C. 32, affirmed. *Lamoureux* v. *Fournier*, 36 S. C. R. 675.

Dangerous Works—*Knowledge of Master—Workmen's Compensation Act—Liability at Common Law.*]—T., an employee in a mill, entered the elevator on the second floor to go down to the ground floor, and, while he was in it, the elevator fell to the bottom of the shaft, and he was injured. On the trial of an action against his employers for damages, it was proved that the elevator was over 20 years old; that it had fallen before on the same day owing to the dropping out of the key of the pinion gear which had been replaced; and the jury found that the vibration and general dilapidation of the running gear caused the key to fall out again, occasioning the accident:—Held, that the defendants were liable under the Workmen's Compensation Act:—Held, also, Nesbitt, J., dissenting, that the defendants were negligent in not exercising due care in order to have the elevator in a safe and proper condition for the necessary protection of their employees, and were, therefore, liable at common law. Per Nesbitt, J., that, as the defendants had employed a

competent person to attend to the working of the elevator, they were not liable at common law for their negligence. Judgment of the Court of Appeal, Traplin v. Canadian Woollen Mills (Limited), 3 O. W. R. 416, affirmed. *Canadian Woollen Mills (Limited)* v. *Traplin*, 25 Occ. N. 26, 35 S. C. R. 424.

Dangerous Works — *Ordinary Precautions — Knowledge of Risk — Contributory Negligence—Voluntary Exposure to Danger.*] —An employer carrying on hazardous works is obliged to take all ordinary precautions, commensurate with the danger of the employment, for the protection of employees, and, where this duty has been neglected, the employer is responsible in damages for injuries sustained by an employee as the direct result of such omission. Lapitre v. Citizens' Light and Power Co., 29 S. C. R. 1, referred to. In such a case it is not a sufficient defence to shew that the person injured had knowledge of the risks of his employment, but there must be such knowledge shewn as, in the circumstances, leaves no doubt that the risk was voluntarily incurred; and this must be found as a fact. *McDougall* v. *Montreal Park and Island R. W. Co.*, 25 Occ. N. 98; *Montreal Park and Island R. W. Co.* v. *McDougall*, 36 S. C. R. 1.

Death—*Absence of Direct Evidence as to Cause of Injury—Inference—Case for Jury —Dangerous Machinery—Factories Act.*] — The plaintiff sued as the personal representative of her deceased husband to recover damages for injuries sustained by him while working as a sawyer in the employment of the defendants, which, as she alleged, resulted in his death, and were caused by a defect in the condition or arrangement of a "jointer" at which the deceased was working, the revolving knives of which it was, as she contended, the duty of the defendants under the Factories Act to guard, and which were not so guarded. There was no direct evidence of the cause of the injury:—Held, that certain circumstances shewn afforded evidence which, if believed, warranted the inference being drawn that the injuries to the deceased happened while he was in the act of putting the board through the jointer, and that, owing to the knives being unguarded, his fingers, without fault of his, came in contact with the revolving knives by which the ends of them were taken off. Montreal Rolling Mills Co. v. Corcoran, 26 S. C. R. 595, Canadian Coloured Cotton Co. v. Kervin, 29 S. C. R. 478, and Wakelin v. London and South Western R. W. Co., 12 App. Cas. 41, [1896] 1 Q. B. 196n., distinguished: — Held, also, following Groves v. Wimborne, [1898] 2 Q. B. 402, and Sault Ste. Marie Pulp and Paper Co. v. Meyers, 33 S. C. R. 23, that failure to obey the direction of the Factories Act as to guarding dangerous machinery, which results in injury being caused to an employee, gives a right of action. *Billing* v. *Semmens*, 24 Occ. N. 83, 7 O. L. R. 340, 3 O. W. R. 17. Affirmed, 8 O. L. R. 540, 4 O. W. R. 218.

Death—Action by widow under Fatal Injuries Act—Cause of death—Defective appliances — Absence of precautions—Dangerous employment—Voluntary acceptance of risk—Knowledge of master—Knowledge of servant. *Campbell* v. *Ontario Lumber Co.*, 3 O. W. R. 235.

Death — *Causal Connection — Evidence —Conjecture — Defect — Want of Guard— Findings of Jury.*]—The plaintiff's husband, who was working on a platform projecting a few feet from a gallery in the defendants' workship, fell from the platform and was killed, there being no evidence to shew how he fell. There was no railing or guard to the platform, but when the deceased was last seen he was standing on the platform next the gallery in a place of safety, and after that, up to the time when he was found lying on the floor, nothing had happened in connection with his work to make it necessary for him to change his position:—Held, Meredith, C.J., dissenting, that there was no case to go to the jury, it being merely at best a matter of conjecture that the accident had happened because of the want of a guard. *Brown* v. *Waterous Engine Works Co.*, 24 Occ. N. 315, 8 O. L. R. 37, 3 O. W. R. 943.

Death—*Cause of—Unauthorized Misconduct of Fellow-workman—Findings of Jury —Irrelevancy — Negligence — Workmen's Compensation Act—Factories Act.*]—An action under the Workmen's Compensation for Injuries Act by a widow to recover damages for the death of her husband, caused by an accident when in the defendant's employment. The deceased was working on the first floor of the defendant's door and sash factory. There was an opening in the floor through which boards were passed from the lower to the first floor when required. The usual method before and at the time of the accident was, that when a number of boards had to be put up-stairs a workman was sent up to stand by the hole and receive each board as it was handed up by a man on the ground floor. When only a few boards were to be put up at a time, the man below would push a board up a little way and rattle it about until some one on the first floor came forward and took it. On the occasion of the accident an employee of the defendants engaged on the ground floor, finding three boards standing with the upper ends in the opening above and in the way of his work, pushed one up a little way and rattled it. No attention being paid, he violently shoved a board up so that it shot through the hole and landed on the first floor. He repeated this with the second and third, and the last one struck the deceased while walking past the hole and caused his death:—Held, that the defendant was not responsible, inasmuch as the act of the employee which caused the accident was wholly unauthorized and opposed to the usual course, and the defendant or foreman could not be blamed for not assuming that any workman would resort to such unlikely and extraordinary measures for removing boards from the lower floor; and the findings of the jury were irrelevant and must be disregarded. Judgment of Britton, J., 2 O. W. R. 305, reversed. *Alexander* v. *Miles*, 24 Occ. N. 124, 7 O. L. R. 103, 3 O. W. R. 109.

Death — Dangerous employment — Foreman—Volenti non fit injuria — Findings of jury—Nonsuit on undisputed evidence. *Cameron* v. *Douglas*, 3 O. W. R. 817.

Death — Dangerous work — Instructions of foreman—Defective appliances — Finding of jury—Knowledge of danger—Voluntarily incurring risk—Workmen's Compensation Act.

Mitchell v. *Canada Foundry Co.*, 3 O. W. R. 907.

Death — *Defective Appliances—Construction by Deceased—Evidence—Appeal.*] — In an action for damages by reason of an accident in a workshop causing the death of a man, where the defendant pleads that the contract of the deceased contained a stipulation that the scaffolds, of which that which caused the accident was one, were to be constructed by the deceased and his father, and were so constructed, may call witnesses to prove such stipulation. 2. A judgment maintaining objections to the enquête falls within the cases enumerated in art. 46, C. P. *Beaudoin* v. *Petit*, 6 Q. P. R. 322.

Death — *Defective System — Immunity from Accident for Long Period.*] — The defendant was the owner of a derrick for hoisting coal from vessels, which was drawn up by a bucket and emptied into a hopper at the top of the derrick. Under the hopper was a platform with an opening in it, across which there were rails for a tram car, into which the coal was loaded when it was desired to weigh it, the coal being then dropped through the opening into a lower hopper; but when the weigh car was not in use, the coal fell directly from the upper hopper through the opening into the lower hopper. The sides of the platform were three feet nine inches from the opening, and were not fenced so as to prevent coal from falling over its edge. There was a ladder from the corner of the platform to the ground, which, though not the ordinary means of access to and from the derrick, was being properly used by deceased, one of the employees, on his way to inspect a vessel then being unloaded, when he was struck on the head and killed by a piece of coal, which had fallen from the platform. The derrick had been in use for fifteen years without the occurrence of any similar accident, or proof of any coal having previously fallen from, though occasionally falling on, the platform. In an action by the administrator to recover damages by reason of the death of the deceased:—Held, that the unfenced sides of the platform were obviously a cause of danger, which was necessarily increased by the existence of the rails across the opening causing coal striking them to be driven outward, and that the plaintiff was therefore entitled to recover. Judgment of a Divisional Court, 2 O. W. R. 396, affirmed. *Bisnaw* v. *Shields*, 24 Occ. N. 120, 7 O. L. R. 210, 3 O. W. R. 112.

Death — *Electric Plant — Defective Appliances — Electric Shock—Engagement of Skilled Manager—Contributory Negligence.*] —An electrician engaged with the defendants as manager of their electric lighting plant, and undertook to put it in proper working order, the defendants placing him in a position to obtain all necessary materials for that purpose. About three months after he had been placed in charge of the works he was killed by coming in contact with an incandescent lamp socket in the power house, which had been there the whole of the time he was in charge, but, at the time of the accident, was apparently insufficiently insulated:—Held, that there was no breach of duty on the part of the defendants towards the deceased, who had undertaken to remedy the very defects that had caused his death, and the failure to discover them must be attributed to him. The judgment appealed from, 14 Man. L. R. 74, 22 Occ. N. 266, ordering a new trial, was affirmed, but for reasons different from those stated in the Court below. *Davidson* v. *Stuart*, 24 Occ. N. 113, 34 S. C. R. 215.

Death — *Employers' Liability Act—Cause of Injury—Negligence — Contributory Negligence.*]—Action under the provisions of the Employers' Liability Act, by the widow and administratrix of McN., who was a night track walker in the service of the defendants, and whose duty was to walk backwards and forwards on the railway tracks of the defendants to see that the tracks were clear. There was a shed over the defendants' blast furnace, the roof of which projected on each side for some distance. The tracks were under the projecting roof, and persons walking along the tracks would be entirely protected from the falling ice and snow from the roof. If slag or metal was being poured from the furnaces, or the track was otherwise entirely obstructed, the walker would have to go outside the track or take the track on the other side of the shed. The deceased was found dead one morning about 12 feet outside the track, covered with pieces of ice, one arm broken and with marks on the back of his head. There was no direct evidence of the cause of the death:—Held, following Wakelin v. London and South Western R. W. Co., 12 App. Cas. 41, that the facts proved were consistent equally with negligence by the defendants, contributory negligence by the deceased, and death in circumstances for which the defendants would not be responsible; and the action was dismissed. *McNeil* v. *Dominion Iron and Steel Co.*, 24 Occ. N. 236.

Death—Fatal Accidents Act—Workmen's Compensation Act—Railway—Engine-driver —Disobedience of rules—Nonsuit. *Holden* v. *Grand Trunk R. W. Co.*, 5 O. L. R. 301, 2 O. W. R. 80.

Death—*Fatal Accidents Act—Workmen's Compensation Act — Pleading — Status of Plaintiff — Expectation of Benefit—Persons for whose Benefit Action Brought.*]—No person can sue under the Workmen's Compensation Act, R. S. M. 1902 c. 178, for damages for the death of a deceased relative, who could not sue under R. S. M. 1902 c. 31, and the statement of claim must shew either that the plaintiff is the executor or administrator of the deceased or that there is no executor or administrator, or, if there be one, that no action has been commenced within six months after the death of the deceased by or in the name of the executor or administrator; and it is not sufficient for the plaintiff to state simply that he is the father and sole heir-at-law of the deceased. It is necessary that the statement of claim should shew that the plaintiff had a reasonable prospect of future pecuniary benefit from the continuance of the life of the deceased. It is not necessary in every case, and it was not necessary in the circumstances of this case, to allege that the action was brought for the benefit of all persons entitled to claim damages. *Makarsky* v. *Canadian Pacific R. W. Co.*, 15 Man. L. R. 53.

Death — Mine — Negligence — Onus—Waiver—Disobedience of servant. *Anderson* v. *Mikado Gold Mining Co.*, 3 O. L. R. 581, 1 O. W. R. 276.

Death — Negligence — Res ipsa loquitor. *Bisnaw* v. *Shields*, 3 O. W. R. 396.

Death — Negligence of master—Mine—Defective machinery—Contributory negligence—Fatal Accidents Act—Death of widow of servant after action. *Adams* v. *Culligan, Howe* v. *Culligan*, 1 O. W. R. 38.

Death — *Neglect to Provide Medical Attendance.*] — The refusal or neglect of the master to provide medical or surgical attendance for the servant injured in his service by his alleged negligence gives no cause of action where death ensues from the injuries. *Makarsky* v. *Canadian Pacific R. W. Co.*, 17 Man. L. R. 53.

Death — *Persons Entitled to Sue for.*]—Where a person has been injured by the negligence of his employer and has died as the result of his injuries, without having received compensation, the right to recover belongs exclusively to the persons mentioned in art. 1056, C. C., which is restrictive and ought to be interpreted strictly. *St. Laurent* v. *Telephone Co. of Kamouraska*, 7 Q. P. R. 293.

Death — *Railway—Defective Appliances.*]—Where a car used by a railway company kills a man who is in charge of it, the company are responsible for the damages sustained by the widow and children of the deceased, unless the company can prove that they could not have prevented the accident. 2. Where, as in this case, the accident could have been avoided by using more perfect appliances, which are easy to procure, as, for example, automatic couplers, compressed air brakes, etc., the company are guilty of negligence in not having these appliances. *Lemay* v. *Quebec and Lake St. John R. W. Co.*, Q. R. 25 S. C. 82.

Death — *Workmen's Compensation Act — Defect.*]—M., proprietor of iron works, had built an engine in the course of business, and, while it was standing on a railway track in the workshop, a heavy dray standing near, owing to the horses attached being startled, was thrown against it, whereby it was overturned and killed a workman at a bench three or four feet away. On the trial of an action by the administratrix of the workman's estate, the jury found that the accident was due to the negligence of M. in not having the engine properly braced: — Held, that this finding was justified by the evidence, and M. was liable under the Workmen's Compensation for Injuries Act, R. S. O. 1897 c. 160:—Held, also, that the accident did not occur through "a defect in the condition or arrangement of the ways, works, machinery, plant, buildings, or premises connected with, intended for, or used in the business of the employer." *King* v. *Miller*, 24 Occ. N. 263, *Miller* v. *King*, 34 S. C. R. 710.

Death — Workmen's Compensation Act—Notice of injury—Excuse for want of—Evidence—Statement of deceased—Negligence—Cause of injury—Jury. *Armstrong* v. *Canada Atlantic R. W. Co.*, 1 O. W. R. 612, 4 O. L. R. 560.

Defect in Engine — *Consequent Death—Negligence—Workmen's Compensation Act—Repair — Inspection — Reasonable Care—Person Intrusted by Master to Provide Proper Appliances—Evidence for Jury—New Trial.*]—The deceased was in the employment of defendants as fireman on locomotive engine No. 480, which was of what is known as the "Atlantic" type, and was provided with arch flues or hot water pipes which passed through the fire box and had their ends inserted into the hot water tank surrounding the fire box. On 17th November, 1903, while the engine was on its journey from Windsor to Niagara Falls, one of these tubes drew out of the tank, with the result that the boiling water and steam from it escaped, and the deceased was so badly scalded that he died a few hours afterwards. Plaintiff's case as presented at the trial was: (1) that the use of arch flues or hot water pipes was improper, because, as it was attempted to be shewn, it was highly dangerous to use them, owing to their being very liable to draw out; (2) that this danger was increased by an unsafe and improper method of keeping the pipes in place, which was adopted and in use by defendants; and (3) that the pipe which drew out when deceased received his injuries was insecurely and negligently fastened into the side of the tank to which it was attached. It was also alleged that defendants had not made proper provision for the inspection of these appliances; and it was contended that, having regard to the liability of the hot water pipes to become displaced and to draw out, special care and vigilance should have been exercised to see that they were always in good and efficient repair and condition. It appeared in evidence that the pipe which drew out when the deceased was injured had been put in, in defendants' workshop, to replace one that had become defective, but it was not shewn by whom this was done or in what circumstances the engine was sent to the workshop to be thus repaired. There was evidence that in making this repair the pipe had not been properly secured, and the inference might be drawn that it was owing to this that the pipe drew out:—Held, "It was clear at common law that the contract between employer and employed involved on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition, and so to carry on operations as not to subject those employed to unnecessary risk." It was also clear that at common law the employer was not bound in person to execute the work in connection with his business, but he was bound, if he did not personally superintend and direct the work, to select proper and competent persons to do so, and to provide them with adequate materials and resources for the work, and that, having done this, he had done all that he was bound to do, and for the negligence of the persons so selected he was not answerable: per Lord Cairns in Wilson v. Merry, L. R. 1 Sc. App. 326, 332. One of the duties flowing from that obligation of the employer was to take due and reasonable care that machinery which, if out of order, would cause danger to his employee, was safe and in such a condition that the employee could use it properly without incurring unnecessary danger. What was due and reasonable case was a question of degree in each case and depends upon the nature of the machinery, its liability to get out of order, and the danger incurred by the employee if he was suffered to use it when not in a condition to be safely used: Murphy v. Phillips, 24 W. R. 649, 35 L. T. N. S. 477. The employer who omits to discharge this obligation to his employee, either by performing it personally or by employing a competent

person to do it, was liable at common law to answer in damages to his employee (unless the employee himself knew of the defect) for any injury happening to him owing to a defect in the condition of the machinery which, by reasonable examination from time to time, might have been discovered. The purpose of s.-s. 1 of s. 3 and s.-s. 1 of s. 6 was to take from the employer the immunity from liability for the neglect of the person to whom he had intrusted the duty of providing and maintaining in proper condition the appliances for the work in which his employees were engaged, but it was not intended otherwise to affect the common law liability of the employer, and it did not do so. If defendants in this case did not provide for a proper examination from time to time of the locomotive upon which the deceased was working, and the defect in it which caused the injury to him would have been discovered had such an examination been made, they were answerable for a breach of the duty which they owed to deceased of taking reasonable care to provide proper appliances and to maintain them in a proper condition, and if, on the other hand, they did provide for such an examination, if the defect could have been discovered they are answerable for the negligence of the person or persons whom they intrusted with the performance of that duty. Defendants are also answerable for the negligence of any person whom they had intrusted with the duty of seeing that the locomotive was repaired so as to make it fit to be safely used, for such a person would be a person intrusted by them with the duty of seeing that the machinery was proper, within the meaning of s.-s. 1 of s. 6: Markle v. Donaldson, 7 O. L. R. 376, 3 O. W. R. 147, affirmed in appeal, 4 O. W. R. 377. There was evidence which would support a finding by the jury of negligence in the discharge of the duty which defendants owed to deceased, and that deceased came to his death owing to that negligence Appeal allowed and new trial ordered; costs of appeal and of last trial to be costs in the cause; upon the new trial it was not to be open to plaintiff to rely upon the 1st and 2nd grounds of complaint, and as to these the action remained dismissed. *Schwoob* v. *Michigan Central R. W. Co.*, 5 O. W. R. 157, 6 O. W. R. 630, 9 O. L. R. 86, 10 O. L. R. 157.

Defect in Ways — Contributory negligence—Course of employment—Sunday work—Jury—Nonsuit. *Hopkins* v. *Barchard*, 5 O. W. R. 246, 6 O. W. R. 330.

Defective Appliances — *Care — Liability.*]—An employer is not absolutely bound to provide the latest tools and appliances, but if old fashioned, inferior, and dangerous tools and appliances (link and pin couplings for cars) are provided, this in itself constitutes an element of negligence imposing the obligation to exercise the greatest care. In the present case the care exercised by the employers was not such as it should have been in view of the defective nature of the couplings provided, and they must be held responsible for the injury and death of the servant. Judgment in Q. R. 25 S. C. 82, affirmed. *Quebec and Lake St. John R. W. Co.* v. *Lemay*, Q. R. 14 K. B. 35.

Defective Appliances — Findings of jury — Evidence of no previous accident—Contributory negligence — Damages. *Commerford* v. *Empire Limestone Co.*, 6 O. W. R. 1018, 11 O. L. R. 119.

Defective Implements — *Right of Servant to Assume Tools Furnished are in Good Order—Accident—Burden of Proof—Admissions of Servant—Value of.*]—An employer is bound to furnish his workmen with tools in good order; if an accident happens by reason of a tool supplied being in bad order, the employer is responsible. The employer should have a foreman capable of judging the condition of tools furnished, and, when they become dangerous, they should be withdrawn from the workmen. The employer has the duty imposed on him to guard the workmen against dangers which may be the consequence of the work at which he is employed. In this case the workman was occupied in cutting a steel rail with a cold chisel; he and another workman, in turn, struck with iron hammers on the head of the chisel which another workman held on the rail with tongs; the head of the chisel was broken, and, when struck with the hammer of the plaintiff's companion, a sliver of steel was detached from the chisel and struck and injured the eye of the plaintiff; the latter had the right to take for granted that the head of the chisel was in good order:—Held, that the defendants were liable for the accident. An admission of a party has value and is binding only on questions of fact and not on questions of law. The admission of the plaintiff, after the accident, that the tools were in good order, that the accident was not the fault of the defendants, is contrary to the evidence and the truth, and it does not bind him, he not having the necessary ability to judge whether the tools were in good order or not, nor the legal knowledge necessary to appreciate the legal consequences resulting from the fact. He who alleges that an accident was due to mere chance (cas fortuit) must prove it. *Drolet* v. *Metabetchman Pulp Co.*, Q. R. 26 S. C. 107.

Defective Machine — Fault of superior workman—Workmen's Compensation Act — Damages. *Glasgow* v. *Toronto Paper Manufacturing Co.*, 5 O. W. R. 104.

Defective Plant — *Ship.*]—As a fisherman, employed by the defendants, was dragging by its wooden handle, according to the usual practice adopted on the defendants' fishing tug, a heavy box of fish along the deck, the handle, which was made of a poor quality of wood, broke, and the man fell overboard and was drowned:—Held, that the defendants were bound, even at common law, to exercise due care to furnish to their men material and plant in a sound and proper condition, and that they were liable in damages. *Sim* v. *Dominion Fish Co.*, 21 Occ. N. 371, 2 O. L. R. 69.

Dilapidated Condition of Elevator—Common law liability — Finding of jury. *Traplin* v. *Canadian Woollen Mills (Limited)*, 3 O. W. R. 416.

Disobedience of Orders — *Dangerous Work.*] — Where a foreman has given the necessary orders to ensure the safety of a workman engaged in dangerous work, the employee who disobeys such orders, and, in consequence, sustains injuries, cannot hold his employer responsible in damages on the ground that the foreman was bound to see

that the orders were not disobeyed. Lamoureux v. Fournier dit Larose, 33 S. C. R. 675, discussed and distinguished. *Royal Electric Co.* v. *Paquette*, 25 Occ. N. 3, 35 S. C. R. 202.

Disregard of Warning — *Danger — Liability.*] — The plaintiff was employed in shovelling coal from a large pile, and carting it to the defendants' furnaces. The pile of coal was frozen over on the outside, and plaintiff was instructed not to undermine the crust, and, moreover, had been frequently warned by his fellow workmen of the danger of shovelling coal from under the crust so formed, but he took the risk, with the result that a portion of the frozen coal fell upon him and caused him serious injury. In an action by the plaintiff to recover damages for this injury:—Held, that employers are not obliged to indemnify their workmen when accidents happen in consequence of their not obeying the instructions given them as to the safe and proper method of performing their work; and under the circumstances the defendants were not responsible. *Primeau* v. *Merchants Cotton Co.*, Q. R. 19 S. C. 62.

Duty to Case Shaft — Evidence—Jury—New trial. *Cameron* v. *Douglass*, 6 O. W. R. 673.

Duty to Servant—Defective appliances—New trial. *Uylaki* v. *Dawson*, *Gyorgy* v. *Dawson*, 6 O. W. R. 569.

Elevator—Defective appliances—Inspection—Duty of tenant—Duty of landlord—Evidence for jury—Nonsuit. *Talbot* v. *Hall*, *Delaire* v. *Hall*, 5 O. W. R. 751.

Employers' Liability Act—*Dangerous Place — Contributory Negligence — Obedience to Orders.*]—Where the plaintiff was required to perform a pice of work in a dangerous place, by a person in the employment of the defendants, whose orders he was required to obey, and, while so engaged, was struck by a moving car and severely injured, the company having failed to provide proper plant and a reasonably safe place for the performance of the work he was directed to do:—Held, that the plaintiff was entitled to recover compensation for the injuries sustained; and that, as the plaintiff, although aware of the serious danger of working where he did, felt obliged to do so under peril of dismissal if he refused, he was not guilty of such contributory negligence as would preclude his recovery. *Oliver* v. *Dominion Iron and Steel Co.*, 37 N. S. Reps. 183.

Employers' Liability Act — *Defect in Ways, Works, etc.—Care in Moving Cars—Contributory Negligence.*]—O., a workman in the employment of the defendant company, was directed by his superior to cut sheet iron and to use the rails of the company's railway track for the purpose. The superior offered to assist, and the two sat on the track facing each other. O. had his back to two cars standing on the track, to which, after they had been working for a time, an engine was attached, which backed the cars towards them, and O., not hearing or seeing them in time, was run over and had his leg cut off:—Held, that O. did not use reasonable precautions for his own safety in what he knew to be a dangerous situation, and could not recover damages for such injury:—Held, also, that the employees engaged in moving the cars were under no obligation to see that there was no person on the track before doing so:—Held, per Sedgewick, Nesbitt, and Killam, JJ., that the want of a place specially provided for cutting the sheet iron was not a defect in the ways, works, etc., of the company, within the meaning of s. 3 (a) of the Employers' Liability Act: — Held, per Girouard and Davies, JJ., that, if it was such a defect, it was not the cause of the injury to O. *Dominion Iron and Steel Co.* v. *Oliver*, 25 Occ. N. 54, 35 S. C. R. 517.

Employers' Liability Act — *Proximate Cause.*]—D. was engaged in moving cars at a quarry of the company. The cars were loaded at a chute under a crusher, and had to be taken past an unused chute about 200 feet away, supported by a post placed seven and a half inches from the track. D., having loaded a car, found that it failed to move as usual after unbraking, and he had to come down to the foot-board and shove back the foot-rod connected with the brake. The car then started, and he climbed up the steps at the side to get to the brake on top, but was crushed between the car and the post. He could have got on the rear of the car, instead of using the steps, or jumped down and walked along after the car until it had passed the post. The manager at the quarry had been warned of the danger from the post, but had done nothing to obviate it:—Held, reversing the judgment in 36 N. S. Reps. 113, Davies and Killam, JJ., dissenting, that D.'s own negligence was the cause of his injury, and the company were not liable:—Held, per Davies and Killam, JJ., that the position of the post was a defect in the company's works under the Employers' Liability Act, which was evidence of negligence. *Dominion Iron and Steel Co.* v. *Day*, 24 Occ. N. 167, 34 S. C. R. 387.

Employers' Liability Act, B. C. — *Common Employment — Former Servant's Negligence—Trial — Party Bound by Course of.*]—Where a party frames an action for negligence at common law and also under the Employers' Liability Act, but at the trial attempts to develop a case at common law and fails, he will not be granted a new trial in order to try to establish a case under the Employers' Liability Act. The jury found that the defendants were negligent in not providing proper and accurate working plans of a mine, and that such neglect was the cause of the accident, but they did not specify what person or official was guilty of the negligent act. The plans were prepared by the defendants' engineers, who were competent, and who had left the defendants' employment before the injured person entered their employment:—Held, that the defendants were not liable either under the Act or at common law. Per Irving, J.—The doctrine of common employment is applicable where the servant because of whose fault the accident happened had left the employer's service before the injured servant entered his service. *Hosking* v. *Le Roi No. 2, Limited*, 23 Occ. N. 300.

Employers' Liability Act, B. C. — *Dangerous Place—Duty to Warn Workmen.*] —G. had been working in the defendants' mine on the floors immediately below the 600-foot level, and on the night of the accident when he was going to work he was told by

the shift whom he was relieving that the place was in pretty bad shape, and to look out for it. He proceeded to make an examination, but while thus engaged the mine superintendent directed him to do some blasting, and while doing it a slide occurred, and he was injured. The principal evidences of the likelihood of a slide were two floors beneath the 600-foot level, of which the superintendent was aware, and G. not aware. The jury found that the superintendent was negligent, inasmuch as he did not advise G. of the probable danger:—Held, in an action under the Employers' Liability Act, that the defendants were liable. Where a workman is put to work in a place where there is an imminent danger of a kind not necessarily involved in the employment, and of which he is not aware, but of which the employer is aware, it is the employer's duty to warn the workman of the danger. *Gunn* v. *Le Roi*, 23 Occ. N. 291, 10 B. C. R. 59.

Employers' Liability Act, B. C. — *Negligence — Common Employment — Mine Owner and Contractor.*] — H. and M. contracted to sink a winze in defendants' mine at a certain price per foot, and by the terms of the contract the direction and dip of the winze were to be as given by the defendants' engineers; the defendants were to provide all necessary appliances, etc.; H. and M.'s workmen should be subject to the approval and direction of the defendants' superintendent, and any men employed without the consent and approval of or unsatisfactory to such superintendent should be dismissed on request. A hoisting bucket hung on a clevis was supplied to H. and M. by the defendants, and through the negligence of the defendants' superintendent, master mechanic, or shift boss, a hook substituted for the clevis by defendants, at the request of H. and M., got out of repair, in consequence of which the bucket slipped off and in falling injured the plaintiff, who was one of H. and M.'s workmen engaged in sinking the winze:—Held, that the plaintiff, being subject to the orders and control of the defendants, was acting as their servant, and the doctrine of fellow-servant applied, and the action was not maintainable. *Hasting* v. *Le Roi No. 2, Limited*, 23 Occ. N. 273, 10 B. C. R. 9.

Employers' Liability Act, B. C. — *Negligence—Findings of Fact—Machinery in Mine—Defective Construction — Proximate Cause.*]—An elevator cage was used in defendants' mine for the transportation of workmen and materials through a shaft over eight hundred feet in depth. It was lowered and hoisted by means of a cable, which ran over a sheave-wheel at the top of the shaft, and, to prevent accidents, guide-rails were placed along the elevator shaft, and the cage was fitted with automatic dogs or safety clutches, intended to engage upon these guide-rails and hold the cage in the event of the cable breaking. The guide-rails were continued only to a point about twenty feet below the sheave-wheel. On one occasion the engineman in charge of the elevator carelessly allowed the cage to ascend higher than the guide-rails and strike the sheave-wheel with such force that the cable broke, and the safety clutches failing to act, the cage fell a distance of over eight hundred feet, smashed through a bulkhead at the eight hundred foot level, and injured the plaintiff, who was engaged at the work for which he was employed by the defendants, about fifty feet lower down in the shaft. In an action to recover damages for the injury sustained, the jury found that the proximate cause of the injury was occasioned by the non-continuance of the guide-rails, which, in their opinion, caused the safety-clutches to fail in their action, and thereby allowed the cage to fall:—Held, that the Court ought not, on appeal, to disturb the verdict entered for the plaintiff, as there was sufficient evidence to support the finding of fact by the jury. Judgment in 9 B. C. R. 62 reversed. *McKelvey* v. *Le Roi Mining Co.*, 23 Occ. N. 61, 32 S. C. R. 664.

Employers' Liability Act, B. C.— *Notice of Injury—Want of—Reasonable Excuse—Prejudice—Evidence.*]—In an action for damages under the Employers' Liability Act for injuries sustained by the plaintiff, it was shewn that the plaintiff was without means and for some weeks after the accident was unable to transact any business; and that the defendants' business manager and representative saw the accident and arranged for the plaintiff's admission into the hospital, where a few days later he discussed with him the cause of the accident:—Held, that the circumstances excused the want of notice of injury. At the close of the plaintiff's case a nonsuit was moved for, on the ground that the plaintiff had not proved notice of injury, and the plaintiff then adduced evidence which the Court held shewed a reasonable excuse for the want of notice, and the trial proceeded. Before closing his case the defendants' counsel tendered evidence of being prejudiced by want of notice:—Held, excluding the evidence, that the proper time to shew prejudice was while the question of reasonable excuse was still open. *Lever* v. *McArthur*, 9 B. C. R. 417.

Employers' Liability Act, B. C.— *Railway—Contributory Negligence—Nonsuit —Jury.*]—The judgment in 22 Occ. N. 244, 8 B. C. R. 393, affirmed. *Faucett* v. *Canadian Pacific R. W. Co.*, 32 S. C. R. 721.

Employers' Liability Act, Nova Scotia *—Railway—Defect in Way—Voluntary Incurring of Risk—Contributory Negligence—Damages—Costs.*]—The plaintiff was employed as a brakesman on cars that were being loaded with stone from a chute on the defendant company's line of railway. At a distance of 150 to 200 feet from the chute where the cars were loaded was a second and unused chute which the cars were required to pass in order to reach the loading point. The track sloped from the point where the empty cars were stationed to the point where they were filled, and as soon as one car was filled it was the duty of the brakesman to release the brakes and allow another car to run down the track and take its place. The gear controlling the brake of a car which the plaintiff was placing in position to be filled failed to work properly, and the plaintiff was obliged to descend for the purpose of releasing it. As he was attempting to regain his position, after the car had started, in order to be in a position to control it, he was caught between the car and one of the posts supporting the unused chute, and was injured. The attention of the manager of the defendant company had previously been called by the plaintiff to the danger of accidents

from this cause, and he had promised to have it remedied, but nothing was done till after the accident, when the chute was removed. The plaintiff had been employed by the company for two years prior to the happening of the accident, but had only been engaged in this particular work for some nine days:—Held, that the position of the post, coupled with the position from which the empty cars had to be started, constituted a defect, and should have been remedied when the attention of the defendants' manager was called to the danger arising from it. After the plaintiff had notified the manager of the danger, there was nothing in his continuance in the defendants' employ from which to infer that he voluntarily incurred the risk. Notwithstanding evidence that the plaintiff might have got on the car in another way, and thus have avoided the accident, he was, under the circumstances, only called upon to use a reasonable way of doing what he was called upon to do—not the safest way—and that the finding of the jury that the plaintiff was not guilty of contributory negligence should not be disturbed. In the absence of evidence of permanent injury, the damages assessed ($850) were excessive and should be reduced; no costs to either party. *Day* v. *Dominion Iron and Steel Co.*, 36 N. S. Reps. 113.

Employment of Child in Factory—*Factories Act—Misrepresentation as to Age—Dangerous Machinery — Warning—Negligence—Jury.*]—The plaintiff, a boy of ten, represented his age as fourteen, and was employed by the defendants in their factory. He was not put at dangerous work, but, in going to his work through a room in which there were dangerous machines, he was injured by one of them:—Held, Meredith, J., dissenting, that the provision of the Factories Act, R. S. O. 1897 c. 256, s. 3, that no child (as defined by s. 2, s-s. 5) shall be employed in a factory, is to protect young children from dangerous employment. It is not enough to take the statement of a child as to his age; the employer must satisfy himself by reasonable means that the applicant for work is of the requisite age; and it is for the jury to say whether reasonable precautions have been taken. The illegal employment may be evidence of negligence. Upon the facts of this case it was for the jury to say whether sufficient warning had been given by the defendants to protect the plaintiff—having regard to his age and the danger of the place. *McIntosh* v. *Firstbrook Box Co.*, 24 Occ. N. 370, 8 O. L. R. 419, 3 O. W. R. 924. Affirmed 10 O. L. R. 526, 6 O. W. R. 237.

Engagement by Contractor—*Control—Defective Machinery—Notice—Failure to Remedy—Common Employment.*]—The sinking of a winze in a mine belonging to the defendants was let to contractors, who used the hoisting apparatus which the defendants maintained and operated by their servants, in the excavation, raising, and dumping of materials, in working the mine under the direction of their foreman. The winze was to be sunk according to directions from the defendants' engineer, and the contractors' employees were subject to the approval and direction of the defendants' superintendent, who also fixed the employees' wages and hours of labour. The plaintiff, a miner, was employed by the contractors under these conditions, and was paid by them through the defendants. While at his work in the winze the plaintiff was injured by the fall of a hoisting bucket, which happened in consequence of a defect in the hoisting gear, which had been reported to the defendants' mastermechanic and had not been remedied:—Held, affirming the judgment in 10 B. C. R. 9, 23 Occ. N. 273, Taschereau, C.J.C., dissenting, that the plaintiff was in common employment with the defendants' servants engaged in the operation of the mine, and that, even if there was a neglect of the duty imposed by statute, in respect to inspection of the machinery, as the accident occurred in consequence of the negligence of one of his fellow-servants, the defendants were excused from liability on the ground of common employment. *Hastings* v. *Le Roi No. 2, Limited*, 24 Occ. N. 116, 34 S. C. R. 177.

Evidence—*Death from Electrical Shock—Inference as to Cause of Death—Jury—Negligence—New Trial.*]—The plaintiff's son and another labourer were directed to clear up and remove the rubbish caused by their cutting a trench in the concrete floor of an alleyway in the defendants' power house. The alleyway was crossed at right angles by others, on each side of which were electric machines and live wires within arm's length of anyone working in the trench, one of the latter of which was ruptured, perhaps by bending in constant use. The other labourer went into a cross alleyway where the live wires were, although there had been a slat nailed across it when the two were put to work; and was sweeping towards the trench the litter that had been scattered about, when he suddenly became unconscious from an electric shock. The bodies of both men were found near a switchboard, plaintiff's son being dead. It was shewn that there was a rupture in the insulation of a loose loop or cable hanging from the switchboard directly over where the survivor was lying, and that the insulation of the wires was, with respect to the voltage passing, insufficient for the safety of anyone working among them, and that the hanging loop might easily have been better guarded than it was:—Held, that there was evidence which could not be properly withdrawn from the jury, and a nonsuit was set aside, and a new trial ordered. *Griffiths* v. *Hamilton Electric and Cataract Power Co.*, 23 Occ. N. 293, 6 O. L. R. 296, 2 O. W. R. 594.

Explosion—*Verdict of Jury—Absence of Exact Proof of Cause of Injury—Appeal.*]—A jury having found that an explosion occurred through the neglect of the defendants to supply suitable machinery and to take proper precautions, and that the resulting injury to the plaintiff, a workman in the employment of the defendants, was not in any way due to his negligence, the verdict was upheld by the unanimous judgment of two Courts:—Held, reversing the judgment in Dominion Cartridge Co. v. McArthur, 22 Occ. N. 5, 31 S. C. R. 392, which went upon the ground that there was no exact proof of the fault which certainly caused the injury, that, although proof to that effect may reasonably be required in particular cases, it is not so where the accident is the work of a moment, and its origin and cause incapable of being detected. *McArthur* v. *Dominion Cartridge Co.*, [1905] A. C. 72.

Explosion of Boiler in Rolling Mill—Defective appliances—Reasonable care—

Common law liability—Incompetency of fellow servant—Workmen's Compensation Act—Damages. *Woods* v. *Toronto Bolt and Forging Co.*, *Dunsford* v. *Toronto Bolt and Forging Co.*, 6 O. W. R. 637, 11 O. L. R. 216.

Factory—Defective system—Negligence—Jury—Workmen's Compensation Act. *Alexander* v. *Miles*, 2 O. W. R. 305.

Factory — Elevator — Defects — Safeguards—Signals — Negligence—Findings of Jury. *Leeder* v. *Toronto Biscuit Co.*, 1 O. W. R. 687.

Factory — Machinery — Guard—Jury—General verdict—Pleading—Notice of accident. *Pearce* v. *Elwell*, 2 O. W. R. 515.

Factory—Negligence—Findings of jury—Finding of Judge—Consent—Notes of evidence. *Walton* v. *Welland Vale Mfg. Co.*, 1 O. W. R. 839.

Factories Act, Ontario—*Negligence—Unguarded Machinery—Proximate Cause.*]—The plaintiff, a workman in a pulp factory, whose duty it was to take the pulp away from a drier, had to climb up a step-ladder to get on a plank in front of the drier. The step-ladder was movable and placed close to a revolving cog-wheel. On returning from the drier on one occasion, another workman, accidentally or intentionally, removed the ladder as the plaintiff was about to step on it, and before he could recover his balance his leg was caught in the cog-wheel and so crushed that it had to be amputated. In an action against the factory owners the jury found that the injured workman was not negligent or careless; that the removal of the ladder would not have caused the accident if the wheel had been properly guarded, and the ladder fastened to the floor; and that the non-guarding and fastening was negligence of the defendants:—Held, affirming the judgment of the Court of Appeal, 3 O. L. R. 600, 22 Occ. N. 203, that the evidence justified the findings; and that the proximate cause of the accident was the want of a proper guard on the wheel and fastening of the ladder to the floor, for which the defendants were liable. *Myers* v. *Sault Ste. Marie Pulp Co.*, 23 Occ. N. 81, 33 S. C. R. 23.

Findings of Jury—*New Trial.*]—In constructing the bins for an elevator, a staging had to be raised as the work progressed by ropes held by men standing on the top until it could be secured with dogs placed underneath. When secured, workmen stood on the staging and nailed planks to the sides of the bin. The planks were run along a tramway at the side of the bins by rollers and thrown off to the side of the bin farthest from the tramway. While two men on the top of a bin were holding up the staging until it could be secured, a plank being thrown struck another on top of the adjoining pile and knocked it off. In falling it hit the men on top of the bin, and they were precipitated to the bottom and one of them killed. In an action by his widow against the contractor for building the elevator, 25 questions were submitted to the jury, and on their answers a verdict was entered for the plaintiff:—Held, Idington, J., dissenting, that, while the falling of the plank caused the accident, there was no finding that the same was due to negligence of the defendant, nor any that the death of the deceased was due to negligence for which, under the evidence, the defendant was responsible. Therefore, and because many of the questions submitted were irrelevant to the issue and may have confused the jury, there should be a new trial. *Jamieson* v. *Harris*, 25 Occ. N. 79, 35 S. C. R. 625.

Inconclusive Verdict—*Course of Trial—Parties Bound By—Effect of s. 66 of Supreme Court Act, 1904—Practice.*]—In an action for damages for personal injuries sustained by a workman engaged in decking logs, caused by the alleged negligence of the defendants in supplying a team of horses unfit for the work, the jury found that the team was unfit; that the accident was caused by reason of such unfitness; and that the plaintiff did not have a full knowledge and appreciation of the danger:—Held, affirming a judgment in the plaintiff's favour, that, although the findings, read alone, did not establish any legal liability on the part of the defendants, yet, as the issues for the jury were limited to the questions submitted to them, and as the defendants' negligence was treated by all parties as an inference arising from the defect charged, a finding of the existence of the defect involved a finding of negligence. The provisions of s. 66 of the Supreme Court Act, 1904, are applicable to an appeal in an action tried and decided before the provisions were enacted. The said section has not wholly repealed the rule that a litigant is bound by the way in which he conducts his case. The proviso of that section giving a party the privilege of having his right to have the issues for trial submitted to the jury, enforced by appeal, without any exception having been taken at the trial, does not give a right of new trial in cases where counsel settle by express stipulation the issues of fact for the jury, or where the issues submitted are accepted on both sides as the only issues on which the jury is to be asked to pass. *Scott* v. *Fernie Lumber Co.*, 25 Occ. N. 51, 11 B. C. R. 91.

Independent Contractor—*Jury.*]—An employer is liable for the consequences, not of danger, but of negligence. He performs his duty when he furnishes machinery of ordinary and reasonable safety. Reasonable safety means safety according to the usages, habits, and ordinary risks of the business. No jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way for which liability shall be imposed. It is only so far as a duty arises on the part of the employer to provide proper means or precautions so as to make the service reasonably safe, and when a breach of that duty is a cause of injury, that a right of action accrues to the person injured. K. entered into an agreement with the defendant company to draw the coal and debris produced in the mine from the places at which the miners worked to the pit bottom, and to carry from the pit bottom to the workmen certain things required in their work, and K. agreed to provide competent and efficient drivers. The vehicles used were cars running on a railway track and drawn by a horse. The plaintiff was employed by K. as a driver, and while so employed was injured. On the evidence set out in the case,

notwithstanding certain adverse answers to questions submitted to the jury, and the trial Judge's judgment thereon for the plaintiff:—Held, that the plaintiff had failed to prove negligence on the part of the defendants. (2) That if the evidence established negligence on the part of K., resulting in the injury to the plaintiff, as was the inferential finding of the jury, K. was an independent contractor, for whose conduct the defendants were not liable. The judgment for the plaintiff was set aside and a judgment directed to be entered for the defendants. *Patton* v. *Alberta Railway and Coal Co.*, 2 Terr. L. R. 438.

Infant—Machinery—Negligence of foreman. *Holman* v. *Times Printing Co.*, 1 O. W. R. 7, 338, 756.

Infant — *Factory — Dangerous Hole—Guard—Report of Inspector—Contributory Negligence—Reduction of Damages.*]—The sixteen year old son of the plaintiff was employed by the defendant in his mill to throw out the waste made by a machine called an "edger." During his moments of leisure—and without having been requested to do so—he helped a man who was working a "butter" or machine for trimming the end of planks. At a time when he was not occupied, he went to look out of the mill, and, in passing near the saw of the butter, which was placed above a hole from two feet to one and a half deep, he fell into this hole, and one of his arms was mutilated by the saw. It was proved that he knew this hole, which was afterwards covered by the employer:—Held, that there was contributory negligence on the part of the boy, and that the damages awarded by the Court of first instance should be reduced. 2. That the fact that the report of the inspector of factories stated that the mill was fitted up in accordance with the law did not relieve the employer from liability, seeing that the law requires that openings in the floor should be, as far as possible, surrounded with protecting apparatus. *Nault* v. *O'Shaughnessy*, Q. R. 19 S. C. 448.

Infant—*Imprudence.*]—The owner of a factory who employs children in it should take all necessary precautions to protect them against the consequences of acts which, although in the case of adults they would be imprudent, are such as might be expected in the case of children, but he is not responsible for accidents which the limited prudence to be expected from a child would have prevented. *Robitaille* v. *White*, Q. R. 19 S. C. 431.

Liability of Master for Medical Attendance—Contract — Privity—Implied authority—"Hospital fund." *Struthers* v. *Canadian Copper Co.*, 2 O. W. R. 748, 6 O. L. R. 374.

Liability of Person Charged as Employer—Failure of evidence to establish relationship—Findings of jury — Nonsuit—Evidence of defendants. *Miller* v. *Woods*, 3 O. W. R. 809.

Machinery—Want of guard — Opinion evidence—Jury—Defect in way—Workmen's Compensation Act. *McCaugherty* v. *Gutta Percha and Rubber Co.*, 2 O. W. R. 204.

Member of Benefit Society—Bar to claim against railway company—Rules of society. *Harris* v. *Grand Trunk R. W. Co.*, 3 O. W. R. 211, 550, 561.

Mill — *Dangerous Machinery — Want of Guard—Factories Act—Workmen's Compensation Act.*]—The plaintiff, a boy between fourteen and fifteen years of age, was employed by the defendants in cleaning up about a machine — called a dove-tailing machine, consisting of rapidly-revolving knives—carrying pieces of board therefor; and on one occasion he had cleaned it. He had carried some boards and laid them down by the machine and was going for another load, when he was directed by the operator to straighten them out. On his proceeding to do so, and not observing that the machine was in motion, he put out his hand to remove some dust on it, when his arm was caught in the machine and cut off. The machine was of a very dangerous character, and the knives, when revolving, had the appearance of a solid stationary cylinder. There was no guard or protection around it, and no one at the time in actual charge of it, the operator having left it and standing some fifteen feet away looking out of a widow. The jury found that the cause of the accident was the negligence of the defendants in not having the machinery properly guarded, and the inattention of the operator, and they negatived contributory negligence on the part of the plaintiff:—Held, that the defendants were liable. *Moore* v. *J. D. Moore Co.*, 22 Occ. N. 283, 4 O. L. R. 167, 1 O. W. R. 290.

Mill—*Dangerous Work — Precautions — Liability.*]—In order to free himself from responsibility, an employer must, either personally or through his foreman, not only order his employees to discontinue work considered dangerous, but must also either personally or through his foreman, see that the orders are respected and carried out, and if he does not do so, he is responsible for accidents which happen as a result of the non-observance of these orders. Judgment in Q. R. 21 S. C. 32 reversed. *Fournier* v. *Lamoureux*, Q. R. 21 S. C. 99.

Mill — *Opening in Floor—Fencing—Contributory Negligence.*]—T. was working in a saw-mill at a time when the saws were stopped in order to change any saws requiring to be replaced. One only, the butting saw, was left running, being near the end of a board 12 feet long used to measure the planks before they were cut. While the saws were stopped several of the workmen sat on this table, and T., going towards the end to find a seat, slipped and fell into an opening in the floor where the deal ends were dropped on being cut off. On slipping he threw out his left arm, which came against the saw in motion, and was cut off:—Held, that the want of protection of the opening was negligence for which the owner was responsible. Held, also, Strong, C.J., hæsitante, that if T. was guilty of contributory negligence, he was sufficiently punished by a division of the damages at the trial. Held, per Sedgewick, Davies, and Mills, JJ., that negligence could not be attributed to the owner from the fact that the butting saw was not stopped with the others. *Price* v. *Talon*, 22 Occ. N. 195, 32 S. C. R. 123.

Mill—*Unguarded Machinery—Fellow Servant — Findings of Jury — Damages.*] — A

workman employed by the defendants, in order to do his work, had to climb a step ladder and step over the unguarded rim of a cog-wheel, to a plank on which he did his work. In coming from his work a trackman removed the ladder as he was stepping on it, and in recovering himself his leg went through the spokes of the wheel and he was injured. At the trial the jury in answer to questions found that the injury to plaintiff was caused by the negligence of the defendants, and not by his own negligence or want of proper care; that it was only to a certain extent caused by the negligence of a fellow-servant, for, if the wheel had been properly guarded and the ladder properly fastened to the floor, the accident would not have happened; that the negligence of the defendants consisted in not guarding the wheel and fastening the ladder; that the wheel was a dangerous part of the mill gearing, and was not, as far as practicable, securely guarded; that he would not have received the injury if it had been so securely guarded:—Held, that the findings of the jury as to negligence were amply supported by the evidence, and could not be interfered with; that the defendants were bound by the common law to take all reasonable precautions for the safety of their workmen, and it was for the jury to say what were such reasonable precautions; that the defendants were also bound by the Factories Act to securely guard, as far as practicable, all dangerous parts of their machinery; that the jury having so found, and their finding being supported by the evidence, the intervention of the truckman in wrongfully taking away the ladder did not relieve the defendants from the consequences of their negligence, for their negligence still remained an operative cause of the workman's injury. Mann v. Ward, 8 Times L. R. 699, not regarded as an authority. As the damages were excessive, a new trial was granted unless the plaintiffs would consent to reduce them. *Myers* v. *Sault Ste. Marie Pulp and Paper Co.*, 22 Occ. N. 203, 3 O. L. R. 600, 1 O. W. R. 280.

Mill—*Use of Dangerous Materials—Proximate Cause of Accident — Presumptions — Findings of Jury—Appeal.*]—As there can be no responsibility on the part of an employer for injures sustained by an employee in the course of his employment, unless there be positive testimony, or presumptions weighty, precise, and consistent, that the employer is chargeable with negligence which was the immediate necessary and direct cause of the accident which led to the injuries suffered, it is the duty of an appellate Court to relieve the employer of liability in a case where there is want of evidence as to the immediate cause of an explosion of dangerous material which caused the injuries, notwithstanding that the findings of a jury in favour of the plaintiff had been sustained by two Courts below. Taschereau, J., dissented, taking a different view of the evidence, and being of opinion that the findings of the jury, concurred in by both Courts below, were based upon reasonable presumptions drawn from the evidence, and that, following George Matthews Co. v. Bouchard, 28 S. C. R. 580, and Metropolitan R. W. Co. v. Wright, 11 App. Cas. 152, those findings ought not to be reversed on appeal. Asbestos and Asbestic Co. v. Durand, 30 S. C. R. 285, discussed and approved. *Dominion Cartridge Co.* v. *McArthur*, 22 Occ. N. 5, 31 S. C. R. 392.

Mines—*Common Employment—Employers' Liability Act.*]—The provisions of s. 3 of the Inspection of Metalliferous Mines Act, 1897, of British Columbia, do not impose upon an absent mine-owner the absolute duty of ascertaining that the plans for the working of the mines are accurate and sufficient and, unless the mine-owner is actually aware of inaccuracy or imperfections in such plans, he cannot be held responsible for the result of an accident occurring in consequence of the neglect of the proper officials to plat the plans up to date according to surveys. The defendant company acquired a mine which had been previously worked by another company, and provided a proper system of surveys and operation, and employed competent superintendents and surveyors for the efficient carrying out of their system. An accident occurred in consequence of neglect to plat the working plans according to surveys made up to date, the inaccurate plans misleading the superintendent so that he ordered works to be carried out without sufficient information as to the situation of openings made, or taking the necessary precautions to secure the safety of the men in the working places. The engineers who had made the surveys and omitted platting the information on the plans, had left the employment of the company prior to the engagement of the deceased, who was killed in the accident:—Held, that the employers, not being charged with knowledge of the neglect of their officers to carry out the efficient system provided for the operation of their mine, could not be held responsible for the consequences of failure to provide complete and accurate plans of the mine:—Held, also, that negligence of the superintendent would be negligence of a co-employee of the person injured for which the employers would not be liable at common law, although there might be liability under the British Columbia Employers' Liability Act, R. S. B. C. c. 69, s. 3, for negligence on the part of the superintendent. Judgment in 23 Occ. N. 360, 9 B. C. R. 551, reversed and a new trial ordered. *Hosking* v. *Le Roi No. 2, Limited*, 24 Occ. N. 117, 34 S. C. R. 244.

Mine — *Defective System—Rules—Findings of Jury.*]—In an action by a miner against the mine owners for damages for injuries caused him by being precipitated to the bottom of a shaft when at work in the mine, the jury found inter alia that the system adopted for lowering the men was faulty and that the plaintiff did not comply with the printed rules of the mine:—Held, that the plaintiff was entitled to judgment, although adherence by him to the rules would have prevented the accident. *Warmington* v. *Palmer*, 7 B. C. R. 414.

Mines—Explosion—Breach of statutory duty—Jury—Contributory negligence — Misdirection—Evidence—Insurance by employers against risk to workmen—New trial—Costs. *Davies* v. *Canadian-American Coal and Coke Co.* (N.W.T.), 1 W. L. R. 55, 97.

Mines—*Inspection Act—Statutory Duty—Protection from Falling Cage.*]—Action for damages for personal injuries sustained by plaintiff, a miner, while working at the bottom of a shaft in the LeRoi mine. The cage or skip used for lowering and hoisting men fell and broke through the bulkhead of cage platform at the 800-foot level, and struck the plaintiff while working a few feet below:

—Held, affirming the decision of McColl, C. J., that the cage or skip used for lowering and hoisting men is not "falling material," within the meaning of that term as used in Rule 20 of s. 25 of the Metalliferous Mines Inspection Act, and amendment of 1899 (c. 49, s. 12) does not create any duty on the mine owner to provide protection from a falling cage. *McKelvey* v. *LeRoi Mining Co.*, 22 Occ. N. 246, 9 B. C. R. 62.

Mines—*Non-observance of Rules—Mines Act.*]—A master is entitled to make and insist on the observance of reasonable rules for the conduct of his business, and if, in consequence of the non-observance of these rules by a servant, that servant is injured, the master is not liable. It was held that the master was not liable in damages for the death of a servant resulting from the servant using, in direct violation of rules, the cage instead of the ladders to ascend from a mine, although the ladders did not in some particulars conform to the requirements of the Mines Act. *Anderson* v. *Mikado Gold Mining Co.*, 22 Occ. N. 175, 3 O. L. R. 581, 1 O. W. R. 276.

Mines—*Shaft—Signals — Disregard of Rules — Negligence — Contributory Negligence—Damages—Employers' Liability Act, B. C.*]—A miner was getting into a bucket by which he was to be lowered into the mine when, owing to the chain not being checked, his weight carried him rapidly down and he was badly hurt. In an action for damages against the mine-owners, the jury found that the system of lowering the men was faulty, the men in charge of it negligent, and the engine and brake by which the bucket was lowered not fit and proper for the purpose. Printed rules were posted near the mouth of the pit providing, among other things, that signals should be given by any miner wishing to go down the mine or be brought up, by means of bells, the number telling the engineer and pitman what was required. The jury found that it was not usual, in descending, to signal with the bells, and that the injured miner knew of the rules, but had not complied with them on the occasion of the accident. On appeal to the Supreme Court of Canada from a judgment setting aside the verdict for the plaintiff:—Held, reversing that judgment, 22 Occ. N. 126, 8 B. C. L. R. 344, and restoring the judgment of the trial Judge, 7 B. C. R. 414, that there was ample evidence to support the findings of the jury that the defendants were negligent; that there was no contributory negligence by non-use of the signals, the rules having, with consent of the employers and of the persons in charge of the men, been disregarded, which indicated their abrogation; the new trial should, therefore, not have been granted:—Held, further, that, as the negligence causing the accident was not that of the employers themselves, but that of the persons having control of those going down the mine, it was not a case of negligence at common law with no limit to the amount of damages, but the latter must be assessed under the Employers' Liability Act, R. S. B. C. 1897 c. 69. *Warmington* v. *Palmer*, 22 Occ. N. 199, 32 S. C. R. 126.

Mines—*Statutory Mining Regulations — Fault of Fellow Workmen.*]—The defendant company employed competent officials for the superintendence of their mine, and required that the statutory regulations should be observed. A labourer was sent to work in an unused balance which had not been fenced or inspected, and an explosion of gas occurred, from the effects of which he died. In an action for damages by the widow:—Held, reversing the judgment below, 34 N. S. Reps. 319, Taschereau and Sedgewick, JJ., dissenting, that, as the company had failed to maintain the mine in a condition suitable for carrying on their works with reasonable safety, they were liable for the injuries sustained by the employee, although the explosion may have been attributable to neglect of duty by fellow-workmen. *Grant* v. *Acadia Coal Co.*, 22 Occ. N. 359, 32 S. C. R. 427.

Negligence — Dangerous place—"Way"—Contributory negligence. *Birmingham* v. *Larkin*, 2 O. W. R. 536, 3 O. W. R. 607, 5 O. W. R. 549.

Negligence—*Death — Action by Widow—Employment of Competent Persons—Damages—Pecuniary Loss—Benefit of Heirship.*] The plaintiff's husband was suffocated by a fire which broke out suddenly in the defendants' distributing station. The evidence, in the opinion of the Court, justified the conclusion that if competent persons had been in charge of the work proceeding when the fire broke out, it might have been extinguished in time to prevent any injury to the deceased: — Held, that it is the duty of the employer to have competent persons in charge while work of a dangerous character is being performed, and he is responsible for an injury to a workman which might have been prevented if the persons in charge had been sufficiently on the alert to give timely warning. The fact that the deceased might have adopted a safer and more prudent method of attempting to escape from the danger did not relieve the employer from responsibility. 2. The "damage occasioned by the death" of the person injured, under art. 1056, C. C., is limited to pecuniary loss, and where the widow, claimant under that article, is heir to the deceased, the pecuniary benefit accruing to her as such heir must be deducted from the loss occasioned by the death. 3. It is for the defendant, in such action, to establish to what extent the claimant, as heir, has benefited by the death, after liquidation of the liabilities of the estate. The Court may, however, under art. 371, C. C. P., in the absence of such proof, order the plaintiff to appear and answer on oath, in order to complete the proof necessary for the determination of the amount for which judgment should be rendered. *Warboys* v. *Lachine Rapids Hydraulic and Land Co.*, Q. R. 22 S. C. 531.

Negligence — *Evidence — Finding of Jury.*]—An appeal by the defendant from the judgment in 32 O. R. 8, 20 Occ. N. 304, reversing the judgment in 31 O. R. 521, 20 Occ. N. 121, was dismissed with costs, the Court agreeing that there was some evidence to support the finding of negligence. *Kelly* v. *Davidson*, 21 Occ. N. 13, 27 A. R. 657.

Negligence—*Unskilled Workman — Dangerous Work—Reasonable Precautions.*]—Although an employer is not liable, as a general rule, for the result of accidents which happen to employees from dangers essentially inherent in the work which is being performed, he nevertheless becomes liable

when reasonable precautions have not been taken by him to reduce the danger to the lowest point or remove it altogether. And so, when work which is not especially unsafe for a skilled workman, such as the driving of spikes on a railway, is intrusted to an unskilled person, the employer is responsible for an accident to the workman resulting from his inexperience, reasonable precautions to avoid it not having been adopted. *Sparano* v. *Canadian Pacific R. W. Co.*, Q. R. 22 S. C. 292.

Negligence of Fellow-servant — *Common Employment.*]—Negligence of a track-master of a railway company causing an injury to a man employed as one of the crew engaged in removing gravel from a ballasting train working on a section of the road under the control of the track-master, is the negligence of a fellow-servant engaged in a common employment, and the company is not liable in an action for damages resulting therefrom. *Day* v. *Canadian Pacific R. W. Co.*, 36 N. B. Reps. 323.

Negligence of Fellow-servant — *Factories Act—Elevator—Mechanical Device.*]—The plaintiff was employed as a dressmaker in the defendants' departmental store, and, while descending in their elevator after her day's work was done, was injured by the fall of the elevator, owing to the failure of the person in charge to properly manage it:—Held, that the defendants were not answerable at common law for such neglect, which was that of the plaintiff's fellow-servant, nor under the Workmen's Compensation for Injuries Act, R. S. O. 1897 c. 160, for the fellow-servant was not a person having any superintendence intrusted to him, within ss. 2 (1) and 3 (2):—Held, that the defendants' store was a factory within the meaning of the Act, and the onus of proving that the brake and "dogs" in use in connection with the elevator were sufficient was upon the defendants; but it was not necessary for them to shew that the device in its concrete form as part of the elevator had been approved by the inspector in accordance with s. 20, s.-s. 1 (d), of the Ontario Factories Act, R. S. O. c. 256; it was sufficient that the kind of device used had been approved:—Held, also, that in order to render the employer liable to a civil action it was incumbent on the plaintiff to make out the casual connection between the omission to provide the statutory safeguards and the injury complained of; and that she had not done. *Carnahan* v. *Robert Simpson Co.*, 21 Occ. N. 74, 32 O. R. 328.

Negligence of Foreman — Jury. *Bowman* v. *Imperial Cotton Co.*, 1 O. W. R. 450.

Negligence of Master — Dangerous Employment — Volunteer. *Blanquist* v. *Hogan*, 1 O. W. R. 15.

Negligence of Master — Foreman — Secretary of company—Knowledge — Evidence. *Wilson* v. *Botsford-Jenks Co.*, 1 O. W. R. 101.

Negligence of Master—*Precautions.*]—The master is in the wrong if it can be shewn that the accident to the servant could have been avoided, however costly and useless he may have thought the necessary precautions to attain this result. 2. Every act of imprudence or negligence on the part of the master puts him in the wrong and makes him liable. *Durand* v. *Asbestos and Asbestic Co.*, Q. R. 19 S. C. 39. (Affirmed by the Court of Review and by the Supreme Court of Canada, 30 S. C. R. 285.)

Negligence of Master — Question for Jury — Res ipsa loquitur. *Brotherson* v. *Corry*, 1 O. W. R. 34.

Notice of Injury—*Excuse for Want of—Evidence—Statement of Deceased — Negligence—Cause of Injury—Jury.*]—The knowledge of the defendants of the injury and the cause of it, at the time it occurs, is (in case of death) a reasonable excuse for the want of the notice of injury required by s. 9 of the Workmen's Compensation for Injuries Act, R. S. O. 1897 c. 160, where there is no evidence that they were in any way prejudiced in their defence by the want of it. Where the deceased received the injuries from which he died by being run over by a train of cars, a statement made by him immediately after he was run over, in answer to a question as to how it happened, "I slipped and it hit me," was held admissible in evidence. Thompson v. Trevanian, Skin. 402, Aveson v. Kinnaird, 6 East 188, 193, and Rex v. Foster, 6 C. & P. 325, followed. Upon that evidence and evidence of the slippery condition, by reason of snow and ice, of the place where the deceased slipped, a question should have been submitted to the jury whether he slipped by reason of such condition, and whether such condition was due to the negligence of the defendants. *Armstrong* v. *Canada Atlantic R. W. Co.*, 21 Occ. N. 497, 2 O. L. R. 219.

Person to whose Orders Servant Bound to Conform—Right to give order—Servant voluntarily incurring risk—Findings of jury. *Parker* v. *Lake Erie and Detroit River R. W. Co.*, 5 O. W. R. 634.

Pleading—*Damages — Factories Act.*]—In an action for damages for physical injuries, the age of the victim, and his personal condition as to means are relevant, but not the number of his children or the fact that he has to support them. 2. The statutory duties prescribed by the Factories Act do not affect the civil responsibility of employers towards their employees. *Riendeau* v. *Peck Rolling Co.*, 6 Q. P. R. 143.

Pleading—"*Not Guilty by Statute*" — *Denial — Contributory Negligence—Common Employment—Statute—Retroactivity — No Cause of Action.*]—In an action by a brakesman in the defendants' employment to recover damages for injuries sustained by him by reason of the negligence of the defendants, the defendants proposed to plead other defences along with "not guilty by statute:"—Held, that it was not necessary to plead contributory negligence specially, for it could be raised under "not guilty by statute," by Rule 13, J. O., N. W. T. 2. That a denial of "each and every material allegation contained in the statement of claim" was too general in form and was contrary to Rule 118, having regard to Rule 114: the defendants must specify the particular allegations which they denied, and must in some cases shew by affidavit that they had good

grounds for the denial. 3. That the defendants should be allowed to set up the defence that the injury was caused by the negligence of the plaintiff's fellow servants in the common employment of the defendants; for c. 13 of the Ordinances of 1900, taking away the right to set up this defence, was not retroactive as applying to a mere matter of procedure, but gave a substantial right. 4. That the defendants might raise a question of law by pleading that the statement of claim disclosed no cause of action, but they must give the grounds. *Smith* v. *Canadian Pacific R. W. Co.*, 21 Occ. N. 193.

Pleading — *Onus—Contributory Negligence—Employer's Liability Act, N. S.*]—The statement of claim alleged that while the plaintiff was in the defendant's employ, and engaged in filling a car with dolomite from a chute, a car was suddenly dumped into the chute above, and came down with great force, and struck and injured the plaintiff, and that such injury was caused by the defendant, his engineers, etc., not warning the plaintiff that the car of dolomite was about to be dumped into the chute, thus giving him notice to avoid danger:—Held, that upon the pleading, the onus was on the plaintiff to prove that that injury was caused by the negligence of defendant; and that, in the absence of evidence to satisfy the burden resting upon him, he could not recover. The evidence shewed that it was the plaintiff's duty to place the car to be loaded below the chute, and to remain in a place of safety until the car was loaded, and the gates of the chute closed, and then to remove the car to the crusher; that, at the request of a fellow workman, he attempted to pull out the car before it was loaded, and before the gates were closed, with the result that he sustained the injury complained of:—Held, that there was contributory negligence on the part of the plaintiff which prevented his recovery. *MacPherson* v. *MacLachlan*, 36 N. S. Reps. 435.

Pleading—*Workmen's Compensation Act—Particulars—Name of Fellow-servant.*] — The requirements of s. 9 of the Workmen's Compensation for Injuries Act are directory rather than imperative, and the omission to give the name and description of the person in the defendants' service by whose negligence the accident which gave rise to the action occurred, is a matter to be dealt with by an application for particulars, and not by demurrer. *Makarsky* v. *Canadian Pacific R. W. Co.*, 15 Man. L. R. 53.

Proximate Cause — Contributory negligence — Findings of jury. *Lennon* v. *Canadian Niagara Power Co.*, 6 O. W. R. 885.

Questions for Jury—New trial. *Sorenson* v. *Smith*, 5 O. W. R. 576.

Railway—*Collision — Duty of Engineman—Orders of Conductor — Rules—Contributory Negligence.*]—By rule 232 of the defendants, "conductors and enginemen will be held equally responsible for the violation of any of the rules governing their trains, and they must take every precaution for the protection of their trains, even if not provided for by the rules." By rule 52, enginemen must obey the conductor's orders as to starting their trains, unless such orders involve violation of the rules or endanger the train's safety; and rule 65 forbids them to leave the engine, except in a case of necessity. Another rule provides that a train must not pass from one double to single track until it is ascertained that all trains due which have the right of way have arrived or left. M. was engineman on a special train which was about to pass from a double to a single track, and when the time for starting arrived he asked the conductor if it was all right to go, knowing that the regular train passed over the single track about that time. He received from the conductor the usual signal to start, and did so. After proceeding about two miles his train collided with the regular train, and he was injured. In an action against the company for damages in consequence of such injury:—Held, affirming the judgment of the Court of Appeal (31st December, 1901), that M. was not obliged, before starting, to examine the register and ascertain for himself if the regular train had passed, that duty being imposed by the rules on the conductor alone; that he was bound to obey the conductor's order to start the train, having no reason to question its propriety; and he was, therefore, not guilty of contributory negligence in starting as he did. *Miller* v. *Grand Trunk R. W. Co.*, 22 Occ. N. 353, 32 S. C. R. 454.

Railway — *Contributory Negligence — Nonsuit—Jury—Employers' Liability Act.*]—F., a conductor and brakesman in the employ of the defendant company, while turning the brake wheel, fell from his train and was run over and killed. The nut which fastens the brake wheel to the brake mast, and which should have been on, was not on, and so the wheel came off and the accident resulted. It was the duty of the deceased to examine the cars of the train and see that they were in good order before leaving the station which the train was just leaving:—Held, in an action by F.'s personal representatives to recover damages in respect of his death, that it was F.'s own neglect in not seeing that the brake was in a secure condition, and that there was therefore no case for the jury. *Fawcett* v. *Canadian Pacific R. W. Co.*, 22 Occ. N. 244. 8 B. C. R. 393.

Railway — *Employers' Liability—Excessive Damages.*]—In the defendants' coal mine the haulage slope, which was necessarily used as a travelling road by the workmen, was not provided with man-holes at intervals of not more than twenty yards, as required by the Coal Mines Regulation Act, and on account of this lack of sufficient manholes it was the custom of the defendants not to run the trip during the time the workmen were going to and coming from work. The plaintiff while coming from work was run into and injured by the trip, which had been started off during a prohibited time. The trip was a train of cars, operated by a stationary engine on the outside, and used for hauling coal out of the mine. The jury found that the accident was caused by the defendants' negligence in letting the trip down, and on the verdict judgment was entered for the plaintiff for $1,424 and costs. An appeal to the full Court was dismissed, the Court refusing to reverse the findings of fact or to interfere with the damages as excessive:—Held, also, that the place in question was a "railway" within the meaning

of the Employers' Liability Act. *Booker* v. *Wellington Colliery Co.*, 22 Occ. N. 436, 9 B. C. R. 265.

Railway — *Lights on Train.*]—A conductor in the defendants' employment, while performing the duty for which he was engaged at the Windsor station of the Canadian Pacific Railway in Montreal, was killed by a train which was being moved backwards in the station yard. There was no light on the rear end of the last car of the train, nor was there any person stationed there to give warning of the movement of the train:—Held, that, by omitting to have a light on the rear end of the train, the railway company failed in their duty, and this constituted prima facie evidence of negligence. Judgment in Q. R. 11 K. B. 394 affirmed. *Boisseau* v. *Canadian Pacific R. W. Co.*, 22 Occ. N. 358, 32 S. C. R. 424.

Railway—Signals — Warning—Findings of jury. —*Basso* v. *Grand Trunk R. W. Co.*, 6 O. W. R. 172, 893.

Railway — *Stipulation in Contract of Service for Non-liability of Master—Assurance Fund—Constitution of Aid Society.*]—A master may validly stipulate with his servant that, in consideration of a contribution which he makes to the funds of a society of aid and assurance formed for the purpose of assisting workmen and their families in case of injury or death by accident, he shall not be responsible for the consequences of an accident sustained by the servant, caused by the fault of his fellow servants. Regina v. Grenier, 30 S. C. R. 42, followed. 2. In this case the society of aid and assurance had been legally constituted. *Ferguson* v. *Grand Trunk R. W. Co.*, Q. R. 20 S. C. 54.

Railway—*Workmen's Compensation Act —Notice of Injury—Absence of—Reasonable Excuse—Meaning of—Cause of Injury.*] — While the notice of injury required by s. 9 of the Workmen's Compensation for Injuries Act, R. S. O. 1897 c. 160, is for the employer's protection against stale or imaginary claims, and to enable him, while the facts are recent, to make inquiry, the injured workman, however, is the primary object of the legislative consideration; and therefore under that section of ss. 13 and 14, notice may be dispensed with where there is reasonable excuse for the want thereof, the employer not being prejudiced thereby. What constitutes reasonable excuse must depend upon the circumstances of each particular case, and a reasonable excuse will be inferred where, as here, there is the notoriety of the accident, the knowledge of the employers of the injury which resulted in death, and its cause, and of a claim having been made on them by the deceased's representative, which they had stated they would take into their consideration, but to which no final answer had ever been given. In an action against a railway company for alleged negligence, it appeared that the deceased was killed by being run over while shunting cars. The evidence shewed that the space between two sets of tracks in the defendants' yard was dangerous by reason of an accumulation of snow and ice thereon, but that the tracks themselves were in good condition, and it was merely a matter of conjecture, whether, at the time of the accident, the deceased was on the tracks themselves, or in the space between them:—Held, that, under these circumstances, the accident could not be said to be due to the defendants' negligence, and the plaintiffs' action failed. Judgment in 2 O. L. R. 219, 21 Occ. N. 497, reversed. *Armstrong* v. *Canada Atlantic R. W. Co.*, 22 Occ. N. 379, 4 O. L. R. 560.

Ship — *Bursting of Capstan—Defect — Notice—Superintendent — Competence—Aggravation of Injury by Subsequent Conduct —Master of Ship—Scope of Authority.*] — The mate of a steamer was injured by the bursting of a capstan, and brought a common law action against the owners for damages for his injuries, and also for aggravation of his injuries owing to his unauthorized detention on the steamer after the accident:—Held, that, in the absence of evidence of a defective system, the defendants were not liable for the negligence, if any, of a competent engineer, who was a fellow-servant of the plaintiff and not the representative of defendants. If there was any negligence on the part of the captain in keeping the plaintiff on the steamer, the defendants were not liable for it, as such interference was not within the scope of his employment. *Morgan* v. *British Yukon Navigation Co.*, 11 B. C. R. 316, 1 W. L. R. 294.

Street Railway—*Negligence — Motorman.*]—The motorman of an electric car may be a "person who has charge or control," within the meaning of s. 3 of the Workmen's Compensation Act, R. S. O. 1897 c. 166, and, if he negligently allows an open car to come in contact with a passing vehicle, whereby the conductor, who is standing on the side in discharge of his duty, is struck and injured, the electric company are liable in damages for such injury. Judgment in 27 A. R. 151, 20 Occ. N. 224, affirmed. *Snell* v. *Toronto R. W. Co.*, 21 Occ. N. 327, 31 S. C. R. 241.

Superintendent of Works — Workmen's Compensation Act—Findings of jury—Inconsistency—New trial. *Higgins* v. *Hamilton Electric Light and Cataract Power Co.*, 5 O. W. R. 136.

Use of Explosives—Cause of accident—Conjecture — Nonsuit—New trial—Discovery of fresh evidence. *Lundy* v. *Dawson*, 3 O. W. R. 720.

Verdict—*Inconsistent Findings — Construction.*]—In an action for damages for personal injuries received by the plaintiff while in the employ of the defendant:—Held, that in construing a jury's verdict, consisting of a number of questions and answers, the whole verdict must be taken together and construed reasonably, regard being had to the course of the trial. The injuries were caused by the plaintiff's failure to withdraw himself from danger in response to a signal. The jury found that the defendant was negligent and that the signal was given prematurely, and that the plaintiff should have heard the signal, but being busy might not have heard it. The answer to the question as to contributory negligence, to which the jury's attention was directed by the Judge, was, "We do not consider that plaintiff was doing anything but his regular work." Judgment was entered for the plaintiff:—Held, that

the judgment must be affirmed. *Marshall* v. *Cates*, 24 Occ. N. 38, 10 B. C. R. 153.

Workmen's Compensation Act — Defect in engine—Repair—Inspection—Reasonable care — Person intrusted by master with duty of providing proper appliances—Evidence for jury — New trial. *Schwoob* v. *Michigan Central R. W. Co.*, 6 O. W. R. 630, 10 O. L. R. 647.

Workmen's Compensation Act — Defects in machinery — Contributory negligence. *Taylor* v. *Conlon*, 2 O. W. R. 714.

Workmen's Compensation Act — Defect in machine—Jury—Finding — New trial. *Glasgow* v. *Toronto Paper Manfacturing Co.*, 2 O. W. R. 772.

Workmen's Compensation Act — —Negligence—Defect in machinery—Knowledge of master—Knowledge of servant — Contributory negligence — Jury — Nonsuit. *Gordanier* v. *John Dick Co.*, 2 O. W. R. 1051.

Workmen's Compensation Act — Defect in machinery—Proximate cause of accident—Knowledge of defect — Evidence — Jury—Damages. *Crosby* v. *Dawson*, 4 O. W. R. 487.

Workmen's Compensation Act — *Defect in Ways, Works, etc.—Person Intrusted with Duty of Seeing that Condition Proper—Fellow-servant — Negligence.*] — Held, that a cleat upon the roof of a building upon which the plaintiff was working, was a part of "the ways, works, machinery, plant, buildings or premises connected with, intended for or used in the business of the employer," within the meaning of s.-s. 1 of s. 3 of the Workmen's Compensation for Injuries Act, R. S. O. 1897 c. 160; and, there being evidence upon which a jury might find that the cleat was defective in that it was not securely fastened, that the defective condition was the proximate cause of the injury, and that it was due to the negligence of the defendants' workmen who put on the cleats, the defendants would be answerable for the negligence (if found) as being negligence of persons intrusted by them with the duty of seeing that the condition or arrangement of the ways, etc., was proper, within the meaning of s.-s. 1 of s. 6. Differences between s.-s. 1 of s. 6 and the corresponding provisions of the English Act pointed out. Under s.-s. 1 of s. 6 of the Ontario Act the employer is answerable, so far as the condition or arrangement of the ways, etc., is concerned, for the negligence of any person, whether in his service or not, to whom he intrusts the duty mentioned in the subsection, in the performance of that duty, in the same way and to the same extent as he would have been answerable at the common law had he taken upon himself personally the performance of the duty, and where an appliance necessary for the safety of the workman is required in the course of the work, and the employer directs any one to provide it ready for the use of the workman, that person is one intrusted with the duty of seeing that the appliance is proper. Giles v. Thames Ironworks Shipbuilding Co., 1 Times L. R. 469, and Ferguson v. Galt Public School Board, 27 A. R. 480, followed. *Markle* v. *Donaldson*, 24 Occ. N. 218, 391, 7 O. L. R. 376, 8 O. L. R. 682, 3 O. W. R. 147, 4 O. W. R. 377.

Workmen's Compensation Act — Defective implement — Orders of foreman—Findings of jury—Negligence—Judge's charge. *Henry* v. *Hamilton Brass Manufacturing Co.*, 3 O. W. R. 448.

Workmen's Compensation Act — Canal works—Dangerous place—"Way" — Negligence of superintendent—Workmen conforming to orders—Contributory negligence. *Birmingham* v. *Larkin*, 3 O. W. R. 607.

Workmen's Compensation Act — *Defects—Private Railway—Unpacked Frog—Negligence.*]—The defendants, manufacturers, had on their premises a private line of railway, with switches, turnouts, etc., connected with one of the public railway lines, and over which ordinary freight cars and steam locomotives used for the purposes of the defendants' business, were drawn or propelled in the usual manner. The plaintiff, a switchman employed by the defendants, while engaged in coupling cars, had his foot caught in an unpacked frog, or an unpacked space between the wing rail and the frog, or between the rail guard and the other rail, whereby he was severely injured: — Held, that the omission of the packing was a defect in the condition or arrangements of the defendants' works, machinery, or plant, within the meaning of s. 3 (1) of the Workmen's Compensation Act, as well as of s. 5 (2), (3), which applied to the defendants' railway, and that it was for the jury to say on the evidence whether the plaintiff had knowledge and the defendants were ignorant of such defect. Order of Divisional Court for a new trial affirmed. *Cooper* v. *Hamilton Steel and Iron Co.*, 8 O. L. R. 353, 3 O. W. R. 898.

Workmen's Compensation Act — Defect in machinery—Knowledge — Contributory negligence — Amendment. *Gordanier* v. *John Dick Co.*, 3 O. W. R. 372, 599.

Workmen's Compensation Act — *Disobedience to Orders—Railway—Death of Engine-driver — Negligence — Contributory Negligence—Signals.*]—The defendants were erecting an interlocking apparatus at a point of their main line where there was a siding, whereby the switch could be worked and a signal shewn to indicate how it was set, by lowering the upper or lower arm of the signal as the case might be. The plaintiff's husband, an experienced engine-driver in the defendants' employment, having been informed before starting with his train that the apparatus was in working order, and that all trains were to be governed by the rules applicable in such cases, approaching the spot saw the signal with both arms down, intimating that the interlocker was out of order, but nevertheless proceeded, and, the switch not being fastened in any way, the train was derailed and he was killed. As a matter of fact, the apparatus was not in working order, a switchman of the defendants being at the spot with flag signals to use in case of necessity, but he failed to warn the deceased. The defendants' rules governing engine-drivers provided that they should stop when in doubt as to the meaning of a signal, also that a signal imperfectly displayed must be regarded as a danger signal, and that in case

of doubt they were to take the safe course and run no risk. Employees were also specially instructed that if any interlocker was out of order trains were to be flagged through. The plaintiff brought this action for damages under R. S. O. 1897 c. 166:—Held, that, although there was a plain defect in the condition of the way which was the cause of the derailment of the engine, the plaintiff was properly nonsuited, in that her husband, had he survived, could not have maintained an action, having negligently disobeyed his orders as contained in the rules by proceeding in spite of the signals. *Holden* v. *Grand Trunk R. W. Co.*, 23 Occ. N. 104, 5 O. L. R. 301.

Workmen's Compensation Act — Liability at common law—Personal negligence—Employment of competent foreman. *Belmont* v. *Smart Manufacturing Co.*, 6 O. W. R. 942.

Workmen's Compensation Act — Negligence of fellow-servant — Person to whose orders plaintiff bound to conform — Evidence — Findings of jury—Damages — Division—Claim of father of infant plaintiff for medical expenses. *Shea* v. *John Inglis Co.*, 6 O. W. R. 962, 11 O. L. R. 124.

Workmen's Compensation Act — Negligence of fellow servant — Superintendence—Jury. *Webb* v. *Canadian General Electric Co.*, 322, 865, 1113, 2 O. W. R. 322, 865, 1113.

Workmen's Compensation Act — Negligence of foreman of works—Questions for jury — New trial—Small verdict. *Aillo* v. *Fauquier*, *Gallio* v. *Fauquier*, 1 O. W. R. 833.

Workmen's Compensation Act — Notice of action—Negligence — Superintendent—Contributory negligence — Conflicting evidence—Findings of jury. *Webb* v. *Canadian General Electric Co.*, 3 O. W. R. 853.

Workmen's Compensation Act — Person intrusted with superintendence — Evidence—Case for jury. *Randall* v. *Sheir*, 6 O. W. R. 394.

Workmen's Compensation Act — Railway contractors—Sub-contractors—Question of liability — Ruling of trial Judge—Questions for jury—New trial. *Bertudato* v. *Fauquier*, 1 O. W. R. 802.

Workmen's Compensation Act — Rolling mills—Dangerous place—Absence of guard—Factories Act—Defect in ways and premises—Evidence for jury. *Colbourne* v. *Hamilton Steel and Iron Co.*, 3 O. W. R. 619.

"Young Girl"—*Negligence — 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 master 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. Roberts v. Taylor, 31 O. R. 10, overruled. Judgment of Street, J., 1 O. L. R. 18, 21 Occ. N. 143, 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. *Fahey* v. *Jephcott*, 21 Occ. N. 556.

III. Wages.

Absence from Duty—*Illness — Resolution of Ferry Commission — Powers — Approval of Governor in Council—Acquiescence —Notice.*]—M. was employed by the defendants to act in the capacity of captain of one of their ferry steamers, under a contract in writing, the employment to commence on the 1st March, 1899. On the 8th January, 1900, the defendants passed a resolution that after that date no employee would be paid for any time he or she might be absent from duty. This resolution was never formally communicated to M., but there was evidence that he was aware of its terms, and that, on two occasions, a portion of his wages was deducted for absence from duty. On the 15th December, 1900, M. was taken ill, and was thereafter continuously absent from duty until the time of his death, which occurred on the 16th July, 1901. In an action by the executrix of M. claiming payment of wages for the time during which he was so absent from duty:—Held, per Weatherbe, J., and Graham, E.J., affirming the judgment appealed from, that the plaintiff was entitled to recover. Per Townshend and Meagher, JJ., that deceased having been aware of the passage of the resolution, and of the change which it purported to make in the terms of his contract, and having assented to the resolution by accepting his wages, less the deductions made therefrom, the action could not be maintained. Per Graham, E.J., that the resolution was not effective in the absence of evidence that it was submitted to and approved of by the Governor in council; and that the resolution was ultra vires. *Marks* v. *Dartmouth Ferry Commission*, 36 N. S. Reps. 158.

Absence of Agreement—*Powers of Justice of the Peace—Appeal.*]—When a servant is employed by a master without any agreement having been made either before entering upon his employment or during the course of it as to the rate of wages to be paid to him, a justice of the peace has power under the Ordinance respecting Master and Servant (C. O. 1898 c. 50, s. 3), to fix the rate of wages to be paid to the servant. Upon appeal the rate of wages fixed by the magistrate was varied. *Holness* v. *Niebergall*, 5 Terr. L. R. 250.

Agreement to Remunerate by Legacy —Quantum meruit. *Wakeford* v. *Laird*, 2 O. W. R. 1093.

Amount—Variation on appeal. *Davieaux* v. *Algoma Central R. W. Co.*, 2 O. W. R. 351.

Claim against Estate of Brother — Evidence — Corroboration — Amount—Costs. *Thornton* v. *Thornton*, 2 O. W. R. 972.

Claim against Estate of Sister — Presumption — Contract — Expectation of legacy. *Mooney* v. *Grout*, 6 O. L. R. 521, 2 O. W. R. 978.

Contract—*Deduction for Defective Work—Time Lost—Damages for Defects.*]—Where a cheesemaker, hired for the season, with a stipulation guaranteeing his work, and agreeing that the loss from sales of cheese by reason of defective workmanship might be deducted from his wages, is dismissed before the expiry of his term, he is entitled to his hire for time lost when it is shewn that the defective cheese resulted from defective factory appliances; and where both factory owner and cheesemaker were to blame for defective cheese, the maker should be allowed wages for the lost time, less the damage suffered on sales of defective cheese. *Leduc* v. *Lalonde*, Q. R. 24 S. C. 423.

Engagement by the Day—*Dismissal at Mid-day.*]—The defendant had engaged the plaintiff and several other workmen by the day at $2 a day, and they had done masonry work for him from the commencement of July until midday on Saturday the 15th August, when the defendant dismissed them, telling them that he had not space and stone to keep them busy for the rest of the day. The defendant acted thus because, as he said, the number of masons engaged was too great for the work to be done that afternoon. When he dismissed them at midday he only paid them up to midday. They remained at the place at the defendant's disposition, and the defendant did not pay them until 5 o'clock in the afternoon, and then refused to pay them their wages for the afternoon. They sued him for the wages for the afternoon:—Held, that they had the right to wages for the half day, because the defendant should have foreseen the shortness in the material and should not have engaged for the whole day more workmen than he had need of. *Corriveau* v. *Larose*, Q. R. 24 S. C. 44.

Summary Procedure — *Justice of the Peace—Jurisdiction — Counterclaim of Master.*]—On the hearing of a complaint before a justice of the peace, under the Ordinance respecting Masters and Servants (C. O. 1898 c. 50), by a servant against his master for non-payment of wages, the justice has no jurisdiction to allow against the amount of wages any sum by way of damages sustained by the master by reason of the servant's neglect or refusal to perform his duty. *Brown* v. *Craft*, 4 Terr. L. R. 461.

Wrongful Dismissal of Servant — Damages—Costs. *McCrae* v. *Sturgeon Falls Pulp Co.*, 3 O. W. R. 737.

IV. Injury to Third Person by Servant.

Execution of Functions—*Permitting Child to Ride in Vehicle.*]—Although masters and employers are responsible for damage caused by their servants and workmen in the execution of the proper functions of such servants and workmen, they are not responsible for damage caused by such servants and workmen during the time that they are exercising such functions, but not in the actual execution thereof. So, the infant son (ten years of age) of the plaintiff having secretly got into a vehicle owned by the defendant, without the knowledge of the driver of the vehicle, and, when discovered, having been permitted by the driver to remain in the vehicle only because the latter did not wish to leave him upon the public road a long way from his father's house, the defendant was not responsible for the fact that the vehicle was struck by an engine when crossing a railway, and the plaintiff's son hurt, the driver not being engaged in the execution of his functions when he thus permitted the presence of the boy in the defendant's vehicle. *Marquis* v. *Robidoux*, Q. R. 19 S. C. 361.

False and Malicious Statements by Servant Injurious to Business of Former Employer—*Benefit of Master—Action on the Case—Trade Slander—Liability of Master—Scope of Employment—Company—Judgment against Both Master and Servant—Joint Tort-feasors — Measure of Damages—Findings of Jury—Judgment Notwithstanding Wrong Finding—Rule 615.*]—Plaintiffs carry on business in the city of Toronto as printers and publishers. They published to sell to the publishers of newspapers throughout the Dominion of Canada, a publication known as an annual Christmas or holiday number, which was disposed of by such purchasing newspaper publishers as a Christmas or holiday number for their papers. Plaintiffs had been publishing the said periodical for many years and alleged that it was an important and lucrative part of their business, from which they have derived considerable profits. Defendant Tibbs was in the employment of plaintiffs in the capacity of salesman, selling the periodical above referred to, and in that capacity travelled each year through different parts of the Dominion of Canada, and became personally acquainted with plaintiffs' customers. He left plaintiffs' employment in November, 1903, and entered that of defendant company. The plaintiffs charged that the defendant company decided to issue a publication, under the name "Christmas Number," similar to the publication issued by plaintiffs, and to sell the same to publishers of newspapers to be issued by them as Christmas numbers for their various publications. The defendant company sent out defendant Tibbs as their salesman much earlier in the season than it was the custom of plaintiffs to send out their salesman; the defendant Tibbs travelled as such salesman for defendant company throughout the Dominion of Canada, soliciting orders for the publication of defendant company from the various customers from whom formerly he had solicited orders on behalf of plaintiffs. They further charged that for the purpose of inducing the various customers of plaintiffs and others to give their orders to defendant company for the said publication, defendant Tibbs and defendant company, through and by Tibbs as their accredited agent and representative, falsely and maliciously made to many persons untrue and fraudulent statements, intending thereby to injure the trade and business of plaintiffs, and well knowing the same to be untrue. The statements differed somewhat from each other, but were to the effect that the Press Publishing Company (the defendant company) had taken over the business of the Sheppard Publishing Company (the plaintiffs) or that part of their business relating to the publication of the Christmas annual, and that plaintiffs were going out of that branch of the business. The questions submitted to the jury and their answers

thereto were as follows: 1. Did defendant Tibbs utter the words charged or words conveying the same meaning to Wilson, Elliott, Featherston, Gordon, Denholm, Fanson, Ellis, and Hogg, or any of them? Answer: Yes. 2. To which of these men did he utter such words? Answer: To all of them. 3. Did he utter them maliciously? Answer: Yes. 4. What damages do you find plaintiffs have proved that they have sustained in consequence of each of the statements which you find Tibbs uttered? Answer: Wilson, $50; Elliott, $30; Featherston, ——; Ellis, $15; Gordon, $20; Denholm, $25; Fanson, $15; Hogg, $25. 5. Did Harkins, knowing that Tibbs had uttered the words charged, to Elliott, and knowing that they were false, and intending to do so, ratify what Tibbs had done? Answer: No. 6. Did Tibbs in uttering any of such words, which you find he did utter, act within the scope of his employment by the Press Publishing Company for their benefit? Answer: No. 7. What general damage, if any, do you find plaintiffs sustained in consequence of such statements charged, which you find Tibbs made? Answer: None. Upon these questions and answers the trial Judge directed to be entered the judgment appealed from:—Held, it was clear that Tibbs was employed by defendant company to sell their Christmas number, and as such agent was acting for and on their behalf and within the scope of his employment in obtaining orders for them, and the jury have found that he uttered the words charged maliciously. The defendant company received these orders and filled them and collected the subscription price; in other words, took advantage of the representations that were made by defendant Tibbs.—Held, it was clear that the agent was acting in the course of his employment in canvassing for subscriptions, although he made statements which were not authorized by the company; no finding such as is made in answer to question 6 could be sustained, nor was there any reason to think that new light could be thrown upon the case by a new trial. There can, therefore, be no object in sending the case back for a new trial, when, upon the view taken, only one result ought to follow. Therefore judgment should be entered against both defendants with costs, and that plaintiffs' appeal should be allowed with costs, and the appeal of defendant Tibbs be dismissed with costs. *Sheppard Pub. Co.* v. *Press Pub. Co.*, 5 O. W. R. 775, 10 O. L. R. 243.

Liability of Master for Negligence of Servant—*Injury to Third Person—Want of Skill.*]—The defendants were engaged by M. T. & Co. to remove furniture from one place to another. It became necessary to lower some tables from an upper window, and the plaintiff, who was not in the employment of the defendants, but was employed by M. T. & Co., was directed to stand below, and, by the use of a long board, keep the tables clear of the windows below. While he was so engaged a table, which was badly tied by defendants' men, fell down and the plaintiff's legs were fractured:—Held, that as the defendants alone had charge of the removal, so far as the actual performance and mode of operation were concerned, responsibility for their employee's want of skill in not properly securing the table, attached to the defendants, and they were, therefore, liable for the result of the accident. *Williams* v. *Cunningham*, O. R. 23 S. C. 263.

Negligence of Servant—*Injury to Third Person—Scope of Employment—Railway—Sectionmen—Piling Ties on Railway near Crossing—Nuisance—New Trial.*]—Plaintiff was a carpenter and contractor. On 24th August, 1903, he was driving across defendants' track in the township of Oxford when his horse became frightened, apparently by a pile of old railway ties upon the highway, and, by reason of the horse swerving, the buggy wheel went into the ditch, and plaintiff was thrown out and very severely injured. A section man, called by plaintiff, deposed that the ties were placed on the highway by himself and another section man, and the section foreman, the others acting under the direction of the latter. "It was laid down in Lord Hale's time and repeatedly since, that wherever the master intrusts a horse or carriage or anything which may readily be made an implement of mischief, to his servant to be used by him in furtherance of his master's business or for the execution of his orders, the master will be responsible for the negligent management of the thing intrusted to the servant so long as the latter is using it or dealing with it in the ordinary course of his employment. Within these definitions, there was evidence that defendants' servants placed the ties in question on the highway in the course of their employment. This was purely a question of fact, and I think there was reasonable evidence from which a jury might so infer. Their employment or duty at that time was to get rid of the no longer useful and now incumbering ties, and to do so two modes are suggested, both of which had previously been adopted—one to burn them on the defendants' own lands, the other to permit their workmen to take them home for firewood. By either method the defendants' purpose would have been accomplished. But the ties were the property of defendants, and there was no evidence to shew that they had ceased to be their property when placed on the highway, even assuming what was certainly not proved, that the section foreman, who was not called, intended to afterwards remove them to his own house. The work was done by defendants' workmen during their ordinary working hours, and under the superintendence of the section boss. Under these circumstances, I think plaintiff made out a prima facie, and the issue was properly for the jury. But there was no specific finding of fact upon the vital question of nuisance or no nuisance, which was essentially plaintiff's cause of action. A nuisance such as the one in question was not necessarily created by placing an object or doing an act causing one horse to be frightened, but by doing something upon or near the highway which is calculated to frighten horses generally in ordinary circumstances. See Roe v. Lucknow, 21 A. R. 1. On referring to the charge it appears that the jury were not told that the question of nuisance or no nuisance depended not so much on the particular result to the plaintiff's horse, but, as they should have been, on the larger and more general result, to horses generally, as before indicated. The damages awarded are so large as to appear excessive. The appeal allowed and a new trial directed. *Forsythe* v. *Canadian Pacific R. W. Co.*, 6 O. W. R. 242, 10 O. L. R. 74.

Negligence of Servant—*Scope of Employment—Railway — Watchman.*]—Defendants employed a watchman to lower the

bars across the highway as a train was approaching, and to raise them as soon as it had passed. This duty carried with it that of warning persons who were obstructing the raising or lowering of the bars, and thereby preventing him from using them for the purpose for which they were required. The infant plaintiff was obstructing the raising of the bars, and the watchman threw a cinder at him, and put out his eye:—Held, the jury had found for plaintiff, and they must be taken to have found, as they might properly do upon the evidence, that the act done by Jarman was done in the course of his employment, not simply to gratify some spiteful feeling of his own against the boy. *Hammond* v. *Grand Trunk R. W. Co.*, 4 O. W. R. 530, 25 Occ. N. 35, 9 O. L. R. 64.

Negligence of Servant—*Scope of Authority—Forbidden Act.*]—A master is liable for an injury caused by the wrongful act of his servant within the scope of his authority, although the master has expressly forbidden the servant to do the act from which the injury resulted. *Read* v. *McGivney*, 36 N. B. Reps. 513.

Theft of Servant—Scope of employment—Bailment — Hospital — Charity patient. *Ierzino* v. *Toronto General Hospital Trustees*, 5 O. W. R. 76.

Trespass to Person—Owner of house—Unnecessary force — Solicitor — Damages. *Burke* v. *Burke*, 1 O. W. R. 127, 419.

V. Secret Profits of Servant.

Dual Employment.]—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 cold storage company not being themselves makers of or dealers in cold storage plant. Judgment of Boyd, C., 32 O. R. 191, 29 Occ. N. 436, reversed. *Jones* v. *Linde British Refrigeration Co.*, 21 Occ. N. 552, 2 O. L. R. 428.

Contract of Servant not to Engage in Particular Business—Wrongful dismissal of servant—Subsequent engaging in same business. *Ryerson* v. *Murdock*, 1 O. W. R. 466.

Servant to Devote Entire Time to Master's Business and to Engage in no Other—*Breach—Account of Profits Made in Other Businesses—Damages—Costs—Reference—Statute of Limitations — Competitive Business.*]—The defendant in 1889 engaged to devote his entire time and attention to the advertising interests of plaintiffs, and to engage in no other business during the period covered by the agreement then made; This provision of the original agreement was extended to the continued services of defendant with plaintiffs; and that the businesses undertaken by defendant, of which plaintiffs complain, were carried on by him while he was in their employment upon these terms. Defendant engaged in other business:—Held, liable to the master for damages for breach of contract, but the master was not entitled to the moneys earned in a different capacity if the servant did not use time which he should have devoted to his master's interest, provided he did not engage in a competitive business. But if the interests conflict in any way with his duty to his master he cannot retain the fruits of his labours against his master. *Sheppard Publishing Co.* v. *Harkins*, 5 O. W. R. 482, 9 O. L. R. 504.

See also 4 O. W. R. 250, 277, 477.

VI. Other Cases.

Action by Parent as Master for Death of Child—*Damages to Estate—Dismissal of Previous Action under Fatal Accidents Act—Evidence of—Negligence—Contributory Negligence—Misdirection—Survival of Right of Action.*]—The plaintiff's son, who was employed as a watchman by the government of Canada, and boarded at home with his father, was killed as the result of an accident while attempting to leave a passenger elevator in the defendant's building. The deceased had entered the elevator for the purpose of seeing a tenant whose office was situated on one of the upper floors of the building, and, not finding the person whom he desired to see, had continued to ride up and down in the elevator. He finally attempted to leave the elevator as another passenger entered, and just as the boy in charge started the elevator and was in the act of closing the door, he was caught between the floor of the building and the upper part of the elevator cage, and received injuries from which he died. In an action by the plaintiff personally, and as administrator of deceased, for damages, the jury awarded the plaintiff "for loss of deceased's services since death $1,500." On the trial, evidence was offered and rejected of the proceedings in, and judgment dismissing, a former action, brought by the plaintiff as administrator, suing for the benefit and on behalf of himself as father and the mother of deceased, under the Act corresponding to Lord Campbell's Act, in respect to the same alleged negligence. The jury, in addition to the damages above mentioned, awarded "for damages to deceased's estate from the happening of the accident to death, and for necessary expenses, $37.50." The trial Judge, in summing up, said to the jury, "I cannot understand myself how the negligence of the deceased contributed to this accident:"—Held, that this part of the verdict could not be sustained without overruling the common law rule that "in a civil court the death of a human being cannot be complained of;" that the evidence was improperly rejected, and that, for this reason also, this part of the verdict could not stand; that, there being no contract for safe carriage, and the case being simply one of tort, for alleged negligence, the action died with deceased; that there was evidence of negligence on the part of deceased, in attempting to leave the elevator at the time he did, which contributed to the happening of the accident, and which should have been submitted to the jury; that the remark of the trial Judge was equivalent to telling them that there was no evidence of the fact, and

was misdirection; and that the direction to the jury that, if they found that deceased pushed open the closed door to get out, they might find that there was contributory negligence, was calculated to hinder the jury from considering any evidence which they themselves might be able to discover tending to shew that there was contributory negligence. *Hawley* v. *Wright*, 37 N. S. Reps. 77, 24 Occ. N. 63, 136.

Breach of Contract—*Actionable Wrong—Damages — Injunction — Necessity for Shewing Malice—Justification—Rules of Labour Union.*]—It is no defence to an action for persuading a servant to break his contract with his master, that the persuader acted in good faith in pursuance of the provisions of the constitution of a trade union of which the servant and the persuader were both members, and that he had no ill will towards the master. Reid v. Friendly Society of Stone Masons, [1902] 2 K. B. 732, and South Wales Miners' Federation v. Glamorgan Coal Co., [1905] A. C. 239, followed. *Branch* v. *Roth*, 6 O. W. R. 345, 10 O. L. R. 284.

Disclosure by Servant of Master's Business Contracts — Use in another action—Partnership—Injunction. *Mitchell* v. *McKenzie*, 6 O. W. R. 564.

Liability of Master to Pay for Medical Attendance on Servant Injured in Service — Company—Contract—Authority of officer in charge of works. *Oldwright* v. *Hamilton Cataract Power Co.*, 3 O. W. R. 16, 397.

Medical Attendance on Servant—*Liability of Master—Contract — "Hospital Fund."*]—A fund called "the hospital fund" was held by a mining company for the purpose of providing medicine and medical attendance for those of the men who required it, medical men being attached to the works, whose duty it was to attend the men and provide the necessary medicines:—Held, that no obligation was imposed on the company to pay out of this fund for the services of any physician whom the men might choose to employ. *Struthers* v. *Canadian Copper Co.*, 23 Occ. N. 323, 6 O. L. R. 374, 2 O. W. R. 748.

Misconduct of Servant — *Breach of Confidence — Soliciting Customers of Master.*]—The appellant, a patent solicitor, had, by means of advertisements in the newspapers, solicited correspondence from persons who might need the services of a patent solicitor. By this means he had succeeded in securing patronage, and had a large number of correspondents: and he kept in his office a particular book in which were entered the names and addresses of about 5,000 of his correspondents and clients. The respondent, while in the employ of the appellant, but after having received from him notice of dismissal, had got hold of this book, which was in charge of another employee, during the absence of his employer, and had taken a copy of a great part of the addresses. Later, having left the service of the appellant, and opened an office on his own account as a patent solicitor, he sent to the addresses taken from the appellant's book, a circular announcing his profession, his address, and his photograph, thus soliciting the business of his former patron and even offering his services free:—Held, that the respondent had violated his contract and failed in his duty as an employee; and that he had unlawfully committed acts calculated to cause damage to the appellant by turning away from the latter part of his clientele. *Marion* v. *Roberts*, Q. R. 14 K. B. 23.

Servant Leaving Employment — *Action—Damages—Particulars.*] — In an action for damages against an employee for deserting his employment, it is sufficient to allege in relation to damages that he left his employment at a time when several of the employees were absent upon holidays. *Chaput* v. *Charland*, 6 Q. P. R. 33.

Servant Leaving Employment without Notice — *Quantum Meruit—Cross-demand for damages.*]—The plaintiff was engaged by the defendants at a monthly salary. After working for nineteen days in a certain month, he left without giving any notice, and subsequently brought this action for $20 for 19 days' work actually performed. The defendant company brought a cross-action for damages resulting from the plaintiff leaving their employment without notice:—Held, that by leaving without notice, the plaintiff had forfeited his right to wages even for work done. 2. That upon the proof adduced the defendants had made out their case on a cross-demand. *McKee* v. *Canadian Pacific R. W. Co.*, 23 Occ. N. 121.

Sharing Profits — Special agreement—Statement furnished by employer—Impeaching—Actual fraud—Account—R. S. O. 1897 c. 157, s. 3. *Cutten* v. *Mitchell*, 6 O. W. R. 497, 552, 629, 10 O. L. R. 734.

MASTER IN CHAMBERS.

Affidavits Verifying Mortgage Account—*Cross-examination on — Forum — Redemption Action.*]—In a redemption action the defendant filed his affidavit verifying the mortgage account in the office of the Master in Ordinary, to whom the action was referred. Plaintiff took out an appointment before a special examiner to cross-examine defendant upon his affidavit:—Held, there was no precedent or authority for any such cross-examination before anyone except the Master before whom the reference was pending. Rule 490 had no application as the proceedings in the Master's office were regulated by Rules 654-700. Rule 668 was expressly negative to any such right as was claimed. Motion granted with costs added to the mortgage debt. *Plenderleith* v. *Parsons*, 6 O. W. R. 145, 399, 10 O. L. R. 436.

Jurisdiction — Motion to set aside appointment of referee to proceed with reference — Jurisdiction of referee questioned—Rule 42 (2), (12)—Appeal — Prohibition. *City of Toronto* v. *Toronto R. W. Co.*, 2 O. W. R. 225, 3 O. W. R. 204, 298, 4 O. W. R. 221, 330, 345, 446, 5 O. W. R. 14, 64, 130, 403, 415, 6 O. W. R. 574, 677, 871.

Jurisdiction—*Summary Dismissal of Action.*] — The Master in Chambers has no power under Rule 261 or otherwise to order the dismissal of an action upon the ground

that no cause of action is shewn upon the plaintiff's own statement. *Knapp* v. *Carley*, 24 Occ. N. 232, 7 O. L. R. 409, 2 O. W. R. 1186, 3 O. W. R. 187, 940.

See COURTS — EXECUTION — JUDGMENT —WRIT OF SUMMONS.

MASTER IN ORDINARY.

See REFEREES AND REFERENCES.

MATRIMONIAL OFFENCES.

See HUSBAND AND WIFE.

MAYOR.

See MUNICIPAL CORPORATIONS.

MEASUREMENTS.

See LIEN.

MECHANICS' LIENS.

I. BRITISH COLUMBIA ACT, 1001.
II. MANITOBA ACT, 1002.
III. NOVA SCOTIA ACT, 1004.
IV. ONTARIO ACT, 1006.
V. QUEBEC ACT, 1010.

I. BRITISH COLUMBIA ACT.

Certificate of Action — *Filing—Time —Existence of Lien.*]—The certificate of action required by s. 24 of the Mechanics' Lien Act must be filed within the time therein limited, otherwise the lien ceases to exist. *Dunn* v. *Holbrook*, 7 B. C. R. 503.

Clearing Land.] — The defendant employed a contractor, under a written contract, to clear a quantity of land for the purpose of cultivation:—Held, that the plaintiff, a labourer who worked for the contractor upon the land, was not entitled to a lien for his work, under s. 4 of the British Columbia Mechanics' Lien Act, as amended. *Black* v. *Hughes*, 22 Occ. N. 220.

Materials Furnished—Request of owner—Authority of agent—Onus—Limitation of agent's powers—Absence of notice to material man—Estoppel—Time for filing claim—Delivery of new materials after expiry—Colourable delivery to extend time—Judgment in personam — Jurisdiction of County Court—Appeal to full Court (B.C.) *Sayward* v. *Dunsmuir* (B.C.), 2 W. L. R. 319.

Materials Furnished—Request of owner—Implication. *Fortin* v. *Pound* (B.C.), 1 W. L. R. 333.

Mineral Claim — *Holder of Option—"Owner."*] — The defendant, a mine owner, gave C. an option to buy a mine for $25,000, with liberty to work it, the net proceeds to be applied towards payment. The plaintiffs claimed liens for labour while employed by C. in working it under the agreement. C. did not exercise his option:—Held, Irving, J., dissenting, that the plaintiffs were not entitled to liens under the Mechanics' Lien Act. There is no lien given for cooking under the Act. *Anderson* v. *Godsal*, 7 B. C. R. 404.

"Owner"—*Interest in Land—Vendor and Purchaser.*] — The plaintiffs claimed a mechanics' lien for $633 against the estate and interest of L. and T. in certain lots in the vicinity of New Westminster, for lumber furnished under the following circumstances: T., the registered owner, agreed to sell the land for $1,200 to L.; $50 was paid down, and the balance was to be paid immediately. No agreement in writing as required by the Statute of Frauds was executed, but L. entered into possession of the premises and proceeded to fit up the buildings for the purpose of his business as a butcher for a slaughter house, spending a large sum in so doing, and the lumber in respect of which the lien was claimed was used in building and repairing the slaughter house and putting up a fence on the land:—Held, that the lien attached only upon whatever interest L. might have in the land. Anderson v. Goodsall, 7 B. C. R. 404, followed. *British Columbia Timber and Trading Co.* v. *Leberry*, 22 Occ. N. 273.

Woodman's Lien — *Action for Wages—Pursuing both Remedies — Estoppel.*]—The plaintiff was employed by G., who had a contract with the defendants, to cut logs on their land, and brought this action in a County Court under the Mechanics' Lien Act for $74.44 for wages. Before the commencement of this action the plaintiff and sixteen others obtained a joint judgment in the same Court against G., under the Woodman's Lien for Wages Act, for the gross amount of their wages. In that action G. and the company were defendants, but the action was discontinued against the company, as they released all claim to the logs seized by the sheriff:—Held, that the plaintiff was estopped from proceeding under s. 27 of the Mechanics' Lien Act for the balance of his wages. *Wake* v. *Canadian Pacific Lumber Co.*, 22 Occ. N. 153, 8 B. C. R. 358.

Woodman's Lien — *British Columbia Law — Wages — Contractor — Pay-roll—Master and Servant.*]—Under the sections of the Mechanics' Lien Act relating to woodmen's wages, a person by requiring only the production of the pay-roll is not relieved of liability to the workmen for the amounts due them from the contractor; he must have produced to him a receipted pay-roll, shewing that the wages were actually paid by the contractor. *Young* v. *West Kootenay Shingle Co.*, 11 B. C. R. 171, 1 W. L. R. 184.

II. MANITOBA ACT.

Action to Enforce — Parties—Former owner. *Christie* v. *McKay*, (Man.), 2 W. L. R. 203.

Costs Subsequent to Judgment—*Taxation—Powers of Taxing Officer.*]—"Costs" in s. 37 of the Mechanics' and Wage Earners' Lien Act, R. S. M. 1902 c. 110, refers to the costs up to and including the trial, and means the costs which are allowed by the Judge at the hearing and entered in the judgment and the provisions of that section limiting the costs to be allowed do not apply to the subsequent costs of sale and proceedings before the Master; and where the judgment pronounced empowered the Master to tax and add to the plaintiffs' claim the costs of the subsequent proceedings, and the Master under it allowed the ordinary costs of a sale conducted in his office, and there was no appeal from the judgment, the Court could not on an appeal from the taxation interfere with the provisions of the judgment. The alternative procedure provided by s. 31 cannot be assumed to be any less expensive than the ordinary, so as to constitute a case for the application of s. 39, and at any rate the question of the least expensive course is one to be dealt with by the trial Judge, and one with which, without special direction in the judgment, the taxing officer has no right to interfere. *Humphrey* v. *Cleave*, 24 Occ. N. 374, 15 Man. L. R. 23.

Materials Furnished — *Drawback — Non-completion of Work — Occupation of Building—Estoppel.*]—Persons supplying materials to the contractor for the building of a house are not entitled to the benefit of the provisions of s. 12 of the Mechanics' and Wage Earners' Lien Act, R. S. M. 1902 c. 110, by which, in the event of the contract not being completed, wage earners may enforce liens against the percentage of the contract price which the owner is required to hold back under s. 9 of the Act; but, if the contract price is payable by instalments, the general lien-holders may enforce their liens pro rata to the extent of any earned instalments in so far as the same remain unpaid in the hands of the owner, although the work is not completed. Brydon v. Lutes, 9 Man. L. R. 463, followed. 2. The occupation of the uncompleted house by the owner, and the mortgaging of it, for a sum to be paid to the contractor in accordance with one of the terms of the contract, do not estop the owner from setting up against the lien-holder that the house has not been completed, and that, consequently, no more money is due under the contract. Pattinson v. Luckley, L. R. 10 Ex. 330, and Sumpler v. Hedges, [1898] 1 Q. B. 673, followed. *Black* v. *Wiebe*, 15 Man. L. R. 260, 1 W. L. R. 75.

One Lien against two Owners—*Encroachment on Wrong Lot.*]—A mechanic's lien registered against two lots of land owned by different persons in respect of work done upon two houses, one on each of the lots, on the order of one of the owners and for an amount claimed to be due for the work on both houses, without apportioning the amount as between the two, cannot be enforced under the Mechanics' and Wage Earners' Lien Act, 1898, nor can effect be given to the lien against one of the lots only for the proper amount. Currier v. Friedrick, 22 Gr. 243, Oldfield v. Barbour, 12 P. R. 554, and Rathbun v. Hayford, 87 Mass. 406, followed. *Fairclough* v. *Smith*, 21 Occ. N. 447, 13 Man. L. R. 509.

Sub-contractor — *Liability of Owner—Failure to Retain Percentage—Entire Contract—Time for Filing Lien.*] — Where nothing is payable under a building contract until the whole of the work is completed, but the owner voluntarily makes payments to the contractor as the work progresses, to the extent of the value of the work done, a sub-contractor who has not been paid is entitled, under s. 9 of the Mechanics' and Wage Earners' Lien Act, R. S. M. 1902 c. 110, as against the owner, to a lien for the amount due him, to the extent of 20 per cent. of such payments. Russell v. French, 28 O. R. 215, followed. The plaintiff's claim consisted of charges for different jobs, all in his line of business, but ordered at different times, and, as to the first job, if considered seperately, his lien was not filed within the time required by the statute:—Held, that, in such circumstances, a mechanic should not be required, in order to secure payment, to file a lien after completing each piece of work, and that filing his lien after he has completed all of his work is sufficient. *Carroll* v. *McVicar*, 15 Man. L. R. 379, 2 W. L. R. 25.

Time for Registration of Lien—Completion of work—Extent of lien—Judgment—Reference — Costs. *Day* v. *Crown Grain Co. and Cleveland* (Man.), 2 W. L. R. 142.

Unpaid Vendor — *Lien Subject to Claim of—Notice.*]—The purchaser of a lot of land under an agreement of sale, fixing 15th August, 1901, for payment of the purchase money, was allowed to enter into possession on 15th June, 1901 and to commence building on the land. He continued the expenditure of money upon the premises after the date fixed for payment, with the knowledge and concurrence of the vendors, but eventually abandoned the purchase, without having paid anything to the vendors. They then notified him that as he had not complied with the terms of the purchase as to time, his interest had ceased. The plaintiff's claim was for a lien on the interest of the purchaser in the property, for work done by him in the erection of the building, but he submitted to the lien of the vendors for the full amount of the purchase money of the land:—Held, that the vendors could not, under the circumstances, put an end to the rights of the purchaser by giving such a notice, and that, apart from the provisions of s. 11, s.-s. 2, of the Mechanics' and Wage-Earners' Lien Act, 61 V. c. 29, the plaintiff was entitled to the lien asked for, with the usual inquiries and directions. *Hoffstrom* v. *Stanley*, 22 Occ. N. 337, 14 Man. L. R. 227.

Workman — Liability of owner—Failure to retain percentage—Pay list—Builders' and Workmen's Act (Man.) — Claim under $20. *Phelan* v. *Franklin* (Man.), 2 W. L. R. 29.

III. Nova Scotia Act.

Lien of Sub-contractor — *Special Agreement between Owner and Contractor—Failure to Retain Percentage — Absence of Notice — Ascertainment of Price—Time for Commencement of Lien.*]—B. contracted with the defendant company to transfer to them a quantity of land, and to erect and equip a mill and to do other work, for an agreed sum in bonds and shares of the company and other considerations. It was subsequently agreed, orally, that a portion of the proceeds of the bonds and shares trans-

ferred to B. should be retained by a trust company as security for the performance by B. of his contract for the erection of the mill, to be paid out as the work progressed. In an action against the company by the sub-contractor by whom the machinery for the mill was supplied:—Held, that, in the absence of notice, the company were not liable to the plaintiff for failure to retain out of the moneys paid to B. the percentage required to be retained under the provisions of the Mechanics' Lien Act; that the transaction which took place when the title to the property was transferred to the company, and the bonds and shares, the consideration therefor, were delivered to B., was not one within the provisions of the Mechanics' Lien Act, s. 8, and that the company were not required to retain anything on that date for the benefit of future sub-contractors; that, as the bonds and shares constituted the price or consideration not only for the construction of the mill, but for the land and other property transferred to the company, the price to be paid for the construction of the mill could not be ascertained so as to enable the claim for work or machinery to be enforced against the property; that the lien for goods or materials placed or furnished under s. 3 of the Act, commences when the goods or materials are so placed or furnished, and that, as against the owner, this cannot be said to have occurred until they have reached his property. *Smith Co.* v. *Sissiboo Pulp and Paper Co.*, 36 N. S. Reps. 348.

Machinery Furnished—*Contract Price.*]—Under the Mechanics' Lien Act of Nova Scotia, R. S. N. S. 1900 c. 171, a lien for machinery for a mill does not attach until it is delivered, and if the contractor for building the mill has then been fully paid, there is nothing upon which the lien can operate, as, by s. 6 of the Act, the owner cannot be liable for a sum greater than that due to the contractor. B., holder of more than half the stock of a pulp company, for which he had paid by cheque, and also a director, offered to sell to the company land to build a mill, and furnish working capital, on receipt of all the bond issue and cash on hand. The offer was accepted, and all the stock issued as fully paid up was deposited with a trust company, and the cash, his own cheque, and the price of five shares handed to B. The stock was sold, and from the proceeds the land was paid for, the working capital promised given to the company, and the balance paid to B. from time to time as the mill was constructed. The machinery was supplied by an American company, but when it was delivered all the money had been paid out as above:—Held, affirming the judgment appealed from, 36 N. S. Reps. 348, that as all the money had been paid before delivery, the company were not liable under the Mechanics' Lien Act to pay for the machinery:—Held, also, that s. 8 of the Act, which requires the owner to retain 15 per cent. of the contract price until the work is completed, did not apply, as no price for building the mill was specified, but the price was associated with other considerations from which it could not be separated. *S. Morgan Smith Co.* v. *Sissiboo Pulp and Paper Co.*, 24 Occ. N. 285, 35 S. C. R. 93.

Practice in Action to Enforce—*Statement of Claim—Service out of Jurisdiction.*]—The plaintiff registered a mechanic's lien against the defendant company, and subsequently filed his statement of claim. He obtained an order for the service of the statement of claim out of the jurisdiction, and service was effected in pursuance thereof. The defendant company applied to have the order and service thereunder set aside, on the ground that there was no statutory authority therefor: s. 28, s.-ss. 1, 2, 6, of the Mechanics' Lien Act, R. S. N. S. c. 171:—Held, that the service was good by reason of s. 28 of the Act, the ordinary procedure of the Court with respect to the service of a writ having been followed in serving the statement of claim. *Macdonald* v. *Consolidated Gold Mining Co.*, 21 Occ. N. 482.

Sub-contractor — *Material Man—Notice to Owner—Failure to Retain Percentage—Identification of Premises.*]—C. & W., who were awarded a contract to place heating apparatus in a hotel building owned by the defendnt D., ordered materials required from the plaintiffs in a letter stating, "We have secured contract for hotel which requires above goods. The sub-contract was made on the 29th September, 1902, and the final payment was made by D. to the principal contractor on the 21st November, 1902, when the work was all done, without retaining 15 per cent. for 30 days, as required by the Mechanics' Lien Act, R. S. N. S. 1900 c. 171, s. 8:—Held, that the letter sufficiently identified the building for which the goods were required; and, distinguishing Smith v. Sissiboo Pulp Co., 30 N. S. Reps. 348, that D. was required to retain the percentage whether he had notice of the sub-contract or not, and that he paid it at his own peril, if there was a sub-contractor in existence who was prejudiced by the payment. *Dominion Radiator Co.* v. *Cann*, 37 N. S. Reps. 237.

Sub-contractors — *Proceedings to Realize Lien—Time.*]—One Rhuland had a contract with Wright for the construction of some houses. Dempster & Co. were the sub-contractors, and supplied Rhuland, on his credit, with materials for the work, the whole of which was delivered before the 28th April, 1900. On the 18th May, 1900, Dempster & Co. registered a lien against the property under the Mechanics' Lien Act, 1899, but no proceedings were instituted by them to realize the claim until the 13th August, 1900. On an application to set aside Dempster's lien:—Held, that the word "contract" in s. 20 of the Act means the original contract with the owner, and not the contract between the contractor and the sub-contractor. If no claim had been registered, Dempster & Co. could have registered one at any time within thirty days after the completion of that contract. In view of s. 9, an abandonment would be equivalent to a completion, and no claim could be registered after thirty days from the abandonment of a contract. In this case no period of credit was mentioned in the claim, and Dempster swore in the affidavit attached to the claim, that none was given, nor was the lien claimed upon materials or machinery, as provided by s. 20, s.-s. 2. The difficulty arose in construing the words "after the work or service has been completed" in the cases of sub-contractors. *Dempster* v. *Wright*, 21 Occ. N. 88.

IV. Ontario Act.

Action—*Affidavit Verifying Statement of Claim—Particulars of Residence.*] — In the

case of an action under the Mechanics' and Wage-Earners' Lien Act, R. S. O. 1897 c. 153, the affidavit verifying the statement of claim, required by s. 31 (2), may be made by the plaintiffs' solicitor as agent. The plaintiffs were day labourers, who did work for the defendants on a railway in an unorganized district, and it was set forth in the statement of claim that they resided in that district; the name and address of the plaintiffs' solicitor was also stated therein:—Held, that it was not necessary to give more precise particulars of the places of residence of the plaintiffs. *Crerar* v. *Canadian Pacific R. W. Co.*, 23 Occ. N. 171, 5 O. L. R. 383, 2 O. W. R. 187.

Action — *Parties — Execution Creditor —Incumbrance Arising Pendente Lite—Notice of Trial—Judgment—Vacating.*] — Under s. 36 of the Mechanics' and Wage-Earners' Lien Act, R. S. O. 1897 c. 153, it is the persons who are incumbrancers at the time fixed for service of notice of trial, and those only, who are required to be served, service of notice of trial on them being the mode by which incumbrancers not already parties to the proceedings are brought in. After service of notice of trial in an action to enforce a mechanic's lien against the lands of the defendants, but before the trial, the petitioners, who were judgment creditors of the defendants, placed a fi. fa. against goods and lands in the hands of the sheriff of the county in which the lands of the defendants lay. The petitioners were not served with any notice of trial, and did not appear at the trial nor prove any claim, but the judgment given upon the trial recited that it appeared that they had some lien, charge, or incumbrance on the lands, created subsequent to the commencement of the action, and declared that the plaintiffs and others were entitled to liens: —Held, that the name of the petitioners and all reference to their claims should be stricken out of the judgment. *Haycock* v. *Sapphire Corundum Co.*, 24 Occ. N. 56, 7 O. L. R. 21, 2 O. W. R. 1177.

Action Begun by Statement of Claim —*Service out of Ontario — Jurisdiction to Allow.*]—There is no authority in the Courts of this province to allow service out of Ontario of a statement of claim filed as the initial step in an action. In re Busfield, Whaley v. Busfield, 32 Ch. D. 123, followed. Such service is not a matter of practice, but of jurisdiction, and Rule 3 does not enable the Court to apply the analogous procedure as to writs of summons. Semble, that if there were power to allow service of such a statement out of Ontario, it could not be allowed nunc pro tunc after it had been effected without an order. Service out of Ontario of a statement of claim, the initial proceeding in an action to enforce a mechanic's lien, under R. S. O. 1897 c. 153, upon foreigners resident in a foreign country, and all subsequent proceedings, set aside. History of the legislation in Ontario as to service out of the jurisdiction. *Pennington* v. *Morley*, 22 Occ. N. 183, 3 O. L. R. 514, 1 O. W. R. 246.

Assignment — *Debt "Due"—Consideration — Lien-holder — Priority — When Lien Attaches—Mechanics' Lien Act, 1897 c. 153, ss. 4, 13—Judicature Act, s. 8 (5).*]—E., a sub-contractor, commenced work on the 19th August, 1903, completed it on the 11th October, 1904, and registered his lien on the 12th October, 1904. On the 14th November, 1903, the contractor by whom E. was employed assigned $2,588.32 of the amount "due" to him from the owner of his contract, to D., another sub-contractor, who duly gave notice thereof to the owner. At the time of this assignment $2,588.32 had been earned under the contract, but it did not become payable until the giving of the architect's certificate on the 14th November, 1904: — Held, that under the Mechanics' Lien Act, s. 4, E.'s lien related back to the commencement of his work, and under s. 13 it was entitled to priority over D.'s assignment, for the full amount of the lien, and not merely for that portion thereof actually earned by E. up to the date of the assignment:—Held, also, that the assignment was valid, and bound the debt assigned, though it was not payable at the date of the assignment:—Held, also, that a debt due and owing is a sufficient consideration for an assignment of a chose in action, and that the assignment was, therefore, not revocable or impeachable as being voluntary. *Ottawa Steel Castings Co.* v. *Dominion Supply Co.*, 25 Occ. N. 58, 5 O. W. R. 161.

Claim of Owner against Contractor —Lien-holders — Pleading — Amendment— Percentage of value of work—Costs of appeals. *Ontario Paving Brick Co.* v. *Bishop*, 2 O. W. R. 320, 1063, 4 O. W. R. 34.

Costs — "*Actual Disbursements.*"]—The "actual disbursements" which, by s. 42 of the Mechanics' Lien Act, R. S. O. 1897 c. 153, may be allowed as against an unsuccessful claimant, in addition to an amount equal to twenty-five per cent. of the claim, do not include counsel fees paid by the defendant's solicitor to counsel retained in the course of the proceedings, and a fortiori not counsel fees charged by the solicitor himself when acting as counsel. *Cobban Manufacturing Co.* v. *Lake Simcoe Hotel Co.*, 23 Occ. N. 168, 5 O. L. R. 447, 2 O. W. R. 48, 310.

Interest on Claim—Right of lien-holder — Computation. *Metallic Roofing Co.* v. *Jamieson*, 2 O. W. R. 316.

Liability of Owner — Admission of claim—Costs — Payment into Court—Discharge of lien. *Gold Medal Furniture Co.* v. *Craig*, 6 O. W. R. 954.

Lien-holders — Mortgagees — Priority —Increased selling value of land—Agreement —Construction. *Boake Manufacturing Co.* v. *McCrimmon*, 6 O. W. R. 979.

Materials Furnished—Credit of owner —Liability — Oral agreement — Privity or consent—Request. *Slattery* v. *Lillis*, 6 O. W. R. 543, 10 O. L. R. 618.

Material Men — *Agreement between Owner and Contractor—Drawback—Value of Plant—Completion of Work — Judgment— Estoppel.*]—The plaintiffs furnished materials to the contractors for certain works, and the action was brought against the contractors and the owner to realize a lien under the Mechanics' Lien Act. After work to the value of $24,290.88 had been done, the owner took possession of the works, the materials on the ground, and the plant and machinery of the contractors, and no work had since been done by them under the contract. An action by the contractors against the owner

for damages for improperly taking the works out of their hands and to recover the value of the materials, machinery and plant, and some supplies taken by the owner, and also to recover a large sum on account of work done, had been dismissed:—Held, that the 15 per cent. which, under s. 11 of the Act, R. S. O. c. 153, the owner was required to deduct from any payments made in respect of the contract and to retain as a fund for the discharge of liens, was to be computed on the value of the work and materials, but not upon the value of the plant as well, notwithstanding that for the security of the owner the plant was declared to be for the purposes of the contract his property:—Held, that, if the judgment dismissing the action brought by the contractors were binding on the plaintiffs, they would not be benefited by a postponement of the trial until the final completion of the works, for the effect of that judgment was that the contractors had forfeited all right to payment for any work which they had performed and for which they had not been paid; and, even if the judgment were not binding on the plaintiffs, the case should not be sent back for a new trial. *Birkett* v. *Brewder*, 22 Occ. N. 93, 1 O. W. R. 62.

Mining Location—*Blacksmith—Cook.*]—A blacksmith, employed for sharpening and keeping in order tools used for the work of mining, is entitled to a lien for his wages on the mining location, but a cook who does the cooking for the men employed is not. Adjoining mining locations even when they are water lots, if "enjoyed with" the mining location on which the mine is situated, are subject to liens for work performed in the mine. *Davies* v. *Crown Point Mining Co. of Ontario*, 22 Occ. N. 52, 3 O. L. R. 69.

Notice in Writing to Owner—*Letter.*]—A letter to the owner, from sub-contractors furnishing materials, asking him, when making a payment to the contractor for the building in question, to "see that a cheque for at least $400 is made payable to us on account of brick delivered, as our account is considerably over $700, and we shall be obliged to register a lien if a payment is not made today," is sufficient "notice in writing" of a claim of lien under the Mechanics' Lien Act, R. S. O. c. 153. Judgment in 32 O. R. 27, 20 Occ. N. 255, affirmed. *Craig* v. *Cromwell*, 21 Occ. N. 13, 27 A. R. 585.

"Owner" — Lease—Covenant by lessee to erect buildings. *Webb* v. *Gage*, 1 O. W. R. 327.

Registered Owner — Contract with—Transfer of property after registration of lien—Previous agreement — Notice — Parties. *Fraser* v. *Griffiths*, 1 O. W. R. 141.

Several Buildings — *Lien for Work on one — Registration—Time—Extent of Work Done.*]—Where a contract is made with the respective owners of adjoining lands, on which two separate buildings are erected, but included under one roof, for the repair thereof, at one entire price, separate accounts being kept of the work done and materials furnished on each building, a lien attaches and can be enforced under the Mechanics' Lien Act, against the lands of each of such owners for the price of the work done and the materials provided on each respective building. The finding of the local Master who tried a mechanic's lien action, as to the fact of the work being done and the materials furnished within thirty days prior to the lien being registered, and as to the extent of such work and materials, was upheld, for, though the evidence was contradictory, there was evidence to support such findings. *Booth* v. *Booth*, 22 Occ. N. 131, 3 O. L. R. 294, 1 O. W. R. 49.

Statutory Action to Realize—*Joining other Causes of Action—Parties—Architect.*]—In an action begun under s. 31 of the Mechanics' and Wage-Earners' Lien Act, R. S. O. 1897 c. 153, by the filing of a statement of claim, to realize a lien created by the Act, the plaintiff cannot include other causes of action and other matters. Where the plaintiff in such an action claimed to be entitled to a lien against the owner of land who had erected a building thereon, and joined as defendant the architect of the building, whom he charged with fraudulently refusing to give a certificate for the amount which the plaintiff claimed to be entitled to recover, and asked that the architect might be ordered to pay the amount claimed, with damages for his fraudulent breach of duty, and the costs of the action, the name of the architect was struck out. Semble, that, as against the owner, the claim to a proper certificate might be maintained in this action as one of the matters involved in the claim to a lien. *Bagshaw* v. *Johnston*, 22 Occ. N. 33, 3 O. L. R. 58.

Writ of Summons—*Service out of Jurisdiction—Statement of Claim—Time for Delivering Defence — Trial — Appointment in Writing—Notice of Trial.*] — An order permitting service out of the jurisdiction of the writ of summons should also authorize service of the statement of claim at the same time, and fix a time for delivery of the statement of defence. Young v. Brassey, 1 Ch. D. 277, followed. Where the order makes no provision as to the statement of claim or defence, the defendant should have eight days from the last day for appearance within which to deliver his statement of defence, and the pleadings cannot be noted closed before the expiry of such eight days. Under s. 35 (1) of the Mechanics' Lien Act, R. S. O. c. 153, the Judge or officer fixing a day for the trial of an action brought under that Act, is to do so in writing; and a notice of trial under that section given by a party who has not obtained a signed appointment from the Judge or officer, is not effective. The notice of trial must be served at least eight clear days before the day fixed, as provided by s. 36. *McIver* v. *Crown Point Mining Co.*, 21 Occ. N. 127, 19 P. R. 335.

Work and Labour—Defect in building—Assent—Estoppel. *Holtby* v. *French*, 1 O. W. R. 821.

V. Quebec Act.

Builder's Privilege—*Promissory Note—Principal Contractor — Sub-contract—Notice to Owner—Registration—Time for—Delay—Default.*]—The holder of a promissory note guaranteed by a builder's privilege may, in suing to recover the amount of such note, demand that the existence of this privilege be recognized in his favour. 2. The principal contractor may take, in his own name, a

builder's privilege, not only for work which he has himself done, but also for work done by his sub-contractor and it is not necessary, in such circumstances, to notify the owner of the contract between the principal contractor and the sub-contractor. 3. The point of commencement of the time for registration of a builder's privilege is the date at which all work on the building has been completed and ended, and not that of beginning to use the building before its completion. 4. The owner who has caused the building in question to be erected cannot complain of delay in registering a builder's privilege, nor even of absolute default of registration. *La Banque Jacques Cartier* v. *Picard*, Q. R. 18 S. C. 502.

Builder's Privilege — *Contract with Owner—Right to Lien—"Additional Value."*] A contractor who contracts directly with the proprietor of a building which is being constructed, is entitled to register a privilege under the terms of art. 2013, C. C., as amended by 59 V. c. 42 (Q.). 2. The "additional value," referred to in the article, is the additional value given to the immovable by the work at the time it is done. *Galerneau* v. *Tremblay*, Q. R. 22 S. C. 143.

Claim of Lien — *Registration—Description of Land.*]—The description of an immovable, in the notice for registration of a workman's privilege, as "part of lot 4101 of the cadastre of the parish of Montreal," but omitting the conterminous properties, does not comply with art. 2168 of the Civil Code, which provides that in any place where the official plans are in force the true description of a part of a lot is by stating that it is a part of a certain official number upon the plan and in the book of reference, and mentioning who is the owner, and the properties conterminous thereto; and such notice does not create any privilege. *Therrien* v. *Hénault*, Q. R. 21 S. C. 452.

Increased Value — *Vendor of Owner—Estimate of Increase—Registration of Lien—Contestation—Pleading.*] — The question of the increase in value of an immovable by reason of work done by a workman can only be raised by the vendor of the owner and his creditors. 2. The increase in value is fixed by an estimate, at the time of the decree, when the money is insufficient to pay a workman who has registered a lien or in case of a contestation of the increase by those interested. 3. When there is a contestation it should be by means of a plea on the merits and not by inscription in law. 4. The defendant being the owner of the immovable, the workman is not bound to allege increase in value. *Therien* v. *Hainault*, 5 Q. P. R. 61.

Material Man—*Manufacturer—Sale or Hiring of Labour.*] — A manufacturer who makes a contract with a contractor to deliver to him a certain number of presses destined to form part of a building of which the contractor has undertaken the construction, is not a workman, but a furnisher of materials. The registration by such manufacturer of a workman's lien against the land of the owner as security for payment of the price of the presses is void under the circumstances, the manufacturer having no other remedies than those given him by arts. 2013 (g), (h), (i), (l), and 2103, C. C. 2. The contract between the manufacturer and the contractor is a sale and not an employment of labour. 3. In order that a workman shall have a workman's lien upon the land of the owner it is indispensable that he should be employed thereon. It is not sufficient that he works and fashions materials intended to form part of the building which the owner is erecting. *Montmorency Cotton Mills Co.* v. *Gignac*, Q. R. 10 Q. B. 158.

Material Man—*Notice to Mortgagee — Registration of Lien—Description of Land—Several Purchasers.*] — When the owner of land builds thereon, the furnisher of materials who wishes to obtain a right of lien, must, before the delivery of the materials, give notice to the person who lends the owner the money for building, and a notice given later to the owner will be insufficient to give a right of lien to the material man. 2. When two portions of the same lot have been sold by separate contracts to two purchasers, and buildings have been erected thereon, a person furnishing materials for such buildings must, in the statement of claim which he registers pursuant to art. 2103, C. C., indicate the portion of the land which belongs to each purchaser, and his registration will be without effect if he describes the whole lot as being the property of the two purchasers. *Paquette* v. *Mayer*, Q. R. 18 S. C. 563.

Material Man — *Notice—Registration.*] —The hypothec or lien of the material man is distinct and independent of the saisie-arrêt mentioned in art. 2013 (h) and (i), C. C., and is not subject to the conditions of notice mentioned in cl. (g), nor to the condition of registration. Ouimet, J., dissenting. *Maclaren* v. *Villeneuve*, 4 Q. P. R. 322, Q. R. 11 K. B. 131.

Material Men Dealing with Owner—*—Non-existence of Lien.*]—The law does not confer a lien on a material man except where he furnishes material to the contractor and not to the owner. A labourer, workman, architect, or builder, dealing directly with the owner, has a lien, but a merchant or manufacturer who sells material for construction to the owner has, as against him, only a personal action, unless he has agreed to a conventional hypothec. *Harris* v. *Charbonneau*, Q. R. 25 S. C. 180.

Registration of Claim—*Quebec Law—Error in Description of Lands—Claim duly Recorded—Value of Land—Acquiescence — Notice.*] — The description in a registered claim for a workman's privilege of the lands affected by the privilege as, "two lots of land known and designated under numbers two C. and three C. of the official subdivision of lot number 907," instead of, in accordance with the plan, as "two lots of land known and designated under numbers two, subdivision C., and three, subdivision C., both of the subdivision of official lot number 907," is not an irregularity sufficient to nullify the registration of the privilege, especially where the description in the claim is identical with that contained in the title deed of the owner (who had acquired the lands from the respondent), and in the proces-verbal of seizure, and where the registrar, upon presentation of the claim, had registered it against the lands as they were described in his office. The circumstances of the case shewing acquiescence by

the respondent in an allegation that the value of the property was $3,000, and in an arrangement by which the parties claiming privilèges d' ouvriers were to rank against the balance of the purchase money (the property as improved having been sold for $5,000 after payment of a charge thereon), he being dominus litis could not be heard to complain that the increased value of the property, by reason of the work done by such claimants, had not been determined by a valuation. The omission by such a claimant to give notice to the owner of the property within three days after registration of his claim (art. 2103, C. C.) does not affect the validity of such registration or privilége. *Daniel* v. *Macduff*, Q. R. 13 K. B. 361.

Time for Registering Lien—*Completion of Work.*]—The point of commencement of the 30 days given by art. 2013b of the Civil Code for the registration of the lien of a labourer, workman, or contractor, is the moment at which the work upon the building in the construction of which they have laboured is completed, and not the date at which the use of the building has been begun. *Quintal* v. *Benard*, Q. R. 20 S. C. 199.

Woodman's Lien—*Quebec Law — Person Cutting Wood at so Much a Cord — Saisie-conservatoire.*]—The persons mentioned in art. 1994 (c), C. C., are not confined to those whose remuneration is fixed according to the time they work, but it also includes all persons who engage to cut wood for so much a cord. A motion to quash a writ of saisie-conservatoire obtained by a person claiming a lien upon wood cut, was dismissed. *St. Onge* v. *Ross*, 7 Q. P. R. 108.

MEDICAL HEALTH OFFICER.

See PUBLIC HEALTH.

MEDICINE AND SURGERY.

Fees of Physician—*Action for—Pleading—Irrelevant Allegations.*]—The plaintiff, a practising physician, sued the defendant for $3,000 for professional services. In his declaration he set up the fact that the case was notorious, and that the public had been daily kept aware of the defendant's condition, and of all details connected therewith, thus putting the plaintiff's professional reputation at stake. These facts were alleged as partly justifying the large amount of the fee claimed. The defendant inscribed in law against these allegations:—Held, that the allegations complained of could not be connected with the amount of the fee due to the plaintiff. The inscription was, therefore, maintained, and the allegations complained of were struck out of the declaration. *Marien* v. *Lussier*, 22 Occ. N. 418.

License to Practise—*College of Physicians and Surgeons — Mandamus.*] — The College of Physicians and Surgeons cannot refuse to grant a license to practise medicine, to a student who has passed the necessary examinations, or has been legally exempted from passing them, and who has obtained the degree of Doctor of Medicine. 2. Upon such refusal a writ of mandamus may issue to enforce the issuing of a license. *Gosselin* v. *College of Physicians and Surgeons*, Q. R. 19 S. C. 175.

Malpractice — *Limitation of Actions — Ontario Medical Act — Termination of Services — Trial — Jury.*] — An action against surgeons for malpractice was held to be barred by s. 41 of the Ontario Medical Act, R. S. O. 1897 c. 176, not having been commenced within one year from the date when, in the matter complained of, the defendants' professional services terminated, although the plaintiff had twice visited the defendants at their offices within the year, the Court finding that on these ocasions she did not go as a patient, but as a person with a grievance, she having previously consulted another surgeon and also a solicitor. Actions of malpractice are now more properly tried without a jury. Upon the evidence, it was held, also, that the plaintiff upon whom the burden rested, had failed to make out a case of negligent malpractice; and the action was dismissed. *Town* v. *Archer*, 22 Occ. N. 258, 4 O. L. R. 383, 1 O. W. R. 391.

Malpractice—*Questions for Jury.*] — In action against a surgeon for malpractice, the plaintiff has the right to a decision by a jury of a fact in controversy—not where that decision involves the consideration of difficult questions in the region of scientific inquiry, but where the fact to be found is as to what actually took place in the history of the plaintiff's malady and the defendant's treatment, for example, where there is a conflict of testimony as to what the surgeon did or did not do in the process of reducing or attempting to reduce a fracture. In the present case there were facts in dispute as to which the plaintiff was entitled to the jury's findings. Jackson v. Hyde, 28 U. C. R. 294, explained. *McNulty* v. *Morris*, 21 Occ. N. 591, 2 O. L. R. 656.

Malpractice—*Want of Care and Skill—Evidence—Nonsuit.*]—In an action against a surgeon for not exercising ordinary care and skill in treating the plaintiff for an injury to his arm, caused by his being accidentally thrown from a sleigh, the trial Judge nonsuited the plaintiff on the ground that, as neither the plaintiff nor any of his witnesses were able to say that the arm was dislocated as a result of the accident, and as both the defendant and another surgeon, who was called in by the defendant and examined the arm three weeks after the accident, swore that it was not dislocated, and as the dislocation, which was sworn to exist a year and nine months after the accident by a third surgeon, whom the plaintiff consulted, and which was admitted to exist at the time of the trial—more than three years after the accident—might have been the result of disease, as was shewn by the evidence of several expert witnesses, there was no evidence to leave to the jury upon which they could properly find a verdict for the plaintiff:—Held, Hanington, J., dissenting, that the nonsuit was right; and that, even if the dislocation was the result of the accident, the mere fact that the defendant did not discover it and treat the plaintiff accordingly, was not of itself evidence of want of ordinary care and skill on the part of the defendant. *James* v. *Crockett*, 34 N. B. Reps. 540.

Medical Act, B. C. — *Registered Practitioner—Charge of Unprofessional Conduct—Inquiry by Private Tribunal — Mandamus — Action.*]—Under s. 36 of the Medical Act, 1898 (previous to its amendment in 1903) the council may hold an inquiry into a charge of unprofessional conduct made against a registered medical practitioner:—Held, that mandamus did not lie to compel the council to hold an inquiry. Charges of unprofessional conduct may be investigated by the council notwithstanding that the acts complained of may be the subject-matter of an action at law. *In re Medical Act, Ex p. Inverarity*, 10 B. C. R. 268.

Medical Act, Manitoba—*Practising for Reward—Electro-therapeutics — Massage.*] — According to standard dictionaries electro-therapeutics, consisting in the treatment of diseases by means of electricity, is a breach of medicine, and it is unlawful under s. 62 of the Medical Act, R. S. M. 1902 c. 111, for a person not registered under the Act to practise as an electro-therapeutist for hire, gain, or hope of reward; and under s. 63 such person cannot recover any fees or charges for such treatment. Massage although a branch of therapeutics, is merely a skilled manipulation by external pressure of the muscles and tissues, and, not depending for its efficacy upon the introduction or application of any other element, cannot be considered to be a branch of medicine. Regina v. Valleau, 3 Can. Cr. Cas. 435, followed. *Bergman* v. *Bond*, 24 Occ. N. 152, 14 Man. L. R. 503.

MEETINGS OF COUNCIL.

See MUNICIPAL CORPORATIONS.

MERCANTILE AGENCY.

See SOLICITOR.

MERGER.

See BILLS OF SALE AND CHATTEL MORTGAGES. —MORTGAGE.

MESNE PROFITS.

See PARTITION.

MILEAGE.

See SHERIFF.

MILITARY LAW.

Militia Act — *Relations of Officers and Privates—Obeying Orders—Arrest—Liability for.*]—Persons belonging to the regular army are always subject to military law and regulations, and they are obliged to obey orders which their superiors give them, the sole condition being that such orders relate to militia affairs and are not so evidently illegal that they lead to the belief that the person giving them is mentally incompetent. 2. It is otherwise in the case of those who belong to the volunteer militia; they are not subject to military law and regulations and are only obliged to obey their superiors in the cases expressly enumerated in the Militia Act. Outside of such cases, they are only ordinary citizens, and their superiors have no more right to give them orders than they have to give orders to persons who do not belong to the militia. 3. A militia officer who causes to be illegally arrested a man who belongs to the militia, makes himself liable to damages. Judgment in Q. R. 22 S. C. 25, affirmed. *Cole* v. *Cooke*, Q. R. 12 K. B. 519.

MILITARY RESERVE.

See CROWN.

MILITIA ACT.

See CONSTITUTIONAL LAW—MILITARY LAW.

MINES AND MINERALS

Action—*Inspection — Underground Workings — Plans — Privilege — Enforcement of Order.*] — The right to inspect underground workings in a mine carries with it the right to inspect and make copies of the plans of such workings. Per Martin, J.:—(1) The practice respecting inspection under r. 514 is distinct from the practice in obtaining discovery, and a claim of privilege set up in an affidavit in answer to a motion to compel inspection is not conclusive. (2) It is a proper and convenient practice to apply to the Court to enforce an order for inspection when the resistance is not contumacious. *Star Mining and Milling Co.* v. *Byron N. White Co.*, 9 B. C. R. 422.

Adverse Action—*Certificate of Improvements—Co-owner—Estoppel — Notice — Res Judicata—Judgment in Rem.*]—A judgment in an adverse action under s. 37 of the Mineral Act is not a judgment in rem. One co-owner of a mineral claim is not estopped by the result of such action instituted by an adverse claimant against another co-owner who has applied for a certificate of improvements. Bentley v. Botsford, 8 B. C. R. 128, followed. Per Martin, J.—Section 37 does not apply to co-owners of the same claim, but to owners of conflicting claims. *Fry* v. *Botsford, MacQuillan* v. *Fry*, 22 Occ. N. 421, 9 B. C. R. 234.

Adverse Action — *Plan—Survey—Affidavit—Condition Precedent.*]—In an adverse action the plan to be filed pursuant to s. 37 of the Mineral Act must be based on a survey made by a provincial land surveyor. The filing of the affidavit and plan pursuant to that section is a condition precedent to the plaintiff's right to proceed with his action. *Paulson* v. *Beaman*, 9 B. C. R. 184.

Adverse Claim—*Form of Plan and Affidavit—Right of Action—Condition Precedent — Necessity for Actual Survey — Blank in Jurat.*]—The plan required to be filed in an action to adverse a mineral claim under the provisions of s. 37 of the Mineral Act of British Columbia, as amended by s. 9 of the Mineral Act Amendment Act, 1898, need not be based on an actual survey of the location made by the provincial land surveyor who signs the plan. The filing of such plan and the affidavit required under the said section, as amended, is not a condition precedent to the right of the adverse claimant to proceed with his adverse action. The jurat to an affidavit filed pursuant to the section above referred to did not mention the date upon which the affidavit had been sworn:—Held, that the absence of the date was not a fatal defect, and that, even if it could be so considered at common law, such a defect would be cured by the British Columbia Oaths Act, and the British Columbia Supreme Court Rule 415 of 1890. Jddgment in 9 B. C. R. 184 reversed. *Paulson* v. *Beaman*, 23 Occ. N. 60, 32 S. C. R. 655.

Application for Certificate of Improvements—*Adverse Action—Location.*] — The plaintiff was the owner of the Colonial mineral claim located on the 7th October, 1900. The defendant located over the same ground the Wild Rose fraction on the 4th September, 1902, and having advertised for purposes of obtaining a certificate of improvements, this action to adverse such application was brought:—Held, on the evidence that the location of the Colonial was proved, and was not invalidated on any ground; that the Wild Rose was duly located, but was already occupied. *Dockstader* v. *Clark*, 24 Occ. N. 43.

Applicant for Crown Grant—*Certificate of Improvements—Injunction — Adverse Claim.*]—The plaintiffs held a Crown grant dated the 8th March, 1895, of certain lands from which there were excepted "lands held prior to 23rd March, 1893, as mineral claims." The defendant held a certificate of improvements dated the 14th August, 1899, and the plaintiffs, being apprehensive as to form of Crown grant to be issued to the defendant, applied for an injunction restraining him from applying for and receiving a Crown grant:—Held, dismissing the motion, that the policy of the Mineral Acts is to compel persons claiming adversely to an applicant for a Crown grant to commence action before a certificate of improvements is obtained. *Nelson and Fort Sheppard R. W. Co.* v. *Dunlop*, 7 B. C. R. 411.

Application for Mining Lease—*Commissioner of Mines—Mandamus.*]—The plaintiffs applied to the Commissioner of Mines for the Province of Nova Scotia, for a coal mining lease covering an area adjacent to an area previously leased to M. A dispute having arisen in relation to the application, the Commissioner held an investigation, and announced, as the result of his inquiry, that the lease granted to M. was not to be considered as in any way void or uncertain, but was to be and remain the evidence of the contract between the Crown, represented by the Commissioner, and M.:—Held, that the plaintiffs' application was not disposed of by this decision, but that they were entitled to a mandamus requiring the Commissioner of Mines to consider their application and give a decision thereon. *Dominion Coal Co.* v. *Drysdale*, 36 N. S. Reps. 282

Application under Mineral Act, B.C.—*Forum—Extension of Time.*]—An order to extend the time for filing the affidavit and plan required by s. 37 of the Mineral Act must be made by the Court, and cannot be made by a Judge in Chambers. Noble v. Blanchard, 7 B. C. R. 62, not followed as to this point. McColl, C.J., dissenting. *Murphy* v. *Star Exploring and Mining Co.*, 22 Occ. N. 104, 8 B. C. R. 421.

Assessment Work — *Affidavit—Notice—Certificate.*] — The plaintiff, owner of the Rebecca mineral claim and having an interest in the Ida, an adjoining claim, performed the assessment work for both claims on the Ida, as believed, but in reality, as shewn by subsequent survey, a few feet outside the claim, but did not file the notice required by s. 24 of the Mineral Act with the Gold Commissioner, who told him the work on the Ida would be regarded as done on the Rebecca. The plaintiff received in August, 1899, a certificate of work in respect of the Rebecca, and in his affidavit stated that the work was done on the Rebecca: — Held, in ejectment, that the plaintiff, being misled by the Gold Commissioner, was protected by s. 53 of the Act. The omission to file the notice required by s. 24 of the Act, and the incorrect filling up of the affidavit, were irregularities which were cured by the certificate of work. *Lauer* v. *Parker*, 7 B. C. R. 418. Affirmed 8 B. C. R. 223.

Certificate of Improvements—*Application for, by Co-owner.*]—A part owner of a mineral claim may apply for a certificate of improvements under s. 36 of the Mineral Act. *Bentley* v. *Botsford*, 21 Occ. N. 492, 8 B. C. R. 128.

Certificate of Work—*Impeachment of—Evidence—Mineral Act, s. 28 — Amendment Act, 1898, s. 11—Parties—Attorney-General.*] —Appeal from judgment dismissing the plaintiff's adverse action. The defendant relied on certificates of work obtained by him in respect of the mineral claims covering the ground in dispute, and the plaintiffs sought to shew that the full amount of work required by the statute as a pre-requisite to such certificates of work being issued had not been performed. The trial Judge refused to admit the evidence, holding that evidence impeaching a certificate of work could not be received in any proceeding to which the Attorney-General was not a party. The full Court affirmed the decision, holding that if a certificate of work is to be set aside the Attorney-General must be a party, and until set aside all things are presumed in favour of its holder. The plaintiffs in making their case admitted that the defendant had obtained certificates of work:—Held, by the full Court, that this in itself was affirmative evidence of the defendant's title, within the meaning of s. 11 of the Mineral Act Amendment Act of 1898. *Cleary* v. *Boscowitz*, 22 Occ. N. 41, 8 B. C. R. 225.

Coal Mines Act (B. C.) — Prospecting licenses—Leases — Powers of chief commissioner—Issue of second license for area—Dispute as to right — Jurisdiction of County Courts (B. C.)—Crown—Lieutenant-Governor

in council — Statutes — Grouping petitions. *Re Baker and Smart* (B.C.), 2 W. L. R. 45.

Co-owner's Interest in Claim—*Seizure by Sheriff—Lapse of Miner's license—Sheriff Renewing—Rights of Co-owners.*]—A sheriff in possession of a free miner's interest in a mineral claim has no power to take out a special free miner's certificate under s. 4 of the British Columbia Mineral Act Amendment Act of 1899, in the name of the judgment debtor; neither has the sheriff power to renew a certificate before lapse. Where some of the co-owners of a mineral claim allow their free miner's certificates to lapse, their interests at once vest pro rata in their former co-owners. *McNaught* v. *Van Norman*, 22 Occ. N. 341, 9 B. C. R. 131.

Dominion Lands Act — *Mining Regulations—Royalties—Placer Miner—Renewal of Grant.*]—Section 17 of the Mining Regulations passed under the Dominion Lands Act (R. S. C. c. 54) does not, on its true construction, extend to the holder of a grant for placer mining the same privileges as to a renewal of his grant which are acorded to the holder of a quartz mining grant. The placer miner, on renewal (to which he has no absolute, but only a preferential right), holds under an annual grant in substitution for, but not in continuation of, his original grant. And the renewed grant is subject to all such regulations as may be in force at the date when it comes into operation, whether or not it was made during the currency of an existing grant: — Held, that the Governor in Council has power to make regulations requiring the placer miner to pay a percentage on the proceeds realized from the grant. Such an imposition, called a royalty, is not a tax, but is a reservation which the owner in fee is entitled to make out of his grant. Judgment in Rex v. Chappelle, 32 S. C. R. 586, affirmed. *Chappelle* v. *The King*, *Cannack* v. *The King*, *Tweed* v. *The King*, [1904] A. C. 586.

Expiration of Certificate — *Special Certificate.*] — Action to adverse claim in which the plaintiffs adversed the defendant's application for a certificate of improvements to the Sunrise mineral claim. The plaintiffs claimed the ground in dispute under two locations, known respectively as the Sunset and Mayflower mineral claims. These locations of the plaintiffs were good and valid up to the 31st May, 1901, upon which date the plaintiffs allowed their free miner's certificate to expire without renewal. The defendant's claim was located upon the 8th July, 1901. On the 25th October, 1901, the plaintiffs, by paying a fee of $300, obtained a special free miner's certificate, in accordance with the provisions of s. 2 of c. 35 of the statutes of 1901, and relied upon that section as reviving their rights, notwithstanding the intervening location of the defendant:—Held, that on the expiration of a free miner's certificate any mineral claim on which the holder thereof was the sole owner becomes open to location, and the obtaining of a special certificate under s. 2 of the Mineral Act Amendment Act, 1901, does not revive the title, if in the meantime the ground has been located as a mineral claim. *Woodbury Mines, Limited*, v. *Poyntz*, 24 Occ. N. 107, 10 B. C. R. 181.

Extralateral Rights — *Trial—Adjournment of—Mineral Act*, 1891, *s.* 31.]—Appeal from an order on application to postpone trial, fixing a date (peremptory) for trial of an action by the owners of a mineral claim for an injunction restraining the defendants, who were the owners of adjoining mineral claims, from running a tunnel from their claims on to the plaintiff's ground. The defendants claimed, under s. 31 of the Mineral Act of 1891, the right to follow on to the plaintiff's ground the vein of ore in question, because the apex of the said vein was on the surface of their claim. Before going to trial the defendants wished to do development work in order that they might determine definitely the continuity of the vein in question, and they shewed that it was impossible for them to do the work needed by the date fixed for the trial:—Held, allowing the appeal; that the defendants should not be forced on to trial without being given a fair opportunity of doing such development work as might be necessary to determine the position of the apex of the vein in question. *Noble Five Mining Co.* v. *Last Chance Mining Co.*, 23 Occ. N. 252, 9 B. C. R. 514.

Free-Miner's Certificate — *Renewals —Vesting of Interest in Co-owners—Sheriff—Levy Under Execution.*]—The sheriff seized the interest in mineral locations held by an execution debtor in co-ownership with another free-miner, and, before sale under execution, the debtor allowed a free-miner's license to lapse. A special certificate in the debtor's name was subsequently procured by the sheriff under the provisions of s. 4 of the Mineral Act Amendment Act, 1899, and it was contended that the debtor's interest had thus been revived and revested in him subject to the execution:—Held, that upon the lapse of the free-miner's certificate the interest in question had, under the statute, become absolutely vested in the co-owner, and could not thereafter be revived and re-vested in the debtor by the issue of a special certificate. Judgment in 22 Occ. N. 341, 9 B. C. R. 131, affirmed. *Van Norman Co.* v. *McNaught*, 23 Occ. N. 63, 32 S. C. R. 690.

Grant of Gold Mining Claim—*Dominion Lands Act—Order in Council—Directory Provisions of Statute—Royalty—Imposition of Tax — Recovery Back.*]—The provisions of s. 91 of the Dominion Lands Act, R. S. C. c. 54, requiring all orders in council under the Act to be laid before Parliament within the first 15 days of the next session, is directory only. 2. The effect of another provision of the same section, that any order under the Act shall, unless otherwise specially provided, have force only after it has been published for four successive weeks in the Canada Gazette, is that such order does not come into force until one week after the fourth publication. 3. There is no authority in the Yukon Territory Act, 61 V. c. 6, as amended by 62 & 63 V. c. 11, for changing the date upon which an order under the Dominion Lands Act shall come into force. 4. The suppliant, by right of discovery, under the Dominion Lands Act and the Dominion Mining Regulations, 1889, obtained a grant of a gold mining claim in the Yukon district in December, 1896. His grant gave him for one year the exclusive right to all proceeds; and the rights which it conferred upon him were those laid down in the said regulations, and no more, and were subject

to all the provisions thereof, whether expressed in the grant or not. During the currency of this grant an order in council was passed making grants of gold mining claims in the district subject to a royalty. On 7th December, 1897, the grant was renewed on the same terms:—Held, that the terms of the renewal should be construed by reference to their meaning in the original grant; and that the renewal was not subject to the royalty imposed by the order in council. 5. The operative words of the order in council imposing the royalty were, "a royalty shall be levied and collected:"—Held, that the expression contained apt words for the imposition of a tax, but that such a tax could not be levied without legislative authority therefor. 6. The evidence shewed that the suppliant had paid the amount of royalty caimed by the Crown under protest, and in the belief that payment was necessary to protect his rights:—Held, that he was entitled to recover it back. *Chapelle* v. *The King*, 7 Ex. C. R. 414.

Legal Posts—*Stone Mounds in Lieu of Stakes — Statute.*]—Held, that the requirement of s. 16 of the Mineral Act (B. C.), that posts Nos. 1 and 2 shall be of wood, is imperative, and stone mounds are not to be substituted. *Callahan* v. *George*, 21 Occ. N. 600, 8 B. C. R. 146.

License—*Rights Acquired Under Application—Estoppel—Amendment.*]—The respondents made application at the office of the Commissioners of Mines for a license to search for coal areas. The application contained a good description of the property in respect of which the license was desired, and was accompanied by the necessary fee. Subsequently one of the applicants received a letter from the Deputy Commissioner, stating that he could not find the starting point, and asking for additional information. A letter was sent in reply, in which the starting point was stated incorrectly, and as a different point from that mentioned in the original application:—Held, affirming the decision of the Commissioner of Mines, that, there having been certain descriptions, and the money and application having been appropriated, the license could not be removed to another locality. The applicants were not estopped, and could not be bound, by an entry made in the registry book of the office, after the receipt of the letter sent in reply to the letter of the Deputy Commissioner, and they could not, as the result of such entry, lose the title that they had acquired by a good application. Semble, that applications may, subject to the rights of intervening applicants, be amended for such causes as uncertainty, but not where there is a certain description and location of the area applied for. *In re Barrington*, 35 N. S. Reps. 426.

Location — *Abandonment — Defects in Title—Certificates of Work—County Court—Evidence.*] — The "Trilby" mineral claim lapsed by abandonment in July, 1896. Before lapse the same ground was located as the "Old Jim" by the defendant's predecessor in title, and certificates of work were recorded in respect of it in 1897, 1898, and 1899. In February, 1899, the plaintiffs located the same ground as the "Herald Fraction" claim:—Held, that the defects in the defendant's title were cured by the recording of the certificates of work. Unless objection is taken to the jurisdiction of the Court below at the trial, it will not be considered an appeal. At the trial evidence tendered by the defendant as to abandonment of the "Trilby" claim by its locator was rejected. Per Martin, J.: As abandonment was not pleaded, the rejection of the evidence was proper. In mining cases especially the parties should know beforehand the case they have to meet. *Gelinas* v. *Clark*, 21 Occ. N. 261, 8 B. C. R. 42.

Location— — *Abandonment — Overlapping — Evidence — Certificate of Work — Irregularities.*]—The Parrot mineral claim, located in February, 1895, lapsed by abandonment in February, 1899. In March, 1895, part of the same ground was located by the plaintiff as the Townsite claim, and certificates of work were recorded in respect of it in 1896, 1897, 1898, and 1899. In December, 1899, the ground covered by the original Parrot claim was re-located as the Defiance No. 1 Fraction, by the defendants' predecessor in title:—Held, in adverse proceedings, that so much of the Parrot claim as was overlapped by the Townsite claim was not unoccupied ground at the time of the location of the Townsite, and as such was not open to location. At the trial the plaintiffs attacked the validity of the defendants' location, and the defendants sought to put in evidence a certificate of work issued the day before. Held, not admissible, as it was obvious that such certificate was to be used to cure irregularities. *Rammelmeyer* v. *Curtis, Powers* v. *Curtis*, 8 B. C. R. 383.

Location—*Adverse Proceedings — Title—Action.*]—Adverse proceedings are essentially in ejectment and not in trespass, and the plaintiff must succeed by the strength of his own title; it is, therefore, for the plaintiff to shew affirmatively the due location of his claim. *Clark* v. *Haney*, 8 B. C. R. 130.

Location—*Approximate Bearing — Misstatement — "Minerals in Place."*]—Accuracy in giving the approximate bearings in staking out a mineral claim is as necessary in the case of a fractional claim as in any other. A prospector, in locating and recording his location line between No. 1 and No. 2, as running is an easterly direction, whereas it was nearly due north, does not comply with the statute requiring him to state the approximate compass bearing; and his location is void. Coplen v. Callaghan, 30 S. C. R. 555, followed. Before a prospector can locate a claim, he must actually find "minerals in place." His belief that the proposed claim contains minerals is not sufficient. Judgment in 8 B. C. R. 153, reversed. *Collom* v. *Manley*, 22 Occ. N. 28, 32 S. C. R. 371.

Location — *Approximate Compass Bearing — No. 1 Post on Occupied Ground.*]—Held, that the location of a mineral claim is not invalid merely because the No. 1 post is placed on the ground of an existing valid claim, if the facts bring the locator within the benefit of s. 16 (g) of the Mineral Act as amended in 1898. The direction of the location line was stated in the affidavit of location as being south-easterly, when, as a fact, it was south 52° 50″ west:—Held, that the discrepancy was of a character calculated to mislead. Appeal from judgment of Irving,

J., dismissed, Martin, J., dissenting. *Dockstader* v. *Clark*, 25 Occ. N. 23, 11 B. C. R. 37.

Location — *Certificate of Work — Evidence to Impugn*.]—A certificate of work done on a mining claim in British Columbia is conclusive evidence that the holder has paid his rent, and can only be impugned by the Crown. Coplen v. Callaghan, 30 S. C. R. 555, and Collum v. Manley, 22 Occ. N. 278, 32 S. C. R. 371, followed. C., believing that the statutory work had not been done on mining claims, and that they were therefore vacant, located and recorded them under new names as his own, and brought an action claiming an adverse right thereto:—Held, affirming the judgment in 8 B. C. R. 225, that evidence to impugn the certificate of work given to the prior locators was rightly rejected at the trial. *Cleary* v. *Boscowitz*, 22 Occ. N. 278, 32 S. C. R. 417.

Location — *Mineral Act — Imperative Provisions*.]—The Blue Bird mineral claim was located 20th April, 1895, and recorded 3rd May, 1895, and on 21st April, 1896 (before it would have lapsed if duly located), the defendants located the Red Oak claim over the same ground, and after lapse the plaintiffs located over the same ground the Back Pay claim and attacked the defendants' title:—Held, that, as the location line of the Blue Bird was not placed as near as possible on the line of the wedge or vein, its location was bad, and the location of the Red Oak was good. The provisions of the Mineral Act as to location are imperative. *Bleckir* v. *Chisholm*, 8 B. C. R. 148.

Location—*Planting of Posts—Formalities required by R. S. B. C. 1897 c. 135, s. 16—61 V. c. 33, s. 4 (B.C.)*.]—Judgment of Supreme Court of British Columbia, affirming judgment of Martin, J., 10 B. C. R. 123, affirmed. *Sandberg* v. *Ferguson*, 35 S. C. R. 476.

Location of Placer Claim Over Lode Claim — *Essentials of a Placer Location—Application and Declaration—Gold Commissioner—Appeal—Pleadings — Issue not Raised in Court Below*.]—Held, that a placer claim may be located on a lode claim. 2. A gold commissioner has no authority to change the entire location of a placer claim, and an order to that effect made by him is null and void. 3. Where it is sought to sustain an appeal on an issue outside the record, on the ground that nevertheless it was an issue fought out in the course of the trial, it must, particularly in a charge of fraud, appear that the attention of the Court and the adversary was directed to the fact that such an issue was being raised, otherwise a waiver of the necessity for a formal pleading will not be assumed. Per Martin, J., at the trial, that upon a locator of a placer claim tendering to the proper officer the proper fee and documents, he is entitled to obtain a record for the claim, and the officer has no discretion in the issuance thereof, and where the record is not granted to him in due course, he shall, under the remedial provisions of s. 19 of the Placer Mining Act, 1901, be deemed to have had such record issued to him at the time of his application therefor. 2. The validity of the placer mining record primarily depends upon the mere belief of the locator, based upon indications he has observed on the claim in the existence of a deposit of placer gold thereon. *Tanghe* v. *Morgan*, 25 Occ. N. 49, 11 B. C. R. 76.

Mineral Claim — *Relocation — Permission — Fractional Claim—Marking Line*.] — Where a holder of a mineral claim which is the subject of an adverse action causes the ground to be relocated by some one else from whom he purchases it for a small consideration, the provisions of s. 32 of the Mineral Act, requiring permission to relocate, do not apply. The location line of a fractional mineral claim must be marked by the blazing of trees or the setting of posts in the same manner as that of a full sized claim. *Snyder* v. *Ransom*, *Ransom* v. *Snyder*, 24 Occ. N. 41, 10 B. C. R. 182.

Mineral Claim—*Defects in Location of —Mistake—Certificate of Work*.]—The defendant's mineral claim Cube Lode was located in May, 1892, and duly recorded, and certificates of work were issued in respect of it regularly since. The plaintiff, in 1896, located and recorded the Cody Fraction and the Joker Fraction claims on the same ground, and attacked the defendant's location on the ground that upon the initial post the "approximate compass bearing" of No. 2 post was not given as required by the Act. The compass bearing was east by north, and not south-easterly as stated on No. 1 post:—Held, that the irregularity in locating was not cured by a certificate of work. Per Drake, J., that s. 28 of the Mineral Act cures only irregularities arising after location and record and which do not go to the root of the title. *Callahan* v. *Coplen*, 7 B. C. R. 422.

Miner's License—*Legality of—Location — Re-location — Permission of Gold Commissioner — Defects—Certificates of Work—Mistakes of Officials*.]—In November, 1897, Cooper, having already a claim on the same lode, located the "Native Silver" claim in the name of Haplin, who transferred, in December, 1897, one-half to Cooper and the other half to Haller, who sold to the plaintiff in July, 1900; the usual certificates of work having been obtained in the interim. The defendant, who knew of the error in the description of the compass bearing and of the issue of such certificates, on failing to effect a purchase of the claim from Cooper and Haller, located the same ground as the "Arlington Fraction," and on obtaining the usual certificates of work applied for Crown grants. Two of the mining licenses on which the plaintiff's title depended were issued by a constable at Sandon, who, acting on instructions from the Government agent at Nelson, obtained the blank forms from the Mining Recorder at New Denver, and on issuing licenses he accounted to the Government:—Held, in adverse proceedings, affirming the decision of Walkem, J. (Drake, J., dissenting), that the defendant not being misled, the irregularities in the plaintiff's title were cured by s. 28 of the Mineral Act. Callahan v. Coplen, 30 S. C. R. 555, and Gelinas v. Clark, 8 B. C. R. 42, specially considered. *Manley* v. *Collom*, 21 Occ. N. 602, 8 B. C. R. 153.

Mining Lease — *Boundaries of Area — Starting Point — Evidence — Plan*.]—In an action brought by the plaintiff to recover

damages for the mining and removal of iron ore, claimed by him, under a lease from the Crown, judgment was given in favour of the defendant company, on the ground that, in order to recover, it was necessary for the plaintiff to establish the south line of land originally granted to G. The starting point in the plaintiff's lease was a marked stone, located a given distance from a marked maple tree, "on the south line of lands originally granted," etc.:—Held, following Fielding v. Mott, 6 R. & G. 339, 14 S. C. R. 254, that the trial Judge erred in holding that the plaintiff could not recover unless he established the south line of the land granted to G., as such line, if shewn to be in a different place from the marked tree, would be rejected as falsa demonstratio. A copy of a plan from the Crown lands office, as to which one of the plaintiff's witnesses was cross-examined, and which was put in by the defendants' counsel, without restriction, as part of his general evidence, was in for all purposes to which the plaintiff might apply it, and was properly used for the purpose of proving measurements made on the ground. *Bartlett* v. *Nova Scotia Steel Co.*, 35 N. S. Reps. 376.

Mining Lease—*Contest as to—Defective Application—License to Search.*]—An application for a mining lease made by the appellants on the 10th November, 1893, was refused by the Commissioner of Mines, on the ground that, at the date of the application, the area applied for was covered by a license to search issued by the department to W. It appeared that on the 16th July, 1890, the appellants applied for a license to search which would come into force on the 13th May, 1892, and expire on the 13th November, 1893. When the application was originally made it covered other areas, but, subsequently, on the application of the appellants, assented to by the Deputy Commissioner of Mines, and indorsed on the application, it was amended so as to cover the area in dispute. The application subsequently made by W. contained no description except one incorporated by reference to the application made by appellants:—Held, that, if the application made by appellants was defective, that made by W. was equally so, and that the parties relying upon it in attacking the application had no locus standi. Assuming the license applied for by W. to be invalid, it was competent for the appellants, under the provisions of the Acts of 1892, c. 1, s. 103, to apply for a lease without a previous license to search. *In re Greener*, 33 N. S. Reps. 406.

Mining Lease — *Forfeiture — Notice — Statutory Requirements—Compliance with — Construction of Statute—Laches.*] — The Nova Scotia Mines and Minerals Act of 1892, c. 1, s. 152, requires "all applicants for leases or licenses under this chapter" to furnish the Commissioner of Mines with their address, which shall be registered, and all summonses, notices, &c., which require to be served under the Act, "shall be considered served if sent to such address." By the terms of the amending Act of 1893, c. 2, s. 10, the Commissioner of Mines is not required to send notices of default of payment to any lessee, unless previous to such default, such lessee shall have given written notice to the Commissioner of his post office address. A lease of gold mining areas, held by the relator, G., was forfeited for alleged non-compliance with the provisions of s. 152 of the Act of 1892. The forfeiture was entirely ex parte, no notice being given to the lessee that rent was overdue, or that any proceedings would be taken to forfeit the lease. The lease was granted in 1890, at which time there was no provision in force requiring an applicant for a lease to give his residence or post office address, but the evidence shewed that, as a matter of fact, the name, address, and occupation of G., were indorsed on his application, and were registered in a book kept in the office of the Commissioner for some time afterwards. No further address was given:—Held, that there having been a substantial, if not a literal, compliance with the provisions of the statute on the part of G., the forfeiture of his lease, without notice sent to the address given by him, was illegal and void, and must be set aside. As the Act imposed forfeiture, and affected individual rights, it must be given a strict construction, and the words "after the passage of this Act" could not be read into it so as to require G. to give a second notice, and, in default thereof, to deprive him of the rights given him under his lease. The doctrine of laches, as affecting the application to set aside the forfeiture, had no application, this not being an action invoking the equitable assistance or interference of the Court, but an official information on the relation of G., based upon his legal rights, in which he required no equitable assistance. *Attorney-General* v. *Waverley Gold Mining Co.*, 35 N. S. Reps. 192.

Mining Lease — *Non-payment of Rental —Dishonour of Cheque—Forfeiture — Intervening Rights — Commissioners of Mines — Equities.*]—The rental payable by the defendants for gold mining areas held by them under lease, fell due on the 2nd July, 1904, and continued unpaid for 30 days thereafter. On the last day for payment the solicitor for A., the holder of a judgment lien against the company, acting under the provisions of R. S. N. S. 1900 c. 18, s. 43, went to the mines office and made out and gave to the clerk his cheque in payment of the rental, and an entry of payment was made opposite the lease in the books in the office, and a receipt was prepared. On the following day the cheque was presented for payment and was returned indorsed "no funds," and the entry in the books and the receipt (still not delivered) were cancelled:—Held, assuming that payment by cheque would be good (as to which quære), that, the cheque having been dishonoured, the lease was forfeited, and the Commissioner of Mines could not subsequently, as against the intervening rights of third parties who had made application for the areas thus vacated, accept payment from A. or his solicitor, for the purpose of preserving the rights of A., whether by good cheque or otherwise; and, affirming the judgment of the Commissioner of Mines on this point, that he had no jurisdiction to deal with the supposed equities of A. as against H., a member of the defendant company, who had filed an application, on the theory that H., as a member of the company, could not allow the lease to be forfeited, and take a fresh title in himself as against A. *Re Hanright and Lakeview Mining Co.*, 37 N. S. Reps. 278.

Mining Regulations — *Representation Work — Rights of Different Crown Grantees to Same Ground.*]—In July, 1898, the plaintiff located and obtained a Crown grant for placer mining in respect of a claim, and on the 25th January, 1898, one Mensing located a claim, and recorded it the next day, and on the succeeding 27th October, a few minutes after midnight on the 26th, the defendant relocated it as ground abandoned and open to occupation on the ground of non-representation. The two claims overlapped. On the 10th November, 1898, the defendant obtained her Crown grant for placer mining, covering the ground in dispute, and being a re-location of Mensing's old land. The Gold Commissioner had made a rule that three months' continuous work in the year was sufficient, and by the regulations a claim was deemed abandoned after it had remained unworked on working days for the space of seventy-two hours:—Held, that the defendant's Crown grant must prevail over that of the plaintiff. *Victor* v. *Butler*, 21 Occ. N. 454, 8 B. C. R. 100.

Overlapping Claim—*Renewal of Application—Re-staking.*] — In August, 1889, M. staked and received a grant for a placer claim, which included part of an existing creek claim, staked previously by W. In 1900 M. applied for and obtained a renewal of his license, embracing the identical ground staked by him in the previous year, and, at the time such renewal was applied for, W.'s creek claim had lapsed. In March, 1901, S. staked a bench claim, embracing the lands in W.'s expired location, which had been overlapped by M.'s claim, as being unoccupied Crown land:—Held, that, although M.'s original staking of the ground in dispute was invalid, yet, as W.'s claim had lapsed at the time of the application for a renewal grant in 1900, M. having been continuously in possession of the whole location as staked by him, his stakes still standing and the limit of his area well known, his application for the renewal gave him a valid entry without the formalities of re-staking and applying anew for the original area located by him, and, following the rule laid down in Osborne v. Morgan, 13 App. Cas. 227, S. could not interfere with M.'s possession. *St. Laurent* v. *Mercier*, 23 Occ. N. 211, 33 S. C. R. 314.

Partnership — *Abandonment—Evidence of — Equitable Relief — Laches.*] — The plaintiff and the defendant, as partners, acquired a lease of forty gold mining area at Mahone. For convenience, the title was taken in the name of one of the defendants. The partnership expended some moneys on the areas, but was unsuccessful in finding gold. In 1887 the plaintiff decided to leave Mahone to study medicine. There was contradictory evidence as to whether he did or did not at this time abandon his interest in the areas. The defendant at all times subsequently treated the areas as theirs alone. The plaintiff took no further interest in the areas apparently until January, 1899, some twelve years after first leaving Mahone, and, although he had made several visits thereto in the interval and had seen the defendants, he made no inquiries. The defendants all along by regular payments to the Mines Office had kept the lease alive until 1894, when the lease was forfeited by the Mines Office. An agreement was then made by which the defendants received $2,400 and conveyed the areas to one F. The plaintiff hearing of this brought an action to recover one-third of the $2,400:—Held, that the plaintiff, when he left Mahone in 1887, gave up and abandoned to the defendants all the interest he had in the areas; and, although he did not do so in writing, the Court would not assist him after such laches as he had shewn. *Dunlop* v. *Nicoll*, 21 Occ. N. 84.

Petition to Cancel Water Record—Water Clauses Consolidation Act (B.C.), s. 36—Practice—Filing petition — "Proper registry"—Venue—Power to change. *Re Wallace and Lewin* (B.C.), 2 W. L. R. 13, 418.

Placer Mining—Lay agreement—Lease—Forfeiture—Breach of conditions—Failure to carry on mining operations—Waiver—Acceptance of percentage of output. *Clazy* v. *Meyers* (Y.T.), 2 W. L. R. 289.

Placer Mining Act — Validity of location—Continuous working—Building cabin on claim—Making drain—Re-location — Notice of abandonment—Change in statute—Boundary line—Common post between claims—Trespass—Damages. Injunction. *Wheelden* v. *Cranston* (B.C.), 2 W. L. R. 546.

Recorded Description — *Error — Adverse Action — Certificate of Works.*]—A. C. located the "Cube Lode" mining claim, describing the direction of the side line as south-easterly both on the Post No. 2 and on the claim as recorded. W. C. subsequently located the "Cody" and "Joker" fractions, whereupon A. C. claimed that a portion of the ground covered by the latter was included in the "Cube Lode," alleging that the survey of the "Cube Lode" was wrong, and that the side line ran north-easterly, instead of south-easterly. In an "adverse action" by W. C., s. 28 of the Mining Act of B.C., R.S.B.C. c. 135, was relied on by the defendant, who had recorded a certificate of work done on the ground. The trial Judge held that this section gave A. C. a perfect title to the ground in dispute, and dismissed the action: 6 B. C. R. 523. His judgment was reversed by the full Court (7 B. C. R. 422, ante 7), and judgment entered for the plaintiff:—Held, affirming this judgment that, as the plaintiff was misled by the error in the recorded description, and located the "Cody" and "Joker" fractions in consequence of such error, the same was not cured by the certificate of work done on the ground in dispute by the defendant under s. 28 of the Act. *Coplen* v. *Callahan*, 21 Occ. N. 9, 30 S. C. R. 555.

Recorded Owner of Mining Claims—Mortgage in possession—Trespass—Justification under lease prior to mortgage—Title of mortgagor—Unlicensed foreign company — Sale under power—Purchase by agent of mortgagee—Notice of sale—Registration of lease—Agency of lessee's husband. *Clazy* v. *Thornburn* (Y.T.), 2 W. L. R. 534.

Royalties — *Dominion Lands Act — Publication of Regulations—Renewal of License—Voluntary Payment.*]—The Dominion Government, by regulations made under the Dominion Lands Act, may validly reserve a royalty on gold produced by a placer mining in the Yukon, through the miner by his license, has the "exclusive right" to all the

gold mines—that is, exclusive only against quartz or hydraulic licenses or owners of surface rights, and not against the Crown. The provision of s. 91 of the Dominion Lands Act as to publication of regulations, means that the regulations do not come into force on publication in the last of four successive weeks in the Gazette, but only on the expiration of one week therefrom. Where regulations provided that failure to pay royalties would forfeit the claim, and a notice to that effect was posted on the claim and served on the licensee, payment by the latter under protest was not a voluntary payment. One of the regulations of 1889 was, that "the entry of every holder of a grant for placer mining had to be renewed and his receipt relinquished and replaced every year:—Held, reversing the judgment in 7 Ex. C. R. 414, that the new entry and receipt did not entitle the holder to mine on the terms and conditions in his original grant only, but he was subject to the terms of any regulations made since such grant was issued. The new entry cannot be made and new receipt given until the term of the grant has expired. Therefore, where a grant for one year was issued in December, 1896, and in August, 1897, the renewal license was given to the miner, such renewal only took effect in December, 1897, and was subject to regulations made in September of that year. Regulations in force when a license issued, were shortly afterwards cancelled by new regulations imposing a smaller royalty:—Held, that the new regulations were substituted for the others and applied to said license. *Rex* v. *Chappelle*, *Rex* v. *Carmack*, *Rex* v. *Tweed*, 23 Occ. N. 34, 32 S. C. R. 586. Leave to appeal granted by the Judicial Committee, 23 Occ. N. 163.

Staking Claims — *Annulment of Prior Lease—Volunteer Plaintiff—Right of Action—Status of Adverse Claimants.*]—In an action by free-miners, who had "staked" placer mining claims within the limits of a concession granted for purposes of hydraulic mining, to set aside the hydraulic mining lease on the ground that it had been illegally issued and was null and of no effect:—Held, that, where there was a hydraulic lease of mineral lands in existence, the mere fact of free-miners "staking" claims on the lands included within the leased limits did not give them any rights or interest in the lands, nor did they thereby require such status in respect thereto as could entitle them to obtain a judicial declaration in an action for the annulment of the lease. *Hartley* v. *Matson*, 23 Occ. N. 61, 32 S. C. R. 144.

Transfer of Mineral Claim—*Time for Recording — Mineral Act.*]—The claimant of an interest in a mineral claim, seized under an execution on the 18th May, 1903, relied on a bill of sale obtained by him on the 23rd February, 1903, while in Dawson, Y.T., over 2,000 miles from the mining recorder's office. The bill of sale was not recorded until the 22nd May, 1903:—Held, that, as the time for recording mineral claims fixed by s. 19 of the Mineral Act is dependent upon the distance of the claim (not of the locator) from the recorder's office, therefore by s. 49 of the Act the bill of sale was of no effect as against the intervening execution. *Dumas Gold Mines, Limited* v. *Boultbee*, 24 Occ. N. 283, 10 B. C. R. 511.

Transfer of Mineral Claim—*Writing—Use by Miner of Another's Name in Locating.*]—A transfer of any interest in a mineral claim is not enforceable unless in writing. Where one free miner locates and records a mineral claim, if he locates another claim on the same vein in the name of another free miner, he thereby acquires no interest in such last claim by virtue of s. 29 of the Mineral Act of 1896. *Alexander* v. *Heath*, 8 B. C. R. 95.

Transfer to Joint Tenants.]—If one of two joint transferees of an undivided interest in a mineral claim rejects the transfer, no title passes to the other. *Cook* v. *Denholm*, 8 B. C. R. 39.

Trespass—*Action for — Discovery — Inspection—Order for—Copies of Plans—Undertaking for Damages—Security.*] — This was an action of trespass to extralateral rights appurtenant to a mineral claim located and recorded in 1891, and the point in dispute was as to the terms of an inspection order enabling the plaintiffs to inspect the defendants' workings:—Held, affirming the decision of McColl, C.J., that the order might allow the inspection party to make copies of plans, charts, &c., of the other party's workings. 2. That the order should contain an undertaking for damages, and the practice does not require security to be given. *Star Mining and Milling Co.* v. *Byron N. White Co.*, 22 Occ. N. 104, 9 B. C. R. 9.

Trespass Workings—Following veins—Evidence—Inspection—Conflicting theories—Determination of Court. *Star Mining Co.* v. *Byron N. White Co.* (B.C.), 2 W. L. R. 411.

Trespass Workings — *Wrongful Abstraction of Ore — Conversion—Accumulation of Water—Nuisance—Injunction—Trespass of Predecessor.*]—A mining company who purchase the assets of an old company, whose debts and liabilities they agree to pay and satisfy, are not liable to a stranger to the contract for a tort committed by the old company. The defendants purchased a mineral claim having ore on the dump which which had been wrongfully taken from the plaintiffs' claim; they let the ore remain where it was at the plaintiffs' disposal:—Held, there had been no conversion of the ore by the defendants. The defendants' predecessors in title ran trespass workings from their mineral claim, the Nickel Plate, through the Ore-or-no-Go mineral claim in which they had a right to mine, but of which the plaintiffs were the owners in fee, into the plaintiffs' mineral claim, the Centre Star, which adjoined the Ore-or-no-Go claim; to stop the flow of water from the Nickel Plate through the trespass workings to the Centre Star claim, the defendants built bulkheads on the boundary between the Centre Star and Ore-or-no-Go claims, and at this point a large body of water accumulated:—Held, that the accumulation of water was a menace to the plaintiffs and amounted to a nuisance, and that the bulkheads should have been built at the Nickel Plate boundary so as to keep the water from flowing from the Nickel Plate into the trespass workings. *Centre Star Mining Co.* v. *Rossland-Kootenay Mining Co.*, 11 B. C. R. 231, 1 W. L. R. 313, 336.

Vendor and Purchaser—*Sale of Mining Locations — Consideration — Lump Sum — Separate Valuation — Misrepresentation —*

Fraud — Damages.] — Upon representations made by the vendor the plaintiffs purchased several mining locations, the consideration therefor being stated in a lump sum. In an action for fraud and deceit brought by the purchaser, the trial Judge, in discussing the total consideration for the properties purchased, found that there was evidence to shew the values placed by the parties upon each of two of these properties as to which false and fraudulent representations had been made, and which had turned out worthless or nearly so:—Held, reversing the judgment appealed from, Taschereau, C.J.C., and Idington, J., dissenting, that the finding of the trial Judge as to the consideration ought not to be disturbed upon appeal, and that the proper measure of damages, in such a case, was the actual loss sustained by the purchaser by acting upon the misrepresentations of the vendor in respect of the two mining locations in question, without regard to the results or values yielded by the other locations purchased at the same time, and as to which no false representations had been made. Peek v. Derry, 37 Ch. D. 541, followed. *Syndicate Lyonnais du Klondyke* v. *Barrett*, 25 Occ. N. 127, 36 S. C. R. 279.

Water Clauses Consolidation Act — *Power Company — Water Records — Amendment—Notices—Terms—Approval of Alteration by Lieutenant-Governor in Council.*] — When a power company have submitted the documents specified in s. 85 of the Water Clauses Consolidation Act to the Lieutenant-Governor in council, one of the purposes set forth in the documents being to alter the points of diversion mentioned in water records purchased by the company, and when a certificate has duly issued under s. 87, approving the proposed undertaking, the power company are entitled, under s. 89, to have the records amended, and are not bound to give fresh notices or submit to such terms as the Commissioner might impose in ordinary cases, under s. 27. *In re Water Clauses Consolidation Act*, 10 B. C. R. 356.

Water Clauses Consolidation Act — Water record—Grant by Commissioner—Subsequent amendment — Nullity — Review — "Decision of a commissioner." *Wallace* v. *Flewin* (B.C.), 2 W. L. R. 13, 418.

Water Clauses Consolidation Act — *Water Record and Rights—Who may Attack —Mining Jurisdiction of County Court—Construction of Statutes.*] — Action respecting water rights appurtenant to a placer mine:—Held, that no one has a status to complain about the diversion or misuse of water by the holder of a water record unless he himself holds such a record under the Water Clauses Consolidation Act, which is an exclusive code on the subject of water rights; and the right to a flow of water is vested either in the Crown or in the holder of such a record. 2. The County Court in its mining jurisdiction has power to deal with actions respecting the disturbance of water rights appurtenant to mining property. 3. All the principles of construction of statutes cannot be applied to enactments such as the Mineral Act, which is constantly being amended without very careful consideration or supervision. *Spruce Creek Power Co.* v. *Muirhead*, 25 Occ. N. 23, 11 B. C. R. 68.

Water Grants—Renewal—Ditch —Compensation—Interference. *Graves* v. *McDonald* (Y.T.), 1 W. L. R. 325.

Water Regulations—Hydraulic lease — Water grant—Diversion of water. *McDonald* v. *Klondike Government Concession Limited* (Y.T.), 2 W. L. R. 501.

Water Regulations — Jurisdiction of Gold Commissioner—Res judicata — Estoppel —Water rights — Priorities. *Anglo-Klondike Mining Co.* v. *Cook* (Y.T.), 1 W. L. R. 322.

Water Regulations — Water rights — Grant by mining recorder—Protest—Jurisdiction of Gold Commissioner — Judicial determination—Authority in ministerial capacity—Diversion of water. *Carpenter* v. *Calligan* (Y.T.), 2 W. L. R. 488.

Water Rights — Diversion of water — Hydraulic concession—Obstruction of stream with débris — Injunction. *Klondike Government Concession Limited* v. *McDonald* (Y. T.), 2 W. L. R. 219.

Water Rights—*Placer Mining—Jurisdiction of County Court—Two Actions—Stay of One—Layman—Status of, to Attack Water Record — Joint Application of Individual Miners—Gold Commissioner—Appeal.*]—The County Court has jurisdiction over water rights appurtenant to placer claims, concurrent with that of the Supreme Court, and such jurisdiction is not ousted by the mere fact that an action was first begun in the Supreme Court by the same parties respecting the same subject matter, and until objection is taken it will continue to exercise its jurisdiction, whereupon the proper course is to apply to stay one of the actions, and it depends upon the circumstances which one will be stayed. It is too late to object to the jurisdiction after judgment. A layman is a lease-holder, and may apply for a water record, which is appurtenant to the mine and not to the miner, and only one who is the holder of a water record, or its equivalent under the Act, has a status to attack a water record; a right to water under s. 29 confers such a status. Individual miners working on the same creek who have statutory rights in the same water may join in an application for a record, or to reduce or modify an existing record which is being misused to their disadvantage, and on such application the Gold Commissioner may make such adjudication as seems to him just; and, unless those interested who participated in or properly had notice of the proceedings appeal from his decision in the summary way provided by s. 36, they are bound by it. If the action taken by the Gold Commissioner was the proper one, it is not invalidated because he gave wrong reasons or relied on one section instead of another which authorized his action. *Brown* v. *Spruce Creek Power Co.*, 11 B. C. R. 243, 1 W. L. R. 143.

MINING COMPANY.

See COMPANY.

MINING LEASE.

See MINES AND MINERALS.

MISDIRECTION.

See CRIMINAL LAW—DAMAGES—INSURANCE —TRIAL.

MISE EN DEMEURE.

See COSTS.

MISNOMER.

Exception to Form—*Husband and Wife —Separation.*] — A judgment authorizing a wife to bring an action for séparation de corps against her husband, described as "Alexander Felix Boyd," does not authorize a suit against "Alexander Felix Boyle;" and an exception to the form in an action for séparation de biens, based upon such incorrect description of the husband, will be sustained. *Selby* v. *Boyle*, 6 Q. P. R. 282.

See AMENDMENT—MUNICIPAL ELECTIONS —WILL.

MISREPRESENTATION.

See FRAUD AND MISREPRESENTATION.

MISTAKE.

Contract for Purchase of Land—Mistake of purchaser as to quantity, not known to vendor—Hardship amounting to injustice —Rescission—Election to affirm contract after discovery of mistake—Fraud—Payment of commission to agent. *Slouski* v. *Hopp* (Man.), 2 W. L. R. 363.

Mortgage — *Prior Agreement — Mining Rights—Misrepresentations — Illiteracy.*] — The plaintiffs leased mining rights under lay agreement to the defendants, providing for division of profits and payment of an existing debt, and for advances to be made out of the clean-ups, a mortgage to be given on the dumps to secure the advances. Owing to some inaccuracy, a new lay agreement was executed at the same time as the mortgage. The mortgage provided for payments at earlier dates than the lay agreement, and was not read over to the defendants, who were unable to read and had requested that it should be read over to them. In an action on the mortgage, evidence was given that a document signed on that date was represented to be in terms similar to the lay agreement as first drawn, but it might, possibly, have been the new lay agreement that was thus spoken of, and it appeared that, although the defendants became aware of the difference in the terms of payment mentioned in the mortgage, and complained of this to the plaintiffs' agent, they continued to work on the lay, assuming that the altered terms of payment would not be insisted on:—Held, that there was not sufficient evidence of acquiescence in the altered terms of payment, and that, as the evidence shewed that the defendants were illiterate, and the mortgage had not been read over to them on request, and they had been misled as to its contents, they could not be bound by its altered provisions as to the payments. *Letourneau* v. *Carbonneau*, 35 S. C. R. 110.

Recovery of Money Paid Under Mistake of Fact—*Mortgage—Account—Acknowledgment — Estoppel — Appeal — Cross-appeal — Leave — Parties — Costs.*] — The judgment of Robertson, J., 22 Occ. N. 59, was reversed on appeal:—Held, that there could be no recovery against the executors, because their testator was not the person who received the erroneous overpayments sought to be recovered back. He omitted to give credit in his books or on the plaintiff's mortgage for two sums paid to him, but the plaintiff made no mistake in paying them, for there was then so much and more due on the mortgage, and when the executors subsequently assigned the mortgage to the defendant G. W. L. H. in part satisfaction of the legacy bequeathed to him by their testator, there was still a considerable balance due thereon. The time when these payments should have been taken into consideration was when the mortgage was being paid off to G. W. L. H. There was nothing to create an estoppel as between him and the plaintiff so as to have prevented the latter from then claiming credit for these payments. G. W. L. H., and not the testator, was the person who received too much, and it was the payment to him which was erroneous. The executors, upon their appeal from the judgment against them, were entitled to be relieved and to costs of the action. And the plaintiff, although he had omitted to appeal, by way of precaution against that result, for judgment in his favour against G. W. L. H., should be permitted to do so, nunc pro tunc, and judgment should be entered for the plaintiff against G. W. L. H. with costs down to the trial and settlement of the judgment as if G. W. L. H. had been the original and only defendant. No costs of the appeal to any of the parties. *McDermott* v. *Hickling*, 23 Occ. N. 40, 1 O. W. R. 19, 768.

MODEL SCHOOL.

See SCHOOLS.

MONEY.

Action for Money Lent — Weight of evidence. *Armour* v. *Anderson*, 2 O. W. R. 473, 3 O. W. R. 214.

Action for Money Paid—Advance to protect stocks—Express or implied contract to repay—Ratification. *Walker* v. *Bower*, 4 O. W. R. 426.

Money Had and Received — Deposit — Repayment — Evidence — Corroboration — Costs. *Burton* v. *Campbell*, 5 O. W. R. 53.

MONEY IN COURT.

Attachment of Debts — *Claimants— Priorities.*] — Moneys paid into a County Court by garnishees were distributed among

claimants according to priorities, the claimants who observed the first charging order being first entitled. *Wilson* v. *Robertson*, 9 B. C. R. 30.

Payment Out—Costs—Solicitor's lien—Judgments—Priorities — Stop orders—Contract—Construction. *Raymond* v. *Faulkner* (Y.T.), 2 W. L. R. 461.

See COSTS—MORTGAGE.

Payment Out—*Life Tenant—Lunatic—Foreign Guardian—Maintenance.*]—During the infancy of the defendant $2,000 was paid into Court, to one-half of which she was entitled on attaining majority, and to the other half after the death of her sister. The defendant having come of age, but being of unsound mind, and residing abroad with her mother, who had been appointed her guardian by a foreign Court, the mother applied for payment out of the whole fund, having given in the foreign Court specific security for the amount:—Held, as to the half of the fund in which the applicant had a life interest, that it might be paid out to proper trustees appointed to administer and safeguard it, or it might be paid out to the applicant upon substantial security being given:—Held, as to the other half, that being actually in the hands of the Court, it was subject to the jurisdiction of the Court, and should be applied for the support and maintenance of the person of unsound mind, in the discretion of the Court—whatever sum should be shewn to be necessary for maintenance being paid to the foreign guardian. *In re Thompson—Thompson* v. *Thompson*, 21 Occ. N. 34, 19 P. R. 304.

MONOPOLY.

See CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS.

MORTGAGE.

I. ASSIGNMENT, 1035.
II. COVENANT FOR PAYMENT, 1036.
III. DISTRESS, 1038.
IV. FORECLOSURE AND REDEMPTION, 1039.
V. FRAUD, 1044.
VI. INTEREST, 1045.
VII. SALE UNDER POWER, 1047.
VIII. SUBSEQUENT INCUMBRANCES, 1052.
IX. OTHER CASES, 1053.

I. ASSIGNMENT.

Amount Due—Evidence—Action on covenant—Costs. *Weber* v. *Oberholtzer*, 6 O. W. R. 111.

Conveyance Subject to Mortgage—*Reservation of Life Estate.*]—A father, being the owner of land, mortgaged it, and then conveyed it to his son subject to the mortgage, and reserved a life estate to himself:—Held, that the son was not entitled, on payment of the mortgage money to the assignee of the mortgage, to an assignment of the mortgage to himself or his nominee under R. S. O. 1897 c. 121, s. 2, ss-ss. 1 and 2; the holder of the mortgage having notice of the equitable right of the father to have his life estate relieved of the burden by payment of the mortgage debt by the son:—Semble, that the grantee was entitled to have the mortgage assigned in such a way that it would remain an incumbrance on the remainder in fee vested in him. *Leitch* v. *Leitch*, 21 Occ. N. 496, 2 O. L. R. 233.

Covenant by Assignor for Payment—*Release of Surety—Assignment of Mortgage—Covenant—Discharge of Part of Land.*]—The defendant, when assigning a mortgage on lands to the plaintiffs, covenanted that the mortgagor would pay. The plaintiffs afterwards, without his consent, discharged half the lands from the mortgage on payment of half the mortgage debt:—Held, that this was such an alteration of the contract guaranteed as to release the defendant from his liability, whether the amount paid was the full value of the part released or not. *Farmers' Loan and Savings Co.* v. *Patchett*, 23 Occ. N. 285, 6 O. L. R. 255, 2 O. W. R. 702, affirmed 25 Occ. N. 7, 8 O. L. R. 569, 4 O. W. R. 349.

Proof of Claim—Affidavit of assignee—Onus—Discovery of new evidence. *Randall* v. *Berlin Shirt and Collar Co.*, 5 O. W. R. 256, 646.

II. COVENANT FOR PAYMENT.

Action on—Attempted exercise of power of sale—Incomplete sale—Inability to reconvey—Change in position of property. *Mendels* v. *Gibson*, 2 O. W. R. 857, 3 O. W. R. 551, 4 O. W. R. 336, 5 O. W. R. 236.

Action on—Defence—Agreement not to enforce—Failure to establish—Consideration—Agreement to stifle prosecution—Evidence to establish. *Mann* v. *Holton*, 3 O. W. R. 804.

Building Society—*Action on Covenants after Foreclosure—Reopening—Consolidation—Lien—Purchaser for Value—Adding Parties.*]—On the 27th December, 1893, the defendant K. gave a mortgage to a loan company to secure $400. On the 10th March, 1894, K. agreed to sell the mortgaged property to L., and L. paid the purchase price. On the 4th June, 1895, the defendant K. gave a mortgage to the same company on other property to secure $2,600. K. subscribed on each occasion for shares in the loan company, which he assigned to the company as security for the loans, the mortgages being treated as collateral. Each mortgage contained a proviso that the company should have a lien upon all stock then or thereafter held by the defendant as security for the loans. K. allowed the payments on both mortgages to fall into arrear. The company proceeded on the $2,600 mortgage, and on the 24th August, 1899, obtained an order vesting the title to the property covered by it in themselves and debarring K. from all right to redeem. The plaintiff company became the owner of the two mortgages by assignment,

and on the 10th January, 1901, sued K. upon his covenant for payment in the $2,000 mortgage, offering to reopen the foreclosure, and claimed the right to consolidate the two mortgages:—Held, that L. was entitled to be added as a party defendant under s. 36 of the Judicature Ordinance, 1898, and that the plaintiffs had no right to consolidate as against him. 2. The proceedings upon the $2,000 mortgage were not identical with foreclosure proceedings, and the presumption from the company's taking a vesting order and from their delay in suing was that they intended to take the land in full satisfaction and to abandon the remedy on the covenant. *Colonial Investment and Loan Co.* v. *King*. 23 Occ. N. 126, 5 Terr. L. R. 371.

Defence of Payment — Promissory notes. *Pegg* v. *Hamilton*, 1 O. W. R. 418, 633.

Interest—Board in lieu of—Settlement—Administrator. *Rockett* v. *Rockett*, 1 O. W. R. 309.

Purchase Subject to Mortgage—*Implied Covenant of Indemnity—Assignment of Implied Covenant—Survivorship of Joint Contractors — Administrators — Territories Real Property Act.*]—The obligation, declared by the Territories Real Property Act, s. 69, to be implied in every instrument transferring any estate or interest in land under the provisions of that Act, subject to mortgage or incumbrance, is assignable by the implied covenantee to the original mortgagor. The implied covenant takes effect notwithstanding that the mortgage or incumbrance is not noted upon the transfer. The plaintiff sold, subject to a mortgage, to L. & V.; L. & V. gave a mortgage back for the whole price, the understanding being that L. & V. should pay the first mortgage, the amount thereof being credited in reduction of the second; L. & V. sold to T. for a certain sum, and T. was to pay what was then owing on the two mortgages; T. sold to S. for a certain sum, and S. was to pay what was then owing on the two mortgages, S. thus became by mesne transfers the registered owner subject to the two mortgages, the first made by the plaintiff, the second by L. & V.; S. died, and the contesting defendants, his administrators, became, by transmission, registered owners, subject to the two mortgages. L. died, and V. assigned to the plaintiff the rights of L. & V. on T.'s implied covenant to discharge two mortgages. T. also assigned to the plaintiff his rights on S.'s implied covenant to discharge the two mortgages:—Held, that the plaintiff was entitled to an order against the contesting defendants, the administrators of S., that they pay the balance owing upon the two mortgages with costs, and that de bonis propriis if the assets of the estate proved insufficient. Semble, the assignment from V., the survivor of L. & V., conveyed the rights also of the representatives of L. *Glenn* v. *Scott*. 2 Terr. L. R. 339.

Release — *Dealings between Mortgagee and Assignee of Equity.*]—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 in 32 O. R. 175, 20 Occ. N. 402, affirmed; Osler and Maclennan, JJ.A., dissenting. *Forster* v. *Ivey*, 21 Occ. N. 550, 2 O. L. R. 480.

Sale—*Deficiency—Personal Order for—Notice of Motion—Service by Filing.*]—A mortgage made by the defendant to the plaintiffs to secure payment of $500, contained a covenant that the defendant would pay, or cause to be paid, the said mortgage money, to wit, $500, with interest. On sale under order for foreclosure and sale, the mortgaged property realized only $110, and the plaintiffs applied for an order for judgment against the defendant, with costs, for the balance due on the mortgage, after deducting the proceeds of the sale. The defendant did not appear to the action, and as he was a seafaring man, and it was impossible to effect personal service, the notice of motion was served by filing with the prothonotary, pursuant to O. 65, r. 4:—Held, that the plaintiffs were entitled to the order applied for. *Reliance Savings and Loan Co.* v. *Curry*, 34 N. S. Reps. 565.

Subsequent Dealings with Equity of Redemption—Merger—Accord and satisfaction—Liability—Reference. *Home Life Association of Canada* v. *Spence*, 2 O. W. R. 974, 3 O. W. R. 414.

III. Distress.

Tenancy at Will—*Quiet Enjoyment—Assignment of Equity—Tenant—Sale of Distress—Appraisement — Damages.*]—A mortgage containing the usual statutory covenants and a special clause providing for a tenancy at will at an annual rent equal to the interest:—Held, not inconsistent or void for repugnancy. Trust and Loan Co. v. Lawrason, 10 S. C. R. 679, distinguished. The mortgagor, remaining in possession upon the execution of the mortgage, had the right under the provision for quiet possession until default, to enjoy the premises, but for no determinate period, and his tenancy thereunder was a tenancy at will, and such provision was, therefore, not inconsistent with an express tenancy at will at a half-yearly rent. There being a tenancy at will at a fixed rent, there was, as incident to it, the right to distrain, and the covenant for quiet enjoyment must be read as subject to such right. Doe d. Dixie v. Davies, 7 Ex. 89, followed. After the mortgagor had made default, his continuance in possession was still as tenant at will. After default, the mortgagor, at the instance of the mortgagees, assigned his equity of redemption to his wife, and she took possession and agreed to apply the proceeds of the land to the payment of the mortgage:—Held, that this operated as a new tenancy at will with the wife, who became liable for the payment of the rent as the assign of her husband with the assent of the mortgagees, and her goods were, therefore, distrainable for the rent. So the goods of the husband might also be distrained as it was a case of real tenancy:—Held, however,

that the defendants were liable for selling the distress without appraisement or valuation; and the measure of damages was the real value of what was sold, minus the rent due. *Pegg* v. *Independent Order of Foresters*, 21 Occ. N. 158, 1 O. L. R. 97.

IV. Foreclosure and Redemption.

Absolute Conveyance to Secure Debt—*Redemption — Entry — Possession—Limitation of Actions—Real Property Limitation Act, Manitoba — Acknowledgment.*]—Where the plaintiff in January, 1891, by a certificate of title under the Real Property Act, vested a parcel of land, vacant and which so continued to be until the commencement of the action, in the defendant, as security for a loan of $200 repayable in two months, and paid no taxes and nothing on the debt until October, 1902, when she asked the defendant for a statement of his claim, who then sent her a memorandum shewing, among other things, the amount due, it was held that such transfer had the effect of a mortgage, that the defendant should be presumed to have "obtained possession" at that time within the meaning of s. 20 of the Real Property Limitation Act, R. S. M. 1902 c. 100, and the plaintiff's right of redemption was barred by the lapse of 10 years; and that an acknowledgment of the right of redemption given after the lapse of the statutory period was of no avail to the mortgagor seeking redemption. *Rutherford* v. *Mitchell*, 15 Man. L. R. 390.

See Burr v. *Bullock*, 2 O. W. R. 428.

Acceleration—*Assignment Pendente Lite —Parties—Costs.*]—Judgment in 21 Occ. N. 555, 2 O. L. R. 500, affirmed without costs, the Court refusing to interfere with the decision of a provincial Court in a matter of procedure. *Gibson* v. *Nelson*, 35 S. C. R. 181.

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. *Gibson* v. *Nelson*, 21 Occ. N. 555, 2 O. L. R. 500.

Action for Foreclosure—Costs—Mortgagee claiming more than due—Tender. *Daigneau* v. *Dagenais*, 2 O. W. R. 132, 5 O. L. R. 265.

Action for Foreclosure—*Parties—Irregularity—Appeal from Report.*]—An action for foreclosure and possession was begun by a mortgagee against the mortgagor and a tenant of the latter in possession. The tenant entered an appearance disputing the amount, and pending the action the mortgagor dispossessed her by other means. Judgment by default was obtained by the plaintiff against the mortgagor, without taking any notice of the tenant:—Held, that this was irregular; the action should have been dismissed or discontinued as against her. Upon the reference directed by the judgment and in his report the Master continued the tenant as a defendant by original action and also added her as a party in his office by serving her with notice to incumbrancers, although she was not a subsequent incumbrancer:—Held, that her name should be struck out both as an original and added party, upon her appeal from the report, notwithstanding that she had not moved to discharge the notice served upon her. Cowan v. Allen, 26 S. C. R. 292, followed. *McLaughlin* v. *Stewart*, 21 Occ. N. 185, 1 O. L. R. 295.

Action to Enforce—Defence—Collateral security — Acceptance of other security — Reservation — Intention. *Hency* v. *Ottawa Trust and Deposit Co.*, 2 O. W. R. 146.

Assignment of Mortgage—*Advances, Subsequent to—Report—Varying, on Motion for Foreclosure—Interest.*]—H. assigned to the plaintiff a mortgage of certain property of which F. was owner, subject to the mortgage to H. The assignment, to which F. was a party, and which was made at his request, contained, among other things, an agreement on his part that any future advances which he might require, if made by the assignee, should also be a lien or charge upon the property. After the death of F. foreclosure proceedings were commenced by the plaintiff, who, in addition to the amount secured by the mortgage, made a claim for subsequent advances. The defendant H. was appointed to represent the heirs of F. in the proceedings, but, subsequently, C. F., who claimed to be one of the legal representatives of F., was permitted to appear, and entered an appearance by her attorney. Plaintiff's claim was sent to a referee to ascertain and report the amount due, and after a hearing, at which C. F. was represented, the referee reported as due the sum of $808.45, including $338.96 for subsequent advances. On application for order for foreclosure and sale, the Judge reduced the amount of the plaintiff's claim to $435.25, with interest to the date of the sale:—Held, that the Judge had authority to open up the question as to the correctness of the referee's report, but was wrong in his conclusion, the recital in the assignment being sufficient as between the parties to make the subsequent advances a charge upon the property, and there being sufficient evidence to support the finding that the advances claimed were actually made:—Held, also, that plaintiff was entitled to recover interest up to the date of payment by the sheriff, and not, as allowed, only to the date of sale. *Wallace* v. *Harrington*, 34 N. S. Reps. 1.

Bonus—*Collateral Advantage.*]—The proviso for redemption in a mortgage dated the 30th August, 1902, to secure an advance of £3,500, was the payment on the 11th November of £6,000 and a transfer of £5,000 in shares in a company to be promoted by the mortgagor. The principal money advanced

was applied in the purchase of the mortgaged premises, which contained salt springs of speculative value, which the company were to develop and work. In a foreclosure suit:—Held, that the proviso for redemption was not unreasonable and should not be relieved against. *Buchanan* v. *Harvie* (No. 2), 25 Occ. N. 76, 3 N. B. Eq. 61.

Conveyance of Equity of Redemption to Mortgagee—Merger — Intention—Evidence—Statute of Limitations—Vacant land—Legal estate—Acknowledgments in writing—Dictated letters—Costs. *Rogers* v. *Brann*, 6 O. W. R. 993.

Covenant—Sale of equity of redemption—Agreement to look to purchaser—Novation—Neglect to insure—Trusts—Evidence. *Cornell* v. *Hourigan*, 2 O. W. R. 4, 510.

Default on Final Day Fixed—Refusal of defendant to accept redemption money—Application to Court to open up order—Exceptional indulgence—Relief from forfeiture—Terms—Costs. *Scott* v. *Buck*, 3 O. W. R. 629, 4 O. W. R. 201.

Extension of Time for Redemption by Second Mortgagee. *Cameron* v. *Rutledge* (Y.T.), 2 W. L. R. 473.

Final Order after Abortive Sale—New day—Rule 393—Time for redemption. *Roberts* v. *Caughell*, 2 O. W. R. 799, 939, 971.

Opening Foreclosure—*Real Property Act.*]—Section 71 of the Real Property Act, R. S. M. 1902 c. 148, must be read along with the other provisions of the Act, as s. 92 dealing with trusts, s. 76 declaring the cases in which an action will lie against a registered owner, and s. 52 giving the Court power over certificates of title in any proceeding respecting land; and foreclosure proceedings conducted by the district registrar, in the case of lands which have been brought under the Act, are no more binding between mortgagor and mortgagee than a decree and final order of foreclosure made by the Court; and, if the dealings between the parties, subsequent to the foreclosure, are shewn to be such as would be sufficient in equity to open the foreclosure and let the mortgagor in to redeem, they should in the case of lands under the Act have the same effect. Campbell v. Bank of New South Wales, Torrens Australasian Digest, p. 149, not followed. Under the circumstances set out in the case, it was held that the defendant was entitled to be let in to redeem the property in question. *Barnes* v. *Baird*, 25 Occ. N. 20, 15 Man. L. R. 162.

Opening Up Foreclosure—*Subsequent Incumbrancer.*]—Mortgagees obtained the usual judgment against the mortgagor and his wife for redemption or foreclosure on the 5th April, 1900. The Master added as defendants a subsequent mortgagee and creditors of the mortgagor having a fi. fa. lands in the hands of the sheriff, and by his report, dated the 16th May, 1900, certified that the execution creditors had not proved any claim, and appointed the 17th November, 1900, for payment by the subsequent mortgagee. Payment not having been made, a final order of foreclosure as to the added defendants was issued on the 21st November, 1900. The Master thereupon made a subsequent report appointing the 29th December, 1900, as the day for payment by the original defendants; and, payment not having been made by them, a final order of foreclosure was issued against them on the 29th January, 1901. On the 3rd April, 1901, the execution creditors served a notice of motion to open the foreclosure. On the same day the mortgagees had written to the mortgagor offering to give him, as of grace, a part of any surplus over their claim which they should realize by a sale of the mortgaged premises, upon the mortgagor agreeing not to move to open the foreclosure:—Held, that the execution creditors, having moved with reasonable promptness, and being in a position to give the mortgagees immediate payment, were, under the circumstances detailed in the evidence, entitled to have the foreclosure set aside, and to be let in to redeem upon the usual terms. Thornhill v. Manning, 1 Sim. N. S. 451, followed. *Scottish American Investment Co.* v. *Brewer*, 21 Occ. N. 522, 2 O. L. R. 369.

Parties—*Devisee of Deceased Mortgagor—Executors—Joint Assignees of Mortgage—Death of One—Action by Survivor—Trustees—Objection—Laches—Action to Open Foreclosure.*]—Mary Ann Plenderleith and her husband had mortgaged certain lands. Husband died in 1890, leaving a will whereby he devised and bequeathed all his real and personal estate to his wife, and appointed her to be his sole executrix. This will was proved on 23rd July, 1890. She died on 22nd September, 1890, also leaving a will whereby she appointed defendants James M. Brown and Jesse Brown to be her executors, and whereby also she devised and bequeathed all her real and personal estate to her daughter, Eliza Plenderleith, the plaintiff in this action, then an infant. Probate of this will was granted to the executors named therein on 2nd October, 1890. John Downey, one of the assignees of the mortgage, died on 11th April, 1894, leaving a will and appointing executors. On 28th November, 1894, the surviving assignee of the mortgage, James Maclennan, brought an action for foreclosure against James M. Brown and Jessie Brown, executors, representing the estates of Mary Ann Plenderleith and her husband. In the statement of claim it was alleged that plaintiff and Downey held the mortgage as mortgagees in trust, and that plaintiff, after the death of Downey, was entitled as surviving mortgagee and trustee to the moneys secured by the mortgage. Defendants filed an answer admitting their character of executors under the wills of the mortgagors, setting out the devise to Eliza Plenderleith, and submitting that she was a necessary party to the action. The usual foreclosure judgment was obtained upon motion for judgment, and, after a reference and report, a final order of foreclosure was made. On 1st May, 1902, James Maclennan conveyed to George Hamilton. On 2nd May, 1902, George Hamilton conveyed to the defendant George B. Smith, who on the same day conveyed by way of mortgage to defendant M. Augustus Thomas. On 14th November, 1904, Eliza Plenderleith brought this action against Smith and Thomas to set aside the foreclosure and for redemption, alleging that the foreclosure proceedings were irregular because the personal representatives of Downey were not made parties, and because Eliza Plenderleith, the plaintiff in the present action, was not a party to those proceedings. Maclennan had entered into

possession of the lot after the foreclosure as owner, and since then the possession had followed the conveyances:—Held, the law laid down in Re Martin, 26 O. R. 465, was there held by the Chancellor that the joint effect of 54 V. c. 18, s. 1, and 56 V. c. 20, s. 4, was to vest all estates in the devisees under the wills of persons dying at any time, whether before or after 4th May, 1891, unless the executors registered a caution within a year. That construction, however, was not approved by the legislature, and the declaratory s. 29 of 60 V. c. 14 expressly interpreted s. 1 of 54 V. c. 18 as applying only to the estates of persons dying after 4th May, 1891, and this interpretation is made retrospective, save where a conveyance had been made before the passing of the declaratory section. Both Mr. and Mrs. Plenderleith died before 4th May, 1891, and the result was, that the equity of redemption was vested in their executors at the time of the foreclosure action and judgment; they were properly made defendants as the owners of the equity, and the present plaintiff, Eliza Plenderleith, the devisee of her mother, was neither a necessary nor a proper party to the foreclosure action. The other objection was, that Downey's personal representatives were not necessary parties to the foreclosure proceedings:—Held, the case was within s. 13 of c. 121, R. S. O. 1897, which entitled a surviving mortgagee, in the case of a mortgage or obligation made or assigned to two persons "jointly and not in shares," to receive the mortgage money from the mortgagor and to give a valid discharge of the mortgage. This mortgage became the property of the two assignees, "jointly and not in shares," within the meaning of this section, and James Maclennan, the survivor," became entitled as against the mortgagors to receive the money and to enforce payment of it by action. It was true that the section applies only to securities made or assigned after 1st July, 1886, but the renewal agreement was made after that date, and contains a direct covenant by the mortgagors with the assignees to pay the mortgage money and interest at a new day, and this constitutes a new "obligation" after 1st July, 1886, so as to bring the case within the section. The statement of claim in the foreclosure action alleged that Maclennan and Downey took and always held the mortgage and the moneys secured by it as trustees. They being trustees, the right to recover the money survived, both at law and in equity, upon the death of Downey, to his co-trustee Maclennan. *Plenderleith* v. *Smith*, 5 O. W. R. 753, 6 O. W. R. 389, 10 O. L. R. 188.

Payment—*Evidence—Onus.*] — Payment of a debt must be proved by the debtor beyond reasonable doubt; and where a mortgagor sought redemption, alleging that he had paid $400, which was in dispute, he was held not to have satisfied the onus of proving the payment. *True* v. *Burt*, 2 N. B. Eq. Reps. 497.

Rate of Interest —Redemption—British insurance company—Contract—Law of Canada—Tender — Agents — Bill of exchange. *Bradburn* v. *Edinburgh Life Assurance Co.*, 2 O. W. R. 253, 5 O. L. R. 657.

Rate of Interest — *Loan Company—Pledge of Shares by Mortgagor—Forfeiture—Separate Action.*]—The defendant, having certain shares in the plaintiff company, obtained a loan of $600. The shares were allotted and the loan granted upon certain conditions, which included the payment of a membership fee, and certain monthly dues, and the execution, as collateral security, of a mortgage, which was to continue until the maturity of the shares, or until payment of the loan was made. Under the by-laws of the company the rate of interest on loans was declared to be 6 per cent., but under the provisions of the mortgage executed by the defendant, the rate of interest payable where the stock payments, dues and interest were not promptly paid, was 15 per cent.:—Held, that, the defendant having made default in her payments, the company were entitled to payment of the amount due them, with interest at the latter rate. The contract of membership as a shareholder was distinct from the mortgage contract, and was not be considered in the foreclosure suit. If her shares were wrongly forfeited, the defendant's rights as a shareholder were to be sought in a separate actiton, and afforded no defence to the foreclosure suit. *Canadian Mutual Loan Co.* v. *Burns*, 34 N. S. Reps. 303.

Sales by Mortgagees under Power of Sale—Redemption subject to sales—Addition of purchasers as parties. *Campbell* v. *Imperial Loan Co.* (Man.), 2 W. L. R. 327.

Tax Title Defence — *Conveyance of Equity to Purchaser at Tax Sale—Onus of Proof of Arrears—Improvements under Mistake of Title.*]—In an action for foreclosure, in which a defendant set up a purchase at a tax sale prior to 1899, and a conveyance of the equity of redemption from the mortgagor, but did not prove the regularity of the sale, or that taxes were in arrear, and relied upon 58 V. c. 90, s. 13 (O.), and 63 V. c. 103, s. 11 (O.), and also claimed for improvements as made under a mistake of title:—Held: following Stevenson v. Traynor, 12 O. R. 804, that the onus of proof that there were taxes in arrear for which land might rightly be sold was upon the person claiming under the sale for taxes, and had not been satisfied. Held, also, that the words "sales . . . for taxes" in s. 11 of 63 V. c. 103, mean sales for taxes for which the lands might rightly be sold. Held, also, under the circumstances here, that the defendant had made no improvements as under a mistake of title—there was no mistake—he had simply improved his own land which he took subject to the mortgage. *Hislop* v. *Joss*, 22 Occ. N. 144, 3 O. L. R. 281.

Trustees — *Debenture Mortgage—Company—Parties—Costs—Decree.*]—A suit to enforce a trust mortgage to secure debentures may be brought in the name of the debenture holders, the trustees being made defendants. In a suit by the holder of debentures to enforce a trust mortgage, the trustees made defendants in the suit were disallowed costs of a part of their answer setting up that the suit should have been brought in their name. Form of decree adopted in suit upon debenture mortgage. *Shaughnessy* v. *Imperial Trusts Co.*, 25 Occ. N. 67, 3 N. B. Eq. 5.

V. Fraud.

Building Society — Fraudulent misrepresentations — Rate of interest. *People's*

Building and Loan Assn. v. *Stanley*, 1 O. W. R. 399, 469, 572, 592, 2 O. W. R. 122.

Forgery—Facts establishing genuineness—Want of independent advice—Reduction of amount—Costs of action — Counterclaim—Promissory note. *Malcolmson* v. *Malcolmson*, 3 O. W. R. 324.

Payment — *Acceptance — Estoppel — Findings of Jury.*]—In an action to foreclose a mortgage one of the chief grounds of defence was that the amount claimed had been placed by the defendant in the hands of M., a solicitor, to be paid over to the plaintiff, and that the plaintiff, after notice of such payment, induced the defendant to believe that he accepted such payment as a payment to himself, and that the plaintiff, after such notice, by failing to press for payment, prevented the defendant from recovering the amount from M., who had become insolvent and unable to pay. The jury found in answers to questions submitted: (2) that the plaintiff by his conduct, after the payment to M., led the defendant to reasonably believe that said payment was regarded and accepted as a payment to himself; but (5) that the position of the defendant, in consequence of such belief, was not changed for the worse. The trial Judge, notwithstanding the fifth finding, ordered judgment to be entered for defendant with costs:—Held, that a letter written by the plaintiff to the defendant did not support the fifth finding of the jury, and that the finding must be set aside. 2. That the fifth finding, even if supported by the evidence, was insufficient to complete an estoppel. 3. That to shew detriment to the defendant, it would be necessary to shew that the money was in the hands of M. at the time, and that the defendant, but for the letter written by the plaintiff, would have taken measures likely to secure payment. *Cameron* v. *McDonald*, 33 N. S. Reps. 469.

VI. Interest.

Amount Due — *Waiver or Dispensation of Tender — Rate of Interest Post Diem—Costs.*]—Prior to the maturity of a mortgage, the mortgagor's solicitor wrote to the mortgagee's solicitor, that if he would call at the former's office he could have the principal and interest due, amounting to $396.48, and, on the mortgagee's solicitor failing to call, he wrote to the mortgagee that he was prepared to pay the said sum; this was answered by the mortgagee's solicitor sending a statement claiming, in addition, certain disputed costs:—Held, that what took place did not amount to a waiver or dispensation of a tender of the amount due under the mortgage. The payment of the principal money was to be made at the expiration of a named period, with interest at a specified rate, as well before as after maturity, until the said principal was fully paid and satisfied:—Held, that the interest at the rate specified was payable after as well as before the expiration of such period. People's Loan and Deposit Co. v. Grant, 18 S. C. R. 262, distinguished. In an action for redemption brought by the mortgagor, in which a tender was set up, the judgment was for a reference to a Master to ascertain the amount due, to make all necessary inquiries for redemption or foreclosure, and to report; the provision for costs being that if the mortgagor had made default in payment of the amount, if any, found to be due, he should pay the costs; and, if no greater sum than $396.48 were found to be due, the defendant should pay the costs. Further directions were not reserved; nor were there any further directions as to costs:—Held, that the defendant was entitled to the costs of the action. Judgment in 22 Occ. N. 28, 3 O. L. R. 26, varied. *Middleton* v. *Scott*, 22 Occ. N. 369, 4 O. L. R. 459.

Building Society — *Monthly Payments—Maturity of Shares—Depreciation — Discharge — Novation — Interest—Premium.*]—The plaintiff became a member of, and mortgaged his land to, a building society incorporated under R. S. O. 1887 c. 169, as collateral security for repayment of the value of his stock, which had been advanced to him, which stock he covenanted to assign forthwith to the company, and to repay its par value in 96 monthly payments, "as per rules, etc., of the company;" and he signed 96 promissory notes, which included interest at 6 per cent. and 40 cents per share per month, bonus or premium. Afterwards the company sold out to another company, and the plaintiff accepted shares in the latter in lieu of his shares in the former, contracting at the same time to observe the by-laws of the latter company, one of which provided that "the monthly dues under mortgages must continue to be paid until maturity of the pledged shares." Having paid the 96 notes, he claimed a discharge. Owing to a depreciation in the value of the assets of the vendor company, 38 per cent. was deducted from the amount credited on the plaintiff's shares, and a discharge was refused:—Held, that there had been a complete novation and change of membership by the plaintiff from one company to the other; and the plaintiff was not entitled to a discharge till he had paid his proportion of the deficiency arising from the depreciation. 2. That R. S. C. c. 127, s. 3, relating to interest on mortgages, and embodied in R. S. O. 1897 c. 205, s. 21, had no application to this mortgage; and moreover the rate of interest was only 6 per cent., the bonus (authorized by R. S. O. 1887 c. 169, s. 38), not being considered to be interest. *Lee* v. *Canadian Mutual L. and I. Co.*, 22 Occ. N. 60, 3 O. L. R. 191, 2 O. W. R. 370, 5 O. L. R. 471.

Building Society—Payment by monthly instalments—Loan on shares—Mortgage as collateral security—Rate of interest—Fines—Rules of society — Insurance moneys received by mortgagees—Appropriation. *Home Building and Savings Assn.* v. *Williams*, 5 O. W. R. 643.

Construction — *Interest.*]—The proviso for payment in a mortgage, given to secure an indebtedness, provided for the payment of "said overdrawn account and all promissory notes or bills of exchange (and interest upon the same) then due and payable;"—Held, that the overdrawn account was made chargeable with interest. *Bank of Montreal* v. *Dunlop*, 22 Occ. N. 327, 2 N. B. Eq. Reps. 388.

Default of Payment of Interest — Possession. *Coté* v. *Meloche*, 1 O. W. R. 802.

Rate of — *Payment by Instalments.*]—A mortgage given to secure payment of $20,000

with interest at nine per cent., payable half yearly, contained these provisoes: "Provided that on default of payment for two months of any portion of the money hereby secured the whole of the instalments hereby secured shall become payable. Provided that on default of payment of any of the instalments hereby secured, or insurance, or any part thereof, at the times provided, interest at the rate above mentioned shall be paid on all sums so in arrear, and also on the interest by this proviso secured at the end of every half year that the same shall be unpaid:"—Held, reversing the judgment in 26 A. R. 232, 19 Occ. N. 210, that the principal sum of $20,000, becoming due for non-payment under the first of the above provisoes, was not an instalment in arrear under the second, on which the mortgagees were entitled to interest at the rate of nine per cent. per annum. *Biggs* v. *Freehold Loan and Savings Co.*, 21 Occ. N. 222, 31 S. C. R. 136.

VII. Sale under Power.

Action to Enforce by Sale—Parties—Mortgagees—Separate advances—Mortgagor—Administrator. *Fox* v. *Klein*, 1 O. W. R. 172.

Frudulent Scheme — *Subsequent Purchase for Value—Exchange of Lands—Constructive Notice—Redemption—Costs.*] — A mortgagee of land made a colourable sale of the land, under the pretended exercise of the power of sale, to D., who conveyed to the mortgagee's wife, who conveyed to B., receiving in exchange a conveyance of another lot. The solicitor who acted for the mortgagee in the sale proceedings and drew the conveyances to D. and the mortgagee's wife, also acted for B. in drawing the deed of the lot conveyed by her in exchange, but there was nothing to shew that he had been instructed to examine the title of the mortgaged land on behalf of B.:—Held, that B. was not affected with notice of anything the solicitor knew, but that knowledge of the contents of the conveyances and of other facts from which a Court of equity would infer that there had not been an actual bona fide exercise of the power, should be imputed to B., whose husband acted as her agent and was aware of the facts, and thus she had sufficient notice of the plaintiff's right as owner of the equity to prevent her from claiming the property free from it. Rose v. Peterkin, 13 S. C. R. 677, followed. 2. The conveyances to D. and the mortgagee's wife operated to vest the legal estate in the latter, and she could exercise the power of sale, which had not been exhausted. Henderson v. Astwood, [1894] A. C. 150, followed. 3. The conveyance to B. (being only a quit claim deed) could not be treated as an exercise of the power of sale because it did not purport to grant the whole estate in mortgage, but only the interest of the grantor, which was really only that of a mortgagee. 4. The power of sale cannot be properly exercised by the mortgagee accepting other property in exchange, unless there is no value in the equity. Smith v. Spears, 22 O. R. 286, explained and distinguished. 5. B. was entitled, on being redeemed, to add to her claim the costs of the sale proceedings up to but not including nor beyond the conveyance to D., and (following Harvey v. Tebbutt, 1 J. & W. 197) the costs of the action so far as it was for redemption only, but she should pay the plaintiff the costs occasioned to him by her resisting the claim to redeem, to be set off; and the mortgagee should pay the costs of the plaintiff and of B. *Winters* v. *McKinistery*, 22 Occ. N. 213, 23 Occ. N. 54, 14 Man. L. R. 284.

Interest on Interest — *Accruing after Maturity of Principal—Construction of Proviso.*]—A mortgage contained the following proviso: "Provided this mortgage to be void on payment of $5,000 with interest from the date hereof at the rate of 8 per cent. per annum as follows: The said principal sum at the expiration of one year from the date hereof, and the interest at the rate aforesaid on the principal money from time to time remaining unpaid until the whole of same is satisfied, and as well after as before maturity thereof, quarterly on each and every 12th day of November, February, May, and August hereafter, the first of such payments of interest to be due and made on the 12th day of November next; it being agreed and understood that in the event of said interest not being punctually paid, the amount of same shall bear interest at the said rate from the date of its maturity until paid in like manner as if it were part of the principal, but this proviso shall not entitle the said mortgagor to any extension of time for payment of the interest on the said principal sum beyond the date hereinbefore provided for payment of the same:"—Held, that the proviso, taken as a whole, did not entitle plaintiffs to any interest upon interest which accrued after maturity of the principal money. It is clearly deducible from the authorities that, where a claim is made to convert interest into capital, the intention of the parties should be indicated by clear and unambiguous language, and, no such intention was indicated in this case, except as to interest accruing during one year. See St. John v. Rykert, 10 S. C. R. 278, at p. 288; Blythewood, 4th ed., vol. 3, p. 895, and precedents, p. 1131; Am. and Eng. Encyc. of Law, 2nd ed., vol. 16, p. 1073; Coote on Mortgages, 7th ed., p. 1181. Appeal allowed with costs, and the report amended by striking out all allowances for interest on interest which has accrued since maturity of principal. *Imperial Trusts Co.* v. *New York Security and Trust Co.*, 5 O. W. R. 213, 10 O. L. R. 289.

Notice — *Sufficiency — Service—Persons Entitled — Agent—Registration—Statutes.*]—A notice of sale under the power in a mortgage was addressed to the mortgagor, then resident abroad, G. A. M. (as his agent), E. M. and W. M., J. M. and J. A., and said: "I, C. W., hereby give you notice," etc. It was dated, and signed by the solicitor for the mortgagee:—Held, that on its face it was a sufficient notice:—Held, that service of it was effective where made upon and accepted by G. A. M., who acted generally as agent of the mortgagor, who was abroad, and who received the notice from G. A. M. and never made any objection to it. J. M. and J. A. were subsequent mortgagees who had assigned their mortgages to G. A. M., who accepted service of it for them, saying in his acceptance that he was the assignee of their mortgages. The assignment to him was not registered:—Held, that J. M. and J. A. were not entitled to notice. The notice was not served upon E. M. and W. M., but the evidence shewed that their mortgage was paid

and satisfied:—Held, that they were not entitled to notice:—Held, also, that the notice was a good notice to G. A. M. in respect to all claims that he might have or profess to have in the matter:—Held, lastly, that, owing to the provisions of s. 8 of 63 V. c. 19, the provisions of s.-s. 5 of s. 6 of 62 V. (2) c. 16, providing for registration of notice of sale, did not apply to this case; here the sale was "effected" prior to the 1st January, 1900, and the conveyance when drawn would be "in pursuance" of that sale. *Fenwick* v. *Whitwam*, 21 Occ. N. 122, 1 O. L. R. 24.

Payment—*Agent of Mortgagee Advancing Money to Make up Interest Unpaid—Dual Character of Agent—Question whether Advance Made on Behalf of Persons Liable for Interest.*]—Plaintiff, residing in Ireland, was first mortgagee of a property upon which defendant held a second mortgage. Mr. Frank Cayley acted as agent for plaintiff in investing her money in a first mortgage upon this property. He also acted as agent for the owners of the equity of redemption in collecting the rentals of the property until July, 1904. Since that time he collected these rentals as agent for plaintiff, qua mortgagee in possession. The rentals received having proved insufficient, after satisfying such charges upon them as taxes, outlays for repairs, etc., to pay plaintiff's interest in full, Mr. Cayley from time to time advanced out of his own moneys, the sum required to make up the deficiency. Thus he remitted to plaintiff half-yearly the full amount of the interest accrued upon her mortgage during the previous six months. Plaintiff asserted that this amount was still due and owing as arrears of interest upon her mortgage; defendant insisted that Mr. Cayley's payments satisfied and extinguished plaintiff's claim for interest, and that only the principal moneys were outstanding: — Held, that the advances made by Mr. Cayley were never intended to be payments in satisfaction of plaintiff's claim for interest upon her mortgage, or to discharge the mortgaged premises therefrom. The facts do not bring the present case within Williamson v. Goold, 1 Bing. 171, and Carroll v. Goold, ib. 190, so much relied on by Mr. Denton. There the circumstances pointed clearly to payment in satisfaction being intended by the person who made it. Simpson v. Eggington, 10 Ex. 845, followed. Appeal allowed with costs here and below. *Glascott* v. *Cameron*, 6 O. W. R. 36, 10 O. L. R. 399.

Payment into Court of Surplus—*Competing Claimants of Fund—Costs.*]—A mortgage sale under power yielded a surplus of $320.20, out of which the mortgagee applied to pay into Court $246.89, being the amount of a judgment against the mortgagor, which the judgment creditor sought by suit to have paid out of the surplus as against the owner of the equity of redemption in the mortgage:—Held, that, on the mortgagee paying into Court the whole surplus, less the costs of his appearance and application, his name should be struck out of the suit. *Boyne* v. *Robinson*, 25 Occ. N. 75, 3 N. B. Eq. 57.

Payment of Arrears—*Acceleration.*]—The effect of the acceleration clause, No. 16, schedule B., of the Act respecting Short Forms of Mortgages, R. S. O. 1897 c. 126, is to give a right in every case to the mortgagor, his heirs and assigns, to pay all arrears and lawful charges, and the mortgagee has then no right to take further proceedings, except when a judgment has been recovered. The plaintiff, as assignee of the mortgagor, was entitled to restrain proceedings under the power of sale in the mortgage, upon payment of arrears of interest and costs, the principal not being due except under the acceleration clause. Robertson v. Hetherington, 8 C. L. T. Occ. N. 141, distinguished. *Todd* v. *Linklater*, 21 Occ. N. 184, 1 O. L. R. 103.

Pretended Sale — *Fraud — Purchasers for Value without Notice — Knowledge of Agent — Redemption — Acts of Parties to Fraud—Damage by.*] — On an appeal from the judgment of Meredith, C.J., 2 O. L. R. 134, 21 Occ. N. 438:—Held, that the defendant D. was not personally liable, as he committed no wrong in taking the assignment of the mortgage, and in exercising the power of sale wrought no change in the plaintiffs' rights, as the property in the hands of H., the purchaser, who became trustee for R., was redeemable unaffected by the sale. But the defendant H. was personally liable, as he was possessed of the legal title and had the legal power and control, and it was his sale and his act that prejudiced the plaintiff. Judgment below varied. *Smith* v. *Hunt*, 22 Occ. N. 429, 4 O. L. R. 653, 1 O. W. R. 598, 798.

Purchase Money — Default—Deficiency—Money in Court—Payment out. *Campbell* v. *Croil*, 6 O. W. R. 933.

Sale on Credit not Carried Out—*Removal of Building from Land—Inability to Reconvey Property in Original Condition—Liability of Mortgagee to Account for Price, though not Paid — Possession — Rents and Profits.*]—Action on a covenant by defendant for the payment of $700 and interest, contained in a chattel mortgage from him to plaintiff. Defendant sets up in answer to plaintiff's claim that the chattel mortgage was given as collateral security to a mortgage on a cheese factory and the land on which it stood, which he had given to plaintiff, and on which there remained due the $700 secured by the chattel mortgage; that plaintiff took possession of the property covered by both mortgages and sold it on 7th August, 1902, under the power of sale, which the mortgages contained, to Alvin W. Mitchell, for $750; that Mitchell subsequently sold the property for $1,000; that the machinery contained in the factory was immediately removed by Mitchell or his grantee; that the factory was dismantled by Mitchell, and "removed piecemeal several miles from the original location;" and that plaintiff, by these dealings with the mortgaged property, "was estopped from proceeding with an action on the covenant." Mitchell never completed the purchase nor paid anything on account of either purchase money or interest, and the factory remained closed and unused until it was taken down: — Held, in an alteration of the character or condition of the mortgaged estate, where the mortgagee was in a position to reconvey the whole of the land itself, that there was no good reason why he should not be entitled to recover the mortgage money after deducting from it what may be sufficient to compensate the mortgagor for the injury done to the mortgaged property by the wrongful act or default. Reference to Munsen v. Hauss, 22 Gr. 279:—Held, that plaintiff was bound to account for the whole of the purchase price

which was to have been paid by Mitchell. Plaintiff was not entitled, according to the terms of the powers, to sell on credit, but a sale made by a mortgagee on credit, if a real sale, is, according to the decided cases, a valid exercise of the power, if the mortgagee stands ready to account to the mortgagor for the price as so much money received by him in cash: Thurlaw v. Mackeson, L. R. 4 Q. B. 97. Judgment should be entered for plaintiff for the mortgage money and interest (including the costs of exercising the power of sale, which could be taxed if defendant so desired), less the amount of Mitchell's purchase money ($750), treating it as a sum received on 7th August, 1902.

Sale under Judgment — Purchase by a defendant—Vesting orders—Rescission—Reference as to title and accounts—Agreement — Ascertainment of amount due — Costs. *Campbell* v. *Croil*, 3 O. W. R. 862.

Service of Notice—*Fraudulent Scheme—Exchange—Notice by Solicitor's Knowledge.*]—In April, 1900, plaintiff mortgaged land to defendant McK. to secure $140 and interest; the whole to become due in the following December. The mortgage provided for sale on one month's notice, after one month's default. Shortly after the mortgage was made, plaintiff paid McK. $2.50 for interest. In January, 1901, plaintiff left the province, and returned in August, 1901. Until two weeks before leaving, plaintiff lived on the mortgaged land. Shortly after plaintiff left, his brother paid McK. $32 on the mortgage. About 25th February, 1901, McK. took proceedings to sell under the power of sale; a notice of intention to sell was fastened to the door of the house on the property, but not served on plaintiff personally. The property was advertised for sale by auction on 9th April, 1901. Before the sale McK. arranged with D. to bid as if for himself, but in reality for McK. D. bid, and the property was knocked down to him. A deed, purporting to be in pursuance of the power of sale, was executed by McK. to D., for the expressed consideration of $195, and a quit claim deed by D. to McK.'s wife, for the expressed consideration of $200. McK. paid for the drawing of both deeds; D. was paid $5, but otherwise no money was paid by or to him. Afterwards an exchange of properties was effected with one B., McK.'s wife executing a quit claim of the plaintiff's land in favour of B.:—Held, that the pretended sale to D. and the deed by D. to McK.'s wife were in pursuance of a fraudulent scheme by McK. to become the owner of plaintiff's land for much less than it was worth, and the sale was declared void. 2. That the service of the notice of sale was good. 3. It was contended that B. had notice of the fraud by having employed the same solicitor who had conducted the sale proceedings: — Held, that there was no presumption that the solicitor would communicate his knowledge to B., as it would be against his interest to tell. 4. The fact that on the day of the alleged mortgaged sale, B. found that the mortgagee or his wife claimed to absolutely own the land, was notice enough to put B. on inquiry. As she did not make such inquiry, she could not avail herself of her ignorance. The best position she could hold was that of an assignee of the mortgage. 5. A power of sale could not be exercised by an exchange of the land instead of by a sale for a price. Smith v. Spears, 22 O. R. 286, dissented from. *Winters* v. *McKinistry*, 22 Occ. N. 213.

Short Forms Act—*Sale without Notice.*]—The insertion of the word "calendar" before the word "month" in the words given in column one, number 13, of the second schedule to the Short Forms Act, R. S. M. 1902 c. 157, does not prevent the mortgagee getting the benefit of the wording of the corresponding long form, and, where the words of the short form above referred to were followed by the words "Should default be made for two months a sale or lease may be made hereunder without notice:"—Held, that these words were effectual to enable the mortgagee to make a valid sale and conveyance of the whole estate mortgaged, without giving any notice whatever of his intention to do so. *In re Cofler*, 23 Occ. N. 289, 14 Man. L. R. 485.

Surplus Proceeds—Distribution—Priorities—Receiver—Second mortgagee—Claim of receiver—Reference—Report—Order of Judge — Res judicata — Estoppel. *Milloy* v. *McClive*, 5 O. W. R. 799, 6 O. W. R. 800.

Tender of Mortgage Money — *Place and Time of.*]—The defendants under a power of sale in a mortgage advertised a sale of lands near Kincardine, to take place there on the 19th January. On the 17th January, at eleven a.m., the mortgagor telegraphed to the defendants at Toronto asking amount required to pay mortgage, to which the defendants telegraphed a reply. At ten a.m. on the 19th January the defendants received at Toronto the amount named, but, in accordance with their office procedure, the accountant was not aware of this till about eleven a.m., when, knowing the property was up for sale, he telegraphed and telephoned the fact to Kincardine. The sale had, however, been made a few minutes before to the plaintiff. The defendants then returned the money to the mortgagor:—Held, that the plaintiff was entitled to specific performance, for the mortgagor had not tendered the amount at such a reasonable time before the sale as to make it obligatory to receive it as payment. *Gentles* v. *Canada Permanent and Western Canada Mortgage Corporation*, 21 Occ. N. 143, 32 O. R. 428.

VIII. Subsequent Incumbrances.

Collateral Security—*Release—Discharge of Mortgage—Rights of Second Mortgagee—Principal and Surety—Priorities.*]—A mortgage, made to the plaintiffs, by a married woman, whose husband was a party, but did not join in the covenants, was given as collateral security for the payment of certain promissory notes made by the husband and wife to secure the husband's indebtedness. Further liabilities were incurred by the husband and payments made on account, and subsequently the whole indebtedness was adjusted, the plaintiffs taking the notes of the husband alone, maturing at several future dates, in substitution of the original notes, which the plaintiffs agreed to cancel and deliver up:—Held, that the effect of what took place was to extinguish the liability on the notes secured by the mortgage, and therefore the mortgage itself given as collateral security therefor, and which enured to the benefit of the holders of a second mortgage

also given by the husband and wife, and that the rights so acquired were not affected by an agreement subsequently entered into between the wife and the plaintiffs that the plaintiffs' mortgage should be considered as still subsisting. *Waterous Engine Works Co.* v. *Livingston*, 24 Occ. N. 338, 7 O. L. R. 740, 3 O. W. R. 670.

Execution Creditors — *Sale—Surplus—Collateral Security.*] — Execution creditors, though they probably cannot sell under their writs the interest of their execution debtor in land subject to more than one mortgage made by him, are nevertheless incumbrancers upon that interest, and upon the proceeds thereof in the event of a sale of the land by a mortgagee, and entitled to payment thereout according to priority. A mortgagee who sells the land and pays off an incumbrancer who holds, to his knowledge, collateral security, must take over that collateral security for the benefit of execution creditors, and is liable to them for the value thereof if he fails to do so. Judgment of a Divisional Court, 31 O. R. 552, 20 Occ. N. 66, affirmed; Maclennan J.A., dissenting. *Glover* v. *Southern Loan and Savings Co.*, 21 Occ. N. 105, 1 O. L. R. 59.

Priorities — *Payment by Sale of Other Property — Improvements — Security.*] — Action for a declaration of hypothec of immovables. The defendant moved for security that the immovables should be sold for an amount sufficient to pay him the whole of his claim, which he alleged was prior to the claim of the plaintiff, and that his hypothec was also prior. The plaintiff replied that the defendant had been paid his privileged or prior claim by the sale of other immovables hypothecated for the same debt. The defendant rejoined that he had not been paid his entire debt, and that a certain sum received by him had been expended in improvements on the property. The plaintiff denied the improvements, and alleged that, in any event, they were off-set by the rents and profits. Finally, the defendant denied the off-set:—Held, that the defendant had not proved his improvements; that he had received from the sale of the other immovables a sum exceeding his claim; that his debt was therefore extinguished, and he was not entitled to security. *Desjardins* v. *Bastien*, 4 Q. P. R. 264.

Rents and Profits—*Collateral Indebtedness—Appropriation of Receipts.*]—A mortgagee, in receipt of the rents and profits of the mortgaged premises, from time to time sold goods to the mortgagor, and the latter upon a settlement of accounts assented to the receipts being applied first in payment of the account for goods sold:—Held, that an incumbrancer whose rights accrued after the settlement could not complain of this, and was not entitled to take the position that the rents and profits necessarily and irrevocably reduced the mortgage debt as they were received. *Mitchell* v. *Saylor*, 21 Occ. N. 224, 1 O. L. R. 458.

IX. Other Cases.

Account—*Payments by Mortgagees—Release of Claim — Improvements — Solicitor—Negotiation of Sale — Commission.*] — Mortgagees of land, the mortgage being in default, made an agreement for sale to C., who paid nothing, but entered into possession and made improvements, and in order to do so borrowed money from N., and assigned to N. his agreement from the mortgagees; the agreement and the assignment were registered. The mortgagees found another purchaser, and paid N. a sum of money for a release of his claim:—Held, that upon an accounting by the mortgagees, at the suit of the mortgagors, on the basis of the second sale, the mortgagees were entitled to credit for the money paid to N.:—Held, also, that they were entitled to credit for a small sum paid to their solicitor for negotiating the second sale—a service which comes within the scope of the professional duties and employment of a solicitor. *Laws* v. *Toronto General Trusts Corporation*, 24 Occ. N. 395, 8 O. L. R. 522, 3 O. W. R. 634, 4 O. W. R. 164.

Action—*Judgment — Subsequent Settlement—Failure to Carry Out—Account—New Day—Reference.*]—A motion by the plaintiff in a mortgage action for an order for a new day and a new account, and to change the relief sought from sale to foreclosure, was opposed on the ground of an agreement for a compromise after judgment under which money had been paid to the plaintiff, the mortgagee:—Held, that if the defendant mortgagor had made default in payments according to the agreement, the unmodified burden of the mortgage existed and was enforceable. Such an arrangement should be investigated in the Master's office, and not by independent litigation. The matter has passed into judgment, and the only matter between the contestants was one of account—how much was due and payable in respect of the mortgage, having regard to the arrangement manifested in the correspondence and dealings subsequent to the Master's report. It was foreign to the policy of the Judicature Act to contemplate new litigation in such a case as this: s. 57, s.-s. 12. *McCollum* v. *Caston*, 21 Occ. N. 189, 235, 1 O. L. R. 240.

Advances for Building — Mechanics' liens—Priority—Subrogation — Agreement to postpone. *Colonial Investment and Loan Co.* v. *McCrimmon*, 5 O. W. R. 315.

Building on Adjacent Lot Projecting on Mortgaged Land—Reformation—Construction—General words—Short Forms Act—Description—Plan—Title—Registry laws—Appeal—Costs. *Fraser* v. *Mutchmor*, 4 O. W. R. 290.

Chattel Mortgage—*Mortgage on Lands as Additional Security — Appropriation of Goods by Mortgagee—Statute of Limitations—Power of Sale—"Proceeding."*] — A mortgage on lands was given as additional security for the amount secured by a chattel mortgage. On default in payment, a warrant was issued under the chattel mortgage, and the goods were seized and taken out of the mortgagor's possession. Although a form of sale was gone through, no sale actually took place, but the goods were taken possession of by the mortgagee and appropriated to his own use. More than 10 years afterwards, the mortgagor's possession of the land not having been in any way interfered with, an assignee of the mortgagee attempted to exercise the power of sale in the mortgage of the lands:—Held, that the intended sale was a "proceeding" within the meaning of s. 23 of R. S.

O. 1897 c. 133, which the assignee was precluded from taking, under that section, after 10 years. The mortgagee of the chattels, having appropriated them to his own use, and being unable to restore them in proper plight, could not enforce payment of the mortgage debt. *McDonald* v. *Grundy*, 24 Occ. N. 356, 8 O. L. R. 113, 3 O. W. R. 731.

Costs—*Excessive Demand—Tender.*]—Demanding much more than is afterwards found to have been due is not such misconduct on the part of a mortgagee as will deprive him of his costs. To relieve the mortgagor from liability to costs he must make an unconditional tender of the amount actually due. *Daigneau* v. *Dagenais*, 23 Occ. N. 90, 5 O. L. R. 265.

Costs of Mortgagee—Unnecessary proceedings — Tender — Waiver. *Middleton* v. *Scott*, 4 O. L. R. 459, 1 O. W. R. 536, 632.

Covenant—Release — Right of Way—Action on by mortgagee after release—Further evidence. *Re Thurcsson, McKenzie* v. *Thurcsson*, 3 O. L. R. 271, 1 O. W. R. 4, 437.

Covenant against Incumbrances — Breach — Damages — Costs — Payment into Court. *Hixon* v. *Wild*, 2 O. W. R. 165.

Enforcement—Defence of payment—Reference — Scope of—Specific performance of agreement—Parties—Evidence of statements made by deceased person — Inadmissibility — Reversing findings of Master — Burden of proof. *Lemon* v. *Lemon*, 3 O. W. R. 734.

Equitable Mortgage—*Mining Leases—Priorities—Judgment Creditor—Sheriff's Sale—Purchaser—Notice.*] — A company incorporated under the laws of the State of New York executed in New York a mortgage of lands in New Brunswick, and of minerals therein, while the title to the latter was in the Crown, the law of New York, unlike that of this province, not reserving minerals to the State. Mining leases subsequently were issued by the Crown to the company. A judgment creditor of the company, with notice of the mortgage, purchased the leases at a sheriff's sale, under an execution upon his judgment, and paid to the Crown rent overdue upon the same, whereupon new leases were issued in his own name, the Crown having no knowledge of the mortgage:—Held, that the new leases were subject to the mortgage. Semble, that the title of the judgment creditor would have been postponed to that of the mortgagee, though he had been a purchaser without notice of the mortgage. *Continental Trusts Co.* v. *Mineral Products Co.*, 25 Occ. N. 67, 3 N. B. Eq. R. 28.

Loan Association—*Collateral Security—Advance of Maturing Shares—By-law Changing Mode of Payment—Covenant.*]—Where a mortgage of real estate by a member of a loan association incorporated under R. S. O. 1887 c. 169, executed to secure collaterally an advance to him of the amount of the maturity value of certain of his shares in the association, contained a covenant by the mortgagor that the monthly payments would be made according to the by-laws of the association until the shares should have matured, and also that he would make the several payments provided by the by-laws for the time being with respect to shares and the payment thereof:—Held, that the association had power, by by-law passed subsequent to the execution of the mortgage, to change the mode of payment, which, according to the mortgage, was by fixed monthly instalments, to a provision by which when the shares matured the mortgage should be released. *Williams* v. *Dominion Permanent Loan Co.*, 1 O. L. R. 532.

Mortgagee Dealing with Property—*Power to Reconvey—Action on Covenant—Right of Way.*]—A mortgagee, being compellable under his mortgage to discharge at any time any portion of the land described in it, having not less than 20 feet frontage, upon payment of a certain sum per foot frontage, not only discharged a certain portion of the land upon payment of a certain sum, but also assented to a right of way across the whole of the property, which right of way had been granted by the owners of the equity of redemption to the purchaser of a portion of the mortgaged lands, and released the right of way from his mortgage: — Held, that the mortgagee having debarred herself from restoring the estate covered by the mortgage, unaltered in character and quantity, in a manner unauthorized by the terms of the mortgage, owing to the right of way, an assignee of the mortgage could not claim under the covenant therein in an administration of the mortgagor's estate. It is proper, however, in such a case that the mortgagee claiming under the covenant should have an opportunity within a limited time to put himself in a position to restore the estate upon payment of the mortgage money, and so twenty days were allowed for that purpose. *In re Thurcsson, McKenzie* v. *Thurcsson*, 22 Occ. N. 51, 3 O. L. R. 271.

Mortgagee in Possession — Statute of Limitations—Payment by rents and profits—Account—Reference. *Chambers* v. *McCombe*, 1 O. W. R. 689.

Payment—Credit—Set-off—Agreement — Death of mortgagee—Sale by administrators under power—Proof against administrators—Corroboration—Statute of Limitations—Account. *Mooney* v. *Provincial Trust Co.*, 3 O. W. R. 337.

Payment—Evidence—Admissibility—Contract—Specific performance—Credit for sum paid—Burden of proof—Scope of reference. *Lemon* v. *Lemon*, 5 O. W. R. 36.

Payment of Instalment — Subsequent advance — Special agreement — Effect of—Costs. *Griffiths* v. *Mackenzie*, 3 O. W. R. 777.

Proposal for Mortgage—*Liability for Expenses—Agreement—Solicitor's Costs—Expenses of Appraisement — Commission to Agent.*]—The defendant applied to the plaintiffs for a loan on mortgage, but the loan was not completed through no fault of the plaintiffs. They sued the defendant for solicitor's costs, costs of appraisement, and brokerage at 1 per cent. on the sum they were ready to advance, and they relied on the following clause in the written proposal made to them: "If the loan for any cause should not be completed, I agree to pay all expenses incurred:"—Held, as to the solicitor's costs and expenses of appraisement, the charges being reasonable, and being for services rendered to

the defendant at his request, that the plaintiffs were entitled to recover, but as to the item of commission at 1 per cent. on the gross amount of the loan, that this could not be properly included under the word "expenses," because the money was not earned, and the plaintiffs would not be legally justified in paying it unless it were an expense properly incurred; the brokerage or commission, under the circumstances of the case, being only payable on completion of the loan to the plaintiff's agents. *British Columbia Provincial Loan Assn.* v. *Charnock*, 22 Occ. N. 155.

Rectification — *Limitation of Actions — Real Property Limitation Act—Interest.*] — In 1882 the defendant mortgaged land to the plaintiffs to secure a loan. The plaintiffs asserted that it was intended by both parties that the mortgage should include the outer two miles as well as the inner two miles of lots 18 and 19, and that the outer lots were omitted by mutual mistake:—Held, on the evidence, that the mortgage deed should be rectified. The defendant paid interest up to the 25th November, 1883. In 1885 the defendant wrote to the plaintiffs asking for a discharge of part of the outer two miles which had been taken for a railway, and the plaintiffs executed the discharge and received payment of compensation from the railway company. The defendant left the land in 1892, and his brother-in-law afterwards cut hay upon it. The defendant paid no taxes since 1887. The plaintiffs paid all taxes from that year:—Held, that the Real Property Limitation Act did not begin to run in the defendant's favour till 1885, and did not continue to run after he abandoned the land in 1892; he thus had no more than 8 years of adverse possession. The principal became due in May, 1884. The contract to pay interest then ceased, and interest thereafter was recoverable only as damages, at the statutory rate, and for only 6 years before action. The statutory rate would be 6 per cent. up to 7th July, 1900, and 5 per cent. since: 63 & 64 V. c. 29 (D.). Judgment for rectification and foreclosure in default of payment; no personal order for payment, as the statute had barred the remedy on the covenant. *British Canadian Loan Co.* v. *Farmer*, 24 Occ. N. 273.

MORTMAIN.

See CHURCH—WILL.

MUNICIPAL CORPORATIONS.

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I. ARBITRATION.

Limitation of Actions — *Mandamus.*] —The limitation of one year prescribed by s. 244 of the Municipal Clauses Act for commencing actions against a municipality, applies to mandamus proceedings to compel a municipality to appoint an arbitrator to determine the amount of compensation for land taken for road purposes. *Regina* v. *District of Mission*, 21 Occ. N. 398, 7 B. C. R. 511.

II. BONUS.

By-law — *Promotion of Manufactures—Removal of Industry "Already Established" —Motion to Quash Registered By-law—Delay.*]—By s. 9 of the Municipal Amendment Act, 1900, a new sub-section, 12, is added to s. 591 of the Municipal Act, R. S. O. 1897 c. 223, which new section provides that councils of municipalities may pass by-laws for granting aid by way of bonus for the promotion of manufactures within the limits of the municipality, but (e) "no by-law shall be passed by a municipality for granting a bonus to secure the removal of an industry already established elsewhere in the province:—Held, that by-laws of a town granting aid to persons who were carrying on a manufacturing business in a village, and who, as the by-law recited, were about to remove their plant and machinery and carry on the same business in the town, were illegal under cl. (e), notwithstanding that these persons had determined, before negotiating with the town, to remove their business from the village at all events, and to such other place as should offer the largest inducement. The by-laws were quashed upon an application made within three months after they were registered, and nearly three months after they were passed, notwithstanding that the industry had been in the meantime established in the town and the money paid over

to the manufacturers. *In re Village of Markham and Town of Aurora*, 22 Occ. N. 205, 3 O. L. R. 609, 1 O. W. R. 289.

Interest — *Illegal Payment—Liability of Councillors—Arbitration and Award.*] — In the year 1899, by special Act, an agreement between the corporation of a town and a company was confirmed, by which on completion of certain works the company were to be paid a bonus. The works were proceeded with, but alterations became necessary, and a new agreement was entered into, in accordance with which the works were completed in January, 1900. In April of that year another special Act was obtained authorizing the payment of the bonus notwithstanding the alterations, nothing being said as to interest. The bonus was thereupon paid, and the company claimed payment of interest on the amount from the date of completion of the works. After some negotiation, the town and the company agreed to obtain the opinion of counsel, who, on an incomplete (as was found) statement of facts, advised the payment of the claim, and payment was made in spite of the protest of the plaintiff:—Held, in an action by the plaintiff on behalf of himself and all other ratepayers, that there was no right to interest; that the payment was illegal and a breach of trust; that there had not been an award by an arbitrator but merely an expression of opinion, which was no protection, and that the councillors who had authorized the payment, and the company who had received it, were bound to make good the amount to the corporation, which was made a party to the action to receive payment. Semble, that the council of a municipal corporation may perhaps refer to arbitration a question of fact falling within their ordinary administrative duties, but cannot refer a question of law. *Patchell* v. *Raikes*, 24 Occ. N. 212, 7 O. L. R. 470, 3 O. W. R. 457.

Manufacturing Corporation — *By-law Closing Part of Highway—Private Interest—Bonus Clauses of Municipal Act—Reducing Width of Street—Rights of Owners Purchasing According to Plan.*] — A municipal corporation passed a by-law to reduce width of a street and conveyed to a manufacturing corporation the part taken from the street as a bonus. There was no contract between the manufacturing and municipal corporations that the manufacturing corporation should employ additional men nor enlarge their plant:—Held, that this fact alone did not invalidate the by-law nor prove that the by-law was passed in interests of a private corporation and not in the interests of the public. The plaintiff purchased lands on the street in question according to a registered plan:—Held, that the fact that the registered plan shewed the street to be 80 feet in width did not prevent the municipality passing a by-law to reduce its width to 66 feet. *In re Inglis and City of Toronto*, 5 O. W. R. 489, 9 O. L. R. 562.

Personal Interest of Councillors — *Necessity for By-law—Approval—Limitation of Actions.—Municipal Code.*]—No member of a council can take part in the discussion of any question in which he has a personal interest. 2. The aid to a factory must be granted, not by a simple resolution, but by a by-law approved by the municipal electors and the Lieutenant-Governor in council. 3. The prescription enacted by art. 708, M. C., does not apply to regular actions in the Superior Court, but only to proceedings taken under the code. *Beauregard* v. *Village of Roxton Falls*, Q. R. 24 S. C. 474.

Res Judicata—*Construction of Aqueduct — Exclusive Privilege—Monopoly.*]—To an action brought to recover a bonus of $3,000 voted for the construction of an aqueduct, a municipal corporation cannot plead matters which it has already invoked and which have been pronounced against in an action which has been finally dismissed by the Supreme Court of Canada, and which was instituted by such corporation to set aside the contract in pursuance of which the bonus was voted. 2. A municipal corporation may pass a by-law granting a bonus to persons who undertake to construct an aqueduct within the limits of the municipality. 3. A municipal corporation, by virtue of art. 637, C. M., may grant an exclusive privilege for not more than 25 years to persons who undertake to construct an aqueduct within the limits of the municipality. Such privilege, if it is limited to the exclusive right to lay pipes in the streets, is not unconstitutional and does not constitute an illegal monopoly. 4. Even if the terms in which such privilege has been granted are of such a nature as to extend this privilege to a period exceeding 25 years, that would not make the contract and by-law totally void, and the bonus granted by such contract and by-law for the construction and working of the aqueduct can always be claimed. *Larivière* v. *Town of Richmond*, Q. L. 21 S. C. 37.

III. Boundaries.

Assessment of Island—*Shore or Coast Line.*]—Itala or Eagle Island is within the boundaries of the municipality of North Vancouver. The meaning of "coast" line and "shore" line considered. *Mowat* v. *Municipality of North Vancouver*, 9 B. C. R. 205.

Charter — *Title to Fisheries.*]—By its charter the city of St. John is granted "all the lands and waters thereto adjoining or running in, by, or through the same" within defined boundaries, including a course at low water mark: "as well the land as the water, and the land covered with water within said boundaries." The fisheries between high and low water mark of the harbour are declared by the charter to be for the sole use of the inhabitants, but by Act of Assembly they are directed to be annually sold by the city:—Held, that where the city is bounded by low water mark it has not a title to sell the right of fishing beyond such mark, though within the harbour. *City of St. John* v. *Wilson*, 22 Occ. N. 209, 2 N. B. Eq. Reps. 398.

IV. Bridges.

Non-repair — *Judgment for Damages—Contribution by Ratepayers—Assessment.*]—A municipal corporation cannot, under arts. 1027 et seq., C. M., levy by way of assessment from the ratepayers liable for the maintenance of a bridge the amount which such corporation has been condemned to pay by

a judgment against the corporation for damages arising from an accident which happened by reason of the bridge being out of repair. Such a debt, resulting from a quasi-tort, is due severally by all those who are charged with the maintenance of the bridge, and cannot be apportioned among them according to the extent of their properties and in the proportion in which they are liable for the work of the bridge. *Pinsonnault* v. *Corporation of St. Jacques le Mineur*, Q. R. 18 S. C. 385.

Re-construction — *Urgency — Irregular Resolutions—Liability for Cost—Borrowing—Levying Rate.*]—The council of a municipality had in July, 1895, by a simple resolution, declared that bridges and roads should be at the charges of the municipality, and in August, 1895, also by resolution, it was decided to re-construct, at the expense of the corporation, a certain bridge. The re-construction work having been done, the council on the 14th October, 1895, resolved to pay the accounts of those who had done it, and on the 4th November, 1895, the mayor was authorized to borrow $300 for this purpose upon a promissory note, which he did. On the 7th January, 1896, a by-law was passed ordering a levy upon the municipality, among other sums, of $310.50 for the cost of re-construction of this bridge. The resolutions of July and August were quashed by the Superior Court (in a proceeding begun on the 1st October, 1895, the works being then nearly finished), upon the ground that the council having jurisdiction over the matter should have proceeded by by-law coming into force on the 1st January following; and in the present case, there was nothing in the evidence to shew that the bridge was a municipal bridge at the charges of all the owners or occupants of properties fronting on the road of which this bridge formed a part, or that it was a part of the works of the watercourse which it crossed and at the charges of the ratepayers who were liable therefor: — Held, Blanchet, J., dissenting, that, in adopting the two resolutions of July and August, the corporation had only acted in an irregular manner in a matter within its jurisdiction; that having caused to be performed the work of re-construction — which was urgent—in virtue of such resolutions, it had made itself liable to those who had done the work; and that it could borrow money upon a promissory note to pay those persons and assess upon the municipality an amount sufficient to repay the loan. *Corporation of Notre-Dame de Bonsecours* v. *Bessette*, Q. R. 9 Q. B. 423.

Undertaking to Repair and Maintain Bridge—Contract with ratepayers — Enforcement — Remedy by indictment. *Thompson* v. *Township of Yarmouth*, 1 O. W. R. 556.

V. By-laws.

Application to Quash — Affidavits — Time for filing. *Re Fox and Town of Owen Sound*, 3 O. W. R. 654.

Application to Quash — *Countermand —Substitution of Another Ratepayer.*] — A summary application to quash a municipal by-law was made at the instance and upon the behalf of nine interested ratepayers, who combined to make the necessary deposit, and put forward R, one of their number, as applicant. R. duly launched the application, but afterwards gave the respondents notice of discontinuing it. After the three months allowed by the Municipal Act for making such an application had expired, the application of R. not, however, having been dismissed, one of the remaining ratepayers applied to be added or substituted as an applicant:—Held, that he should be allowed to continue the proceedings in R.'s name, on the usual terms of indemnifying him against costs. *In re Ritz and Village of New Hamburg*, 22 Occ. N. 410, 1 O. W. R. 574, 690, 4 O. L. R. 639.

Application to Quash—Time for—Registration of by-law. *Re McClelland and Village of Sutton*, 3 O. W. R. 278.

Application to Quash—*Vacation.*] — The court has no jurisdiction, during vacation, to hear a petition to annul a by-law of the city of Montreal. *Franklin* v. *City of Montreal*, 5 Q. P. R. 76.

Billiard Rooms — Licensing powers — Provisions as to times for closing—Lord's day observance—Constitutional law—Provision as to screens—Discrimination. *Re Fisher and Village of Carman* (Man.), 1 W. L. R. 455.

Cattle — *Highway—License Fee.*]—A by-law passed by a township council under s. 546 (2) of R. S. O. 1897 c. 223, prohibiting the running at large of cattle, horses, sheep, swine, or geese, and for impounding those contravening the by-law, was amended by a by-law subsequently passed, whereby milch cows, heifers, and steers under two years, were permitted to graze on the public highways of the township, on payment of an annual fee of $2 for each animal, such animal to have securely fastened thereon a tag bearing a registered number, furnished by the clerk at the township's expense, the township also furnishing a book to contain such registered numbers, all moneys received to be the common property of the township. The by-law also contained a provision for the appointment of inspectors:—Held, that the amending by-law was valid; that the sum named as a license fee was not excessive, and was merely for the purpose of meeting the expenses of carrying out the by-law, and not for raising a revenue; and that the permission to graze on the highways was not ultra vires of the corporation. In re Fennell and Corporation of Guelph, 24 U. C. R. 238, distinguished. *In re Ross and Township of East Nissouri*, 21 Occ. N. 287, 1 O. L. R. 353.

Closing Road Allowance — *Notice of —Sufficiency—Providing Way.*]—A farm lot occupied by the owner as one farm was diagonally divided by a railway into two separate parcels, having a farm crossing provided by the railway company, giving access from one parcel to the other. In addition to a road which afforded access to the parcel where the residence was, there was another road which gave access to the other parcel, and which, except by the farm crossing, was the only mode of access thereto:—Held, that the latter road came within s. 629 (1) of R. S. O. 1897 c. 223, and could not be closed

up by the municipal council, unless, in addition to compensation, another road or way was provided in lieu thereof. A by-law passed by the council directing the closing up of such road, without the requirement of the statute being complied with, was therefore quashed. Order of Boyd, C., 21 Occ. N. 122, reversed. Per Boyd, C.: A notice providing that any one desiring to petition against the passing of a by-law to close a road must do so within one month from the date thereof, is sufficient under s. 632 (1) (a) of the Act. *In re Martin and Township of Moulton*, 21 Occ. N. 376, 1 O. L. R. 645.

Closing of Saloons — *Bar-rooms—Sunday Closing—Powers of Municipality—Liquor Traffic Regulation Act.*]—Appeal by way of case stated from a conviction by the police magistrate for Nanaimo, whereby the appellant was convicted under a Sunday observance by-law, the offence being that of being found in the bar-room of the Crescent Hotel between 10 and 12 p.m. on Sunday, contrary to the provisions of the by-law. By the Liquor Traffic Regulation Act, liquor is prohibited from being sold between 11 p.m. on Saturday and 1 a.m. of the Monday following, and also during any other days or hours during which the place is to be kept closed by order of municipal by-law:—Held, setting aside the conviction, that a municipality has no power under s. 50, s.-ss. 109 and 110, of the Municipal Clauses Act, to pass a by-law closing any kind of licensed premises except saloons. 2. A municipality is not empowered, by s. 7 of the Liquor Traffic Regulation Act, to pass any closing by-law, the intention of the section being to prohibit the sale during, inter alia, such hours as may be prescribed by the municipality under the authority of some other statute. 3. Where a statute creates offences and provides the necessary machinery for the carrying out of its provisions, a by-law to put it in force is unnecessary and bad. *Hayes* v. *Thompson*, 22 Occ. N. 422, 9 B. C. R. 249.

Closing Street — *Ordinance Lands — Dominion of Canada — Consent — Void By-law — Subsequent Consent — Amending By-law.*] — The Consolidated Municipal Act, 3 Edw. VII. c. 19, s. 628, provides that, without the consent of the Government of the Dominion of Canada, no municipal council shall pass a by-law for the stopping up or altering the direction or alignment of any street made or laid out by the Dominion of Canada, and a by-law for any of the purposes aforesaid shall be void unless it recites such consent. On the 26th September, 1904, the municipal council of Toronto passed by-law 4420, stopping up and closing a certain portion of Strachan avenue in that city. It was afterwards discovered that Strachan avenue was a street which had been laid out by the Dominion of Canada, being part of the Ordinance survey, and the consent of the Dominion Government was sought and given by an order in council of the 6th October, 1904. On the 10th October, 1904, the city council passed by-law 4428 amending by-law 4420 by reciting the consent of the Dominion Government. A motion to quash the by-law was launched, and notice served on the 1st October, 1904, before the passing of the amending by-law:—Held, that when by-law 4420 was passed, the powers of the city council were spent, and, as it was a void by-law by reason of the consent of the Dominion Government not having been obtained, it could not be given life and rendered valid by the subsequent consent of the Dominion Government and the passing of the amending by-law, and must be declared invalid. *In re John Inglis Co. and City of Toronto*, 24 Occ. N. 396, 8 O. L. R. 570, 4 O. W. R. 253.

Closing Street—Private interests — Notice to persons affected—Increased expense of maintenance. *Re Waterous and City of Brantford*, 4 O. W. R. 355.

Diversion of Road—Interests of individuals—Contrary to public interest. *Re Pelot and Township of Dover*, 1 O. W. R. 792.

Dog Tax—*Summary Conviction—Amendment — Duplicity — Special Act — Application of General Act.*]—Amendment of clerical errors is permissible after proof, in summary matters. 2. Allegation of violation of two clauses of a by-law is not a cause for the dismissal of a complaint. 3. The Town Corporations Act clauses are not applicable against the special authorization of a city charter. 4. The head of a household, inscribed as a voter on the valuation roll, is liable for the dog tax. *Bell* v. *Parent*, Q. R. 23 S. C. 235.

Early Closing of Shops—*Ultra Vires—Penalty — Imprisonment—Special Charter—Private Rights.*]—It is ultra vires of a municipal corporation to pass a by-law ordering the early closing of shops, and imposing for an infraction thereof, a penalty with the alternative of imprisonment, under the sole authority of 57 V. c. 50, when there is no specific provision in its charter to pass such a by-law. 2. When a municipality is acting under a special charter the provisions of the Municipal Code do not apply. 3. A by-law containing a penal clause with alternative of imprisonment, must be directly and specifically authorized by the Legislature. 4. Semble, that a by-law ordering the closing of all shops at a certain hour is tyrannical, oppressive, arbitrary, not in the general interest of the public, and an unwarrantable and unjust interference with private rights. *Town of Coaticook* v. *Lothrop*, Q. R. 22 S. C. 225.

Enforcement — *Mandamus.*]—A municipal corporation will not be ordered by mandamus to enforce its by-laws, any person of full age having the right to institute a prosecution against those who contravene such by-laws. *Perron* v. *Village of Belœil*, 6 Q. P. R. 408.

Enforcement — *Penalty—Fine and Imprisonment.*]—Municipal councils can inforce their by-laws only by fine or imprisonment, and not by both at once. *Bigaouette* v. *Corporation de la Petite Rivière*, Q. R. 25 S. C. 220.

Establishment of Municipal Electric Light Plant—Issue of debentures — Voting on by-law—Irregularities—Defective publication—Failure to appoint day for final consideration by council—Curative provisions of Municipal Act—Special Act. *Re Cartwright and Town of Napanee*, 6 O. W. R. 773, 11 O. L. R. 69.

Explosives — *Statute—Construction — Ejusdem Generis Rule—Constitutional Law —Petroleum Inspection Act.*]—The defendant was convicted for a breach of a city by-law, which enacted that no larger quantity than three barrels of rock oil, coal oil, or other similar oils, nor any larger quantity than one barrel of crude oil, burning fluid, naphtha, benzole, benzine, or "other combustible or dangerous materials," should be kept at any one time in a house or shop in the city, except under certain limitations. The by-law was passed under s.-s. 17 of s. 542 of the Municipal Act, R. S. O. c. 223, such section being headed, "Storing and Transportation of Gunpowder," and providing "for regulating the keeping and storing of gunpowder and other combustible or dangerous materials," and being one of a group of sections under division VI. of the Act, headed, "Protection of Life and Property," sub-division 3 of the said division, which included s. 542, being under the heading "Prevention of Fires:"—Held, that s.-s. 17 authorized the passing of the by-law, and that the conviction could be supported thereunder, for that the words "other combustible or dangerous materials" were not limited by the ejusdem generis rule to gunpowder or other similar substances, but would include the substances set out in the by-law; and that such legislation was not superseded by Dominion legislation, for the Petroleum Inspection Act, 1899, 62 & 63 V. c. 27 (D.), dealing with the subject, was expressly made conformable thereto. *Rex* v. *McGregor*, 22 Occ. N. 290, 1 O. W. R. 358, 4 O. L. R. 198.

Factories — *Regulation of Location of—Decision as to Locality Left to Council—By-law should Designate Places.*]—A by-law of a municipal corporation, by which "the establishment or operation within the limits of this municipality of any factory, saw mill, or other mill run by steam is forbidden without in the first place conferring with the council, and obtaining permission to erect such mill, said council to determine beforehand the places in the municipality where such mills may be established," is null and void, as not complying with the provisions of arts. 616 and 648, C. M.; and a by-law of this kind, to be valid, should contain in plain terms an enumeration of all the conditions on which the council will give leave to build, and should designate the places in the municipality where such works may be established. Judgment in Q. R. 24 S. C. 461, reversed. *Village of Ste. Agathe-des-Monts* v. *Reid*, Q. R. 26 S. C. 379.

Fireworks—Discretion as to enforcement —Injury to person—Nonfeasance. *Brown* v. *City of Hamilton*, 4 O. L. R. 249, 1 O. W. R. 271.

Formation of New School Section—Publication of by-law—Filing notice to quash —Laches—Uncertainty as to land included—Notice to dissentients—Pending appeal—New territory of township — Provision for only part. *Re White and Township of Sydenham*, 3 O. W. R. 631.

Guaranteeing Debentures of Company — *Approval of Governor in Council—Hypothec — Revenues — Debenture Holders.*]—1. A by-law authorizing a municipal corporation to guarantee debentures issued by a company, is not valid until it has been approved by the Lieutenant-Governor in council. 2. A general hypothec given by a company on its present and future property is null; and where special authority is conferred on a company by its charter to give such hypothec in favour of its creditors, or of the holders of bonds, debentures, and other securities, such special authority does not enable the company to give a valid general hypothec on present and future property in favour of a municipal corporation which has become surety for the debentures of the company. 3. In any event, the guaranty of the corporation, under the by-law in this case, was only to pay over two-thirds of the revenues collected, and as no revenues had been collected the action could not be maintained. 4. The warranty being invalid, even innocent holders of the debentures issued have no action against the warrantor (the municipal corporation.) *Village of Pointe Gatineau* v. *Hanson*, Q. R. 10 K. B. 346.

Houses — *Construction of—Conviction—Certiorari.*]—A municipal by-law may forbid the construction of houses of less than two storeys which are not cottages, and a conviction under such a by-law will not be quashed upon certiorari. *St. Pierre* v. *City of St. Henri*, 5 Q. P. R. 362.

Illegality—*Limit of Time for Attacking —Meeting of Council—Notice—Minutes — Time for By-law Going into Operation.*]—The right to attack a municipal by-law for illegality is prescribed after 30 days, counting from its coming into force: art. 708 of the Municipal Code. 2. The absence of any mention in the minutes of the meeting of a municipal council at which a by-law had been attacked, that notice of the meeting has been sent to the absent councillors, is without effect upon the validity of the by-law, if in fact that notice has been given. 3. By-laws, unless the contrary is expressed, come into force 15 days after their promulgation, and a notice given by the secretary-treasurer of a corporation that a by-law would come into force 30 days after the notice, has not the effect of retarding the coming into force of the by-law. *Filiatrault* v. *Corporation of Cotcau Landing*, Q. R. 21 S. C. 302.

Illegality — *Rules of Construction.*]—A by-law having for its object the closing of the Craigflower road read thus: "That portion of the Craigflower road by-law No. 327, being the 'Craigflower road re-opening by-law, 1900,' declared to be a public highway, is hereby stopped up and closed to public traffic." The word "by" was omitted inadvertently from between "road" and "by-law," and by the strict grammatical construction a former by-law dealing with the same road was declared closed instead of the road itself:—Held, that the words "by-law No. 327, being the Craigflower road re-opening by-law," in the enacting clause, should be regarded as a parenthetical expression and as descriptive of the portion of the road referred to, thus giving the by-law a sensible meaning and the one intended. The Court will not hold any legislation to be meaningless or absurd unless the language is absolutely intractable. *Esquimalt Waterworks Co.* v. *City of Victoria*, 24 Occ. N. 105, 10 B. C. R. 193.

Invalidity of—Payment of money under —Recovery from corporation. *Cushen* v. *City of Hamilton*, 4 O. L. R. 265, 1 O. W. R. 441.

Invalidity—*Remedy — Petition to Quash —Action.*]—Although, by virtue of the provisions contained in ss. 4376, 4389, 4390, 4391, of the Revised Statutes of Quebec, the quashing of by-laws, procès-verbeaux, and resolutions of town councils may be demanded by petition of the Superior Courts, such quashing may also be claimed in an ordinary action. *Farwell* v. *City of Sherbrooke*, Q. R. 24 S. C. 350.

Laundry — *Municipal Ordinance—Ejusdem Generis Rule.*]—By s.-s. 33 of s. 95 of the Municipal Ordinance, municipalities may pass by-laws for "controlling, regulating, and licensing livery, feed, and sale stables, telegraph and telephone companies, telegraph and telephone offices, insurance companies, offices and agents, real estate dealers and agents, intelligence offices, or employment offices or agents, butcher shops or stalls, skating, roller or curling rinks, and all other business industries or callings carried on or to be carried on within the municipality":—Held, that a by-law imposing a license fee of $25 per annum on every person carrying on a laundry business could not be supported under the foregoing provision, inasmuch as it was unreasonable and oppressive, as many women in destitute circumstances who earn a meagre support by taking in washing would be included within its terms. The application of the ejusdem generis rule discussed. *In re Song Lee and Town of Edmonton*, 5 Terr. L. R. 466.

Lease of Municipal Property—Bonus —Manufacturing industry — Submitting by-law to electors—Closing up public place—Exemption from municipal taxation—School taxes—Application to quash — Time—Promulgation—Discretion. *Re Lamb and City of Ottawa*, 4 O. W. R. 408.

Licensing—*Lodging House Keepers.*] — Where a by-law requiring lodging house keepers to take out a license did not define what was meant by keeping a lodging house:—Held, that it did not apply to a person not engaged in such occupation for profit. *In Re Gun Long*, 7 B. C. R. 457.

Limiting Number of Tavern Licenses and Prescribing Accommodation—Liquor License Act—Special meeting of council—Notice of—Objections to procedure — Validity of by-law. *Re Caldwell and Town of Galt*, 6 O. W. R. 340, 10 O. L. R. 618.

Livery Stable Keeper — Damage to vehicle — Refusal of hirer to pay for — Conviction—Fine. *Brothers* v. *Alford*, 1 O. W. R. 31.

Local Option—*Application to Quash — Alleged Irregularities—Submission to Electors.*]—Application to quash a local option by-law of the rural municipality of Argyle, passed in 1889, under the Liquor License Act, 52 V. c. 15. Three objections were taken: (1) that the by-law was not signed by the reeve; (2) that the by-law fixing the day, hour, and places for taking the vote was not signed by the reeve, or sealed with the corporate seal; and (3) that the notice of the by-law and of the purpose to take the vote thereon was not published during the period in which it was required to be published. By s. 428 of the Municipal Act, R. S. M. 1902, c. 116, an application to quash a by-law cannot be entertained unless the application is made within one year from the passing of the by-law, "except in the case of a by-law requiring the assent of the electors or ratepayers, when the by-law has not been submitted to, or has not received the assent of the electors, or ratepayers." A similar provision, differing only as to the period of limitation, was in force when the by-law in question was enacted; see 49 V. c. 52, s. 328:—Held, that the above provision meant a submission in fact, and an assent in fact, without reference to the validity of the formalities attending the submission. The alleged by-law was submitted to a vote of the electors and received their assent, and it had stood without objection for over thirteen years. The summary method of quashing a by-law was the creature of the statute, and must be taken with the limitations imposed by statute. *In re Houghton and Rural Municipality of Argyle*, 23 Occ. N. 257.

Local Option—*Directions to Voters — Motion to Quash — Electors' Status to Oppose.*]—A local option by-law named as one of the polling places a small unincorporated village, without specifying any house, hall, or place in the village. Polling had taken place at this village year after year at municipal elections, and any house or place in it could be easily found:—Held, following In re Huson and South Norwich, 19 A. R. 343, that the polling place was sufficiently defined. But held, also, that, as directions to voters had not been, as required by the Municipal Act, ss. 142 and 352, furnished to the deputy returning officers, and as there was not clear evidence of the posting up under the directions of the council of the by-law at four or more public places, the by-law must be quashed, these not being irregularities cured by s. 204, and the fact that no harm had, as far as shewn, resulted, being no answer. The municipal council having decided not to oppose the motion to quash the by-law, certain electors were allowed, at their individual risk as to costs, to oppose it in the council's name. Re Mace and Frontenac, 42 U. C. R. at p. 76, followed. *In re Salter and Township of Beckwith*, 22 Occ. N. 182, 1 O. W. R. 266, 4 O. L. R. 51.

Local Option—*Seal and Signature—Order to Quash—Alteration in Boundaries of Municipality.*] — 1. Section 336 of the Municipal Act, R. S. M. c. 100, is imperative, and an instrument not sealed with the seal of a municipal corporation or not signed by its head or the person presiding at the meeting at which the supposed by-law was passed, is no by-law of the corporation. 2. When such alleged by-law purports to be passed in accordance with the local option clauses of the Liquor License Act, R. S. M. c. 90, the applicant is entitled to a definite order quashing it, so that the council of the municipality may know whether to receive license fees or not. 3. The order to

quash a by-law should not effect territory detached from the municipality whose council originally passed it, now and forming parts of new municipalities which were not served with notice of the application. *In re Vivian and Rural Municipality of Whitewater*, 22 Occ. N. 338, 14 Man. L. R. 153.

Local Option By-law—Motion to quash—Procedure—Non-compliance with statute—Substantial compliance—Petition for by-law—Percentage of qualified electors—Inquiry by council—Minutes of council—Voters' list—Certificate of clerk—Summing up of votes—Adjournment—Time for by-law to take effect. *Re Caswell and Rural Municipality of South Norfolk* (Man.), 1 W. L. R. 327.

Local Option By-law—Procedure under Liquor License Act—Omission to give notice of place where by-law may be seen—Omission to give notice of third reading by council—Fatal irregularities—Quashing by-law—Costs. *Re Cross and Town of Gladstone* (Man.), 2 W. L. R. 40.

Local Option By-law — *Procedure at Council Meetings—Right to Reject By-law Approved by Electors—Statute, Imperative or Directory—Right to Reconsider and Adopt Rejected By-law at Subsequent Meeting.*]—A municipal council submitted a local option by-law to the people and it was carried. At a regular meeting of the council when only four of five members were present the by law was voted down by two voting each way. Later on in the month, at another meeting of the council when all the members were present, they passed the by-law without again taking a vote thereon by the electors. Argued that the by-law having once been voted down it could not be passed without another vote of the electors. Plea held bad, that the by-law was valid:—Held, that the first sentence of s. 373 of 3 Ed. VII. c. 19 was not imperative and the council could still reject the by-law although approved by the electors. In re Wilson and Ingersoll, 25 O. R. 439, considered. *Re Dewar and Township of East Williams*, 6 O. W. R. 186, 10 O. L. R. 463.

Local Option By-law—*Voting on By-law—Irregularities — Publication of By-law—Designation of Newspaper by Council — Appointment of Agents or Scrutineers—Persons not Entitled to Vote—Compartments for Voters — Secrecy of Ballot — Presence of Strangers in Polling Place—Duties of Returning Officer at Close of Poll.*]—Application to quash a "local option by-law." The applicants complain that the requirements of the Municipal Act were not complied with. They state 20 grounds. Those urged may be classed under 8 heads: — 1. That no newspaper was designated by the council, as the Act requires, wherein the by-law should be published. 2. Non-appointment of one person to attend the polling on behalf of those interested on each side. 3. Persons being allowed to vote who were not so entitled. 4. Absence of a compartment wherein a voter could mark his ballot screened from observation. 5. Presence of other persons in the compartment with the voter. 6. Allowing other persons to be in a position to see how the voter marked his ballot. 7. Allowing persons to be in the polling place who were not entitled to be there. 8. Non-performance by the returning officer of various duties required of him at and after the close of the poll. Part of the complaint was proved, part was disproved:—Held, that the election had been conducted within the meaning of the s. 204 of the Act and did not affect the result of the election. Motion refused. *Re Dillon and Village of Cardinal*, 5 O. W. R. 653, 750, 10 O. L. R. 371.

Monopoly — *Validating Statute—Constitutionality — License—Revocation.*]—Under a by-law of the Hull city council, afterwards declared valid by the appellants' incorporating Act (Quebec, 58 V. c. 69), the appellants obtained an exclusive right of establishing a system of electric lighting for a certain term of years in the said city, and thereupon sued to revoke a license previously granted by the city to the respondents for a similar purpose:—Held, that the Quebec Act, passed in favour of a purely local undertaking, was within the exclusive competence of the Provincial Legislature, and none the less so because it excluded for a limited time the competition of rival traders:—Held, also, that by the true construction of the by-law the city did not themselves revoke the license to the respondents under which they were actually supplying electric light to the municipality nor give to the appellants the right to have it revoked, and that the respondents were free to carry on their operations until revocation was effected. Judgment in Q. R. 10 Q. B. 34, affirmed. *Hull Electric Co.* v. *Ottawa Electric Co.* [1902] A. C. 237.

Penalty — *Recovery by Corporation — Exemption—Pleading.*] — A suit for the recovery under a by-law of a penalty, belonging wholly to the corporation, is properly brought in the name of the corporation. And the plaintiff corporation are not obliged to put defendant en demeure to shew that he is exempt under a special clause of the by-law. *Township of Cleveland* v. *Ledoux*, Q. R. 22 S. C. 85.

Prohibition of Use of Steam Power —*Violation — Injunction — Intervention.*]—A municipal corporation, which has adopted a by-law prohibiting the construction and operation of any factory, saw-mill, or other building containing machinery moved by steam, without the permission of the council (art. 648, C. M.), has a remedy by injunction against any person who, in violation of the by-law, builds a mill to be operated by steam within the limits of the municipality. 2. The owner of such building has a sufficient interest to be allowed to intervene in the proceedings for injunction. *Village of Ste. Agathe Des Monts* v. *Reid*, Q. R. 24 S. C. 461.

Public Vehicles — *Conviction—Information — Variance — Penalty — Appropriation—Construction of By-law.*] — A conviction for an offence against a by-law of police commissioners of a city, relating to express waggons, was not in accordance with the information, which charged an offence against a by-law of the city:—Held that s. 559, s.-s. 5, of the Municipal Act did not conflict with the powers conferred upon police commissioners by s. 484. 2. That, as an offence was

disclosed in the information, and it would have been unobjectionable had the reference to a by-law been omitted, as a by-law had been proved at the hearing, as the defendant had not been deceived or misled, and no adjournment had been refused, the variance was not fatal. Martin v. Pridgeon, 1 E. & B. 778, distinguished. 3. That the penal clause of the by-law was not invalid because silent as to the appropriation of the penalty. Re Snell and Town of Belleville, 30 U. C. R. 81, distinguished. 4. That some reasonable meaning must be attributed to the clause of the by-law prohibiting the driver of a waggon from leaving it unattended on the stand; that the nature or disposition of the horse had nothing to do with the interpretation of the regulation, the object of which was to compel the driver to remain in close proximity to his horse and vehicle; and the defendant had not complied with it when he took up a position 120 or 130 feet away. *Regina* v. *Duggan*, 21 Occ. N. 35.

Regulating Issue of Liquor Licenses—Validity—Powers of license commissioners—Wholesale license—Discretion—Mandamus—Practice—Summons or motion. *Re Dundass and Municipality of Chilliwack* (B.C.), 1 W. L. R. 94.

Repair of Buildings—*Fire Limits—Ultra Vires—Validation by Legislation.*]—Under s.-ss. (a) and (b) of s. 607 of the Municipal Act, R. S. M. 1892 c. 100, as amended prior to the 8th May, 1899, a municipal council has no power to pass a by-law requiring the submission of plans and specifications of proposed repairs to a building inspector and the obtaining of his certificate before the commencement of repairs of any building; and the conviction of the defendant for breach of such by-law was quashed. And a council has no power to enact that, if the proposed repairs to a building should cost 40 per cent. of its actual value, they should be considered a re-erection thereof, subject to the terms of the by-law; and where the owner had made repairs to a frame building within the first-class fire limits, which had been damaged by fire, a rule nisi to prohibit a magistrate from proceeding with a prosecution as for alleged unlawful re-erection of the building, in breach of the by-law, was made absolute. The amendment by the city council of other provisions of the same by-law, under powers conferred by legislative amendments of the section of the Municipal Act referred to, made after the passing of the by-law, had not the effect of re-enacting the provisions objected to. The effect of s. 6 of the Winnipeg Charter, 1 & 2 Edw. VII. c. 77, which provides that the by-laws, &c., of the city, "when this Act takes effect, shall be deemed . . . the by-laws . . . of the city of Winnipeg, as continued under or altered by this Act, was merely to provide that the then existing by-laws should stand as they stood before the passing of the Act, with only such force, effect, or validity as they previously had, and not to declare that all such by-laws were legal and valid. *Rex* v. *Nunn, Re Rogers and Nunn*, 15 Man. L. R. 288, 1 W. L. R. 559.

Submission to Electors—*Adoption by Council—Motion by Ratepayer to Invalidate—Vote of Councillor—Bribe.*]—A ratepayer who is interested in the granting of licenses for the sale of intoxicating liquors in the municipality, may apply to have it declared that a by-law which the electors of the municipality have approved by their votes, and which has been transmitted to the collector of revenue for the district in order to prohibit the granting of licenses, was not adopted by the council of the municipality and is inexistent. 2. A municipal council has no right to declare that one of its members is incompetent to vote upon questions relating to the granting of licenses for the sale of spirituous liquors, on the ground that he has been bribed by a person soliciting such a license. *Guay* v. *Village of Malbaie*, Q. R. 25 S. C. 263.

Submission to Electors—*Approval—Majority.*]—When a special statute provides that a by-law shall not come into force until after it has been approved by a majority of the municipal electors having the right to vote at the election of a municipal councillor, there must be an absolute majority of the electors. *Mercier* v. *Corporation of Warwick*, 6 Q. P. R. 78.

Supply of Electric Light by Village to County House of Refuge—Necessity for submission to electors — Extraordinary expenditure. *County of Grey* v. *Village of Markdale*, 6 O. W. R. 978.

Telephone Company—*Regulation of.*]—The council of the plaintiff municipality were authorized by 59 V. (Q.) c. 56, s. 18, cl. 10, to order by by-law the painting of all poles then or subsequently erected within the town; and the by-law complained of in this case was not ultra vires. *Town of Coaticook* v. *People's Telephone Co.*, 21 Occ. N. 351, Q. R. 19 S. C. 535.

Trimming of Trees in Streets—*Resolution—Necessity for By-law.*]—Motion to quash resolution of the council of the town of Napanee that "the street committee have instructions to see that the street trees, where necessary, be properly trimmed:"—Held, that under s. 574, s.-s. 4, of the Municipal Act, R. S. O. 1897 c. 223, municipal corporations have power to deal with the trimming of all trees the branches of which extend over the streets of the municipality, but that it is a matter which should be dealt with not by resolution, but by by-law, as indicated by s. 575 of the Municipal Act. *In re Allen and Town of Napanee*, 22 Occ. N. 412, 1 O. W. R. 634, 4 O. L. R. 582.

Violation—*Toleration by Corporation—Liability for Damages.*]—A city corporation has no right, in the administration of its by-laws, to act with partiality, and where it tolerates the violation of an existing by-law, it is responsible for the damages thereby caused. *Brunet* v. *City of Montreal*, Q. R. 23 S. C. 262.

VI. Cabs.

By-law—*Cab-rank—Private Grounds.*]—The corporation of the city of Montreal cannot by by-law prevent a licensed cabman from taking up his station upon the private property of a hotel proprietor, with the consent of the latter. *Desmarais* v. *Samson*, 5 Q. P. R. 167.

License—*Chief Constable—Discretion — Mandamus.*]—The chief of police of the city of Montreal has a discretion to exercise in the granting of permits or licenses to cabmen, and the Court will not by mandamus interfere with the exercise of this discretion, unless the chief of police has acted in bad faith and with evident injustice. 2. The fact that the chief of police has granted a permit to a cabman, after the latter has committed reprehensible acts, is not a ground for granting a permit to him for the following year, if the chief of police is satisfied that he should not have granted the first one. *Carrière* v. *Legault*, Q. R. 23 S. C. 449.

License—*Mandamus.*]—A cabman who alleges that his license has been taken away from him illegally, cannot obtain a mandamus against the municipal corporation by which the license was granted, to compel the return of it. *Laberge* v. *City of Montreal*, Q. R. 22 S. C. 473.

Regulation of Cabmen—*Establishment of Stand—Committee of Council—Resolution—Action.*]—The council of the city of Montreal has no power to delegate to a committee the authority, vested in it by the charter of the city, to prescribe standing places or stations for cabs. 2. The resolution of a committee of the council cannot be considered a by-law so as to bring it within the provisions of s. 304 of the charter of the city, 62 V. c. 58 (Q.), concerning the annulment of by-laws, on petition of any ratepayer, on the ground of illegality. 3. A licensed cabman has, as such, no special or individual interest sufficient to justify an action for the annulment of a resolution of a committee of the city council establishing a cabstand. Judgment in Q. R. 23 S. C. 256 reversed. *Samson* v. *City of Montreal*, Q. R. 23 S. C. 500.

Vehicles Standing on Highway — Agreement with railway companies—Injunction — Quashing by-law — Public interest. *Canadian Pacific R. W. Co.* v. *City of Toronto*, 1 O. W. R. 255.

Vehicles Waiting for Hire—*Standing in Streets—Engagement by Hotel Company—Nominal Consideration—Agreement—Validity—Conviction.*]—An hotel company engaged three vehicles from a livery man to keep standing at their doors constantly ready for immediate use by guests of the hotel, the hotel company paying one cent per hour from time of attendance until dismissed or engaged for use by a guest; the hotel becoming responsible for the payment by the guests of the fees charged for such service:—Held, the liveryman did not commit a breach of a municipal by-law which provided that no cab should stand upon any street while waiting for hire or engagement, by keeping these vehicles waiting on the street for the use of the guests under the above agreement. *Rex* v. *Maher*, 6 O. W. R. 247, 10 O. L. R. 102.

VII. Contracts.

Agent—*Designation of Principal—Change of Principal—By-law—Approval of ratepayers—Bonus—Mandamus—Specific Performance.*]—Where a principal has been named by the agent charged with the negotiation, the latter cannot afterwards designate a different person as his principal, and more particularly where the negotiation would not have been entered into if the principal secondly designated had been disclosed at the outset. 2. Where a contract with a municipal corporation required the sanction of a by-law approved by the ratepayers, and a by-law substantially embodying the terms of the contract, with the name of the principal first designated, was rejected by the ratepayers, the corporation were held not subject to any further liability. 3. The contract in question, although disguised as a sale with a consideration of one dollar, really amounted to a bonus, and in manner and form, as made, was ultra vires of the corporation. [The question whether there was a right to a mandamus to enforce specific performance of a contract, under the circumstances, was not decided.] *Real Estate Investment Co.* v. *Town of Richmond*, Q. R. 23 S. C. 151.

Breach—*Damages—Construction of Sewers—Interference by Reason of Other City Sewers.*]—The plaintiff entered into a contract with the corporation of the city of Ottawa to construct certain sewers. In the course of his work the contents of certain city sewers, which existed in the streets in which the plaintiff was required to build the sewers he had contracted to construct, the existence of which was not known to and was not disclosed to him, flowed into the trenches dug by him and impeded and delayed him in the work and caused him additional expense in doing it:—Held, that the plaintiff was entitled to recover damages from the defendants, for the loss he had thus sustained, for the defendants owed him a duty to do nothing to prevent or interfere with his doing the work he had contracted to do, and in discharging through the sewers under their control upon his work the sewage and other matter which they carried, they committed a breach of duty for which they were answerable to him in damages. *Bourque* v. *City of Ottawa*, 23 Occ. N. 263, 6 O. L. R. 287, 2 O. W. R. 701.

By-law—*Variation—Necessity for By-law—Mode of Payment for Work.*]—A city made a contract for supply of dynamos and station systems for a plant to furnish electric lighting for their streets. The contract was executed by a by-law under the corporate seal of the city, subject to the approval of the city engineer. He inspected and approved of the work subject only to re-armaturing, if it should be necessary, during the next five years. It was arranged that a part of the purchase money should be retained as a guarantee for the same:—Held, a contract, being manifested in and adopted by by-law, can be changed in some important details without the means of another by-law, such as changing the mode of payment. *Thompson* v. *City of Chatham*, 5 O. W. R. 156, 9 O. L. R. 343.

Certificate of Engineer—*Delay in Issuing—Loss to Contractor.*]—Where, under a contract with a municipal corporation which made the right of the contractors to receive payment for the construction of certain works dependent upon the certificate of an engineer who was also sole arbitrator of all disputes, the engineer unjustifiably delayed the issue of the certificate for seven months and acted in a shifting and vacillating, though

not fraudulent, manner, and probably caused heavy loss to the contractors by his mistakes: —Held, that in the absence of collusion on the part of the corporation, the certificate could not be set aside. Impropriety of certain acts of the corporation remarked upon. *Walkley* v. *City of Victoria*, 7 B. C. R. 481.

Electric Lighting—*Use of Streets—Poles and Wires—Rights of Rival Companies—Injunction.*]—The plaintiffs and defendants were respectively companies incorporated to produce and supply electricity for heat, light, and power, and each had authority from the corporation of the city of Ottawa to erect and maintain poles and wires along the sides of, across, and under the streets of the city for certain periods. The plaintiffs had obtained their rights before the defendants, and had erected their poles and wires before the defendants were incorporated. The agreement between the city corporation and the defendants provided that the latter should not, without the express permission of the corporation, erect additional poles on certain streets:—Held, that, as the plaintiffs and defendants were both electric light companies, and therefore on an equal footing in regard to the business they were respectively chartered to carry on, the fact that the plaintiffs were in prior occupation of the streets gave them no exclusive right or privilege to use such streets or the particular sides of such streets occupied by their poles and wires. But, being first in occupation and using the streets under an authority conferred by the municipality, they were entitled to protection against a company subsequently using the street under a like authority in such a manner as would be likely to injure the property of the plaintiffs or endanger their workmen or servants. Semble, that the plaintiffs could not, by extending cross-arms on their poles occupy space not required for the present or immediate future service:—Held, that danger apprehended by the plaintiffs from the use by the defendants of their wires in the condition in which they were strung or threatened to be strung, was ground for moving for an interim injunction. *Ottawa Electric Co.* v. *Consumers' Electric Co.*, 22 Occ. N. 140, 1 O. W. R. 154, 2 O. W. R. 767.

Erection of Public Library—*Resolution Rescinding Contract—Statutory Authority—Attorney-General — Relator—Consideration.*]—The Attorney-General, on the relation of M., a ratepayer of the city of Halifax, applied for an injunction to restrain the defendants, the city council of Halifax, from carrying into effect a resolution seeking to rescind a previous resolution accepting an offer made by C. to furnish a sum of money for the purpose of erecting a free public library building in the city, on condition that the city would provide a specified sum of money for its maintenance, and would provide a free site for the building. An interlocutory injunction was granted (23 Occ. N. 24), from which the defendant appealed: —Held, per Townshend, J., that the city council, in passing the rescinding resolution, was acting within the scope of its corporate powers, and that, assuming there was a breach of contract, no one except the other party to the contract could legally complain of its action, or adopt remedies for the enforcement of the contract; that no public right or interest was endangered to justify the intervention of the Attorney-General. Per Meagher, J., concurring (without discussing the position of the relator or of the Attorney-General), that the question was one that was imminently proper for the consideration and action of the city council. Per Graham, E.J., (McDonald, C.J., concurring), affirming the judgment appealed from, that the corporation, having accepted the offer, were bound by its terms, and that the passing of the rescinding resolution was a breach of contract which the Court had power to restrain, the council being agents or trustees of the citizens in securing the gift; that the council could not without like authority rescind a contract entered into by statutory authority; that the Attorney-General could sue either with or without a relator; that the words "will guarantee to support," were responsive to the words "pledge itself by resolution to support;" that the detriment to the city incurred at the request of C. the promise to support, and the rates being bound, was consideration to support the promise on the part of C.; that where a promise to support the "library" was asked, and the resolution was to support the "library building," the word "building" should be rejected as falsa demonstratio. *Attorney-General ex rel. Mackintosh* v. *City of Halifax*, 36 N. S. Reps. 177.

Execution by Mayor—*Authorization by Council—Want of Consensus ad Idem.*]—A municipal corporation can be bound only by the acts of those who have the right to represent it, and, if, in a case in which it can only be represented by its council, the mayor should execute an instrument other than that which the council has authorized him to sign such instrument is void as against the corporation. 2. If by reason of a misunderstanding one of the parties to a contract supposes that he is to undertake a certain work, while the other party wishes him to execute another work, there is no contract between them. (Reversed by the King's Bench.) *Canadian Pacific R. W. Co.* v. *City of Montreal*, Q. R. 21 S. C. 225.

Lighting—Reduction of price—Execution of contract—Part performance—Tax by-law. *Citizens Telephone and Electric Light Co.* v. *Town of Rat Portage*, 1 O. W. R. 42; *Town of Rat Portage* v. *Citizens Electric Co. of Rat Portage*, 1 O. W. R. 44.

Lighting of Town—*Necessity for by-law —Invalidity of Contract—Part Performance.*] —The power conferred on a municipal council by art. 638, M. C., to provide for the lighting of the municipality in any manner deemed suitable, can only be exercised in the manner indicated by the municipal code, viz., by by-law (art. 616); and the council has, therefore, no authority to contract for such purpose under a simple resolution. 2. The part execution of a void or non-existing contract does not give it validity. Judgment in Q. R. 21 S. C. 241, reversed. *Town of St. Louis* v. *Citizens' Light and Power Co.*, Q. R. 13 K. B. 19.

Purchase and Sale of Electrical Energy—Powers of corporation — Special Act—Construction. *Ottawa Electric Co.* v. *City of Ottawa*, 6 O. W. R. 930.

Rescission—*Charter — Prescription.*] — An action to avoid a resolution and for cancellation of a contract as ultra vires of a

municipality, is not subject to the conditions and prescriptions enacted by its charter. *Aubertin* v. *Town of Maisonneuve*, 7 Q. P. R. 305.

Sale of Land Acquired in Satisfaction of Arrears of Taxes—*Specific Performance—Resolution of Council—Redemption—Damages.*]—At a tax sale in November, 1899, as the price offered for a lot owned by one B. was less than the arrears of taxes, it was bid in by the corporation. In September, 1902, the plaintiff wrote the corporation asking if they would accept "the taxes and costs" for the property, and the next day the council passed a resolution reciting the plaintiff's offer and resolving to accept for the property the amount of "taxes, costs, and interest," amounting to $88, and the reeve and clerk were authorized to issue a deed for that price, and a deed in the statutory form of conveyance by the officers upon a sale for taxes was prepared and signed and the corporate seal attached, but was not delivered to the plaintiff, who then demanded the deed and tendered his cheque for $88. Subsequently the clerk received from the agent of B. $88, and returned the plaintiff his cheque, informing him that B. had redeemed his property. The plaintiff sued for specific performance:—Held, per Hunter, C.J., at the trial, that no cause of action existed against the corporation, and that the action lay, if at all, only against the reeve and clerk as personæ designatæ:—Held, on appeal, reversing that decision, (Irving, J., dissenting), that a contract had been made out, and that the plaintiff had a good cause of action against the corporation, but that, as the land had been redeemed by the original owner, specific performance could not be granted, and it was therefore referred to the registrar to assess the damages. Per Irving, J.:—The resolution of September did not satisfy the requirements of s. 26 of the Municipal Clauses Act, which requires all contracts to be made under seal; a resolution to sell must be followed up by a contract under the corporate seal, placed there by order of the council. *Tracy* v. *District of North Vancouver*, 10 B. C. R. 235. Reversed by the Supreme Court of Canada 10th November, 1903.

Specifications — Injunction. *Allen* v. *City of Toronto*, 1 O. W. R. 518.

Supply of Water — Evidence. *Morden* v. *Town of Dundas*, 2 O. W. R. 856.

VIII. Councillors and Officers.

Councillor — *Disqualification—Contract with Corporation — Vacating Seat — Elections.*]—A municipal councillor who, in a case of urgency, has supplied to employés of the corporation timber and joists and money for the purpose of repairing municipal bridges, under the direction and control and at the sole charge of the corporation, who makes and files his claim, amounting to $19.38, with the council, who approve of it and order it to be paid at a session presided over by such councillor as mayor, and who receives payment, but does not make any profit, and between whom and the council there was no prevenient contract, does not thereby vacate his office. 2. In any event, supposing that art. 205, C. M., would be applicable, the only result would be a simple incapacity to act as councillor; such incapacity would not have any retroactive effect upon the election of the defendant; it would cease with the facts which gave rise to it, and would come to an end with the payment of the account, before the issue of the writ of quo warranto and before any notice could be given pursuant to the terms of art. 207, or any resolution adopted by virtue of art. 208; and the result would be, therefore, that there was never any vacancy in the office, according to art. 337; and that such councillor does not come within the provisions of art. 205, C. M., and art. 987, C. P. C. *Houle* v. *Brodeur*, Q. R. 18 S. C. 440.

Disqualification—*Contract.*]—The only contracts which, according to art. 4215, R. S. Q., render the contractor incapable of sitting in the council of a town, are those which establish permanent relations between the contractor and the town corporation. 2. The fact that a man has sold to a town corporation a quarry and plant does not render him incapable of being a member of the council of such town. *Leonard* v. *Martel*, 4 Q. P. R. 320.

Disqualification — *Contract — Professional Services—Resolution—Creditor—Election of Councillor—Agent—Corrupt Practice—Personation.*]—Art. 4215, R. S. Q., renders ineligible for municipal officers only those who receive from the municipality remuneration for services which they render to it by virtue of a contract, express or implied, effecting between them and it a connection for a certain period, and not professional men who, without being bound in advance by any contract, render professional services to the municipality for which they receive only the remuneration fixed by the tariff of their profession. 2. A resolution of a municipal council to the effect that a certain person shall be for the future the advocate or the notary of the corporation, even if it is communicated to the person whom it concerns, and acted under for several years, is only an instruction to the officers of the corporation to address themselves to such person when they need the professional services which he can render, and does not constitute a contract which renders him incapable of being elected a member of the council. 3. The fact that a person is a creditor of a corporation does not render him ineligible to be elected a member of the council. 4. An agent of a candidate for a municipal office in whose presence an act of personation is committed without his endeavouring to hinder it is not guilty of a corrupt practice, and the election of a candidate cannot be affected. *Chaussé* v. *Olivier*, Q. R. 21 S. C. 387.

Disqualification—*Contract for Performance of Work—Solicitor Employed by Officer of Town.*]—Under the provisions of the Towns Incorporation Act, R. S. N. S. c. 71, ss. 54 and 56, no person is qualified to be elected, or to hold office as mayor or councillor who, "directly or indirectly, by himself or with any other person, as a partner or otherwise, enters into, or is directly or indirectly interested in any contract, express or implied, for the supply of any goods, or materials, or for the performance of any work or labour to or for the town." Among the officials appointed by the town of W. was an

inspector for the purpose of enforcing and carrying out the provisions of the Canada Temperance Act. The inspector received as salary one-half the net proceeds of fines imposed, after paying expenses, and was authorized by resolution of the town council to engage his own solicitor, whose fees were not to exceed a fixed amount in each case. The defendant, who was elected mayor of the town, had been previously engaged by the inspector for the purpose of prosecuting cases under the Act, and at the time of his election there was due him a small sum for services rendered as such prosecutor, which was passed by the council, and paid after the election:—Held, that the defendant was a person directly or indirectly interested in a contract for the performance of work for the town, within the meaning of the Act, and was therefore disqualified from holding office. *Rex ex rel. McDonald* v. *Robertson*, 35 N. S. Reps. 348.

Disqualification—*Diversion of Sinking Fund.*]—The provisions of s. 418 of the Consolidated Municipal Act, 3 Edw. VII. c. 19, do not apply to debentures payable in annual instalments, there being in such a case no "sinking fund" to be provided. Regina ex rel. Cavanagh v. Smith, 26 O. R. 632, distinguished. *Rex ex rel. Seymour* v. *Plant*, 24 Occ. N. 235, 7 O. L. R. 467, 3 O. W. R. 550.

Disqualification—*Insurance Agent—Interest in Contract.*]—A municipal councillor who represents an insurance company, and is paid by a commission on the premiums, is not disqualified from holding office by the fact that the company he represents insures through him property belonging to the corporation. Art. 4215, R. S. Q., which says that whosoever has, directly or indirectly, by himself or his partner, any contract or "interest in any contract with the corporation," cannot be appointed a member of the council or act as such, does not cover the case of an agent paid by commissions on premiums paid under a contract between the insurance company and the corporation. *Pinder* v. *Evans*, Q. R. 23 S. C. 229.

Disqualification—*Interest in "Contract" —Judgment.*]—The object of the legislature in passing s. 80 of the Consolidated Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), was to prevent any one being elected to a municipal council whose personal interests might clash with those of the municipality; and the word "contract" used therein must be construed in its widest sense; and a member of a municipal council against whom the corporation held an unsatisfied judgment for costs was unseated as being disqualified under that section. *Rex ex rel. McNamara* v. *Heffernan*, 24 Occ. N. 233, 7 O. L. R. 289, 3 O. W. R. 431.

Disqualification—*Interest in Contract—Solicitor for Prosecutor Appointed by Town.*]—The Towns' Incorporation Act, R. S. N. S. c. 71, s. 54, disqualifies for the office of mayor "any person who directly or indirectly, by himself or by or with any other person as co-partner or otherwise, enters into or is directly or indirectly interested in any contract, express or implied, for the supply of any goods or materials or for the performance of any work or labour to or for the town." R. S. N. S. c. 100, s. 181, enacts that the town shall annually appoint an inspector to enforce and carry out the provisions of the Canada Temperance Act, and authorizes the town to pay out of its funds the expenses of enforcing the Act. On the 19th December, 1900, W. was appointed prosecutor under the Canada Temperance Act, and his salary was by resolution fixed at one-half the net proceeds of the fines, after deducting expenses. It was also resolved that the prosecutor should engage his own solicitor, whose fees were not to exceed $5 for any one case. The defendant, a solicitor, acted for W. in four cases before his election as mayor, and his fees were paid on the 6th March, 1901. On the 8th February, 1901, the defendant was elected mayor, and thereafter he acted gratuitously for W. in a number of cases:—Held, that the direct relation of agency was constituted between the town and the defendant, and that the defendant could recover directly from the town his fees: Tilson v. Warwick Gas Light Co., 4 B. & C. 962. Held, also, that the defendant had a direct interest in the contract with W. *Rex* v. *Robertson*, 22 Occ. N. 240.

Disqualification — *Proceeding against Municipality.*]—At a municipal election the respondent C. was elected mayor, and the other respondents were elected councillors of a town, and subsequently took the declarations of office, and sat as members of the municipal council. The relator complained that at the time of such election, each one of the respondents had "a claim, action, or proceeding" against the municipality. The respondents were members of "The Good Citizens' League" of the town, and they subscribed money to pay the expenses of a summary proceeding taken at the instance of the league to quash a by-law of the town. The respondents were not the applicants in the application to quash the by-law:—Held, that the proceeding to quash the by-law was a proceeding against the municipality, within the meaning of s. 80 (1) of the Municipal Act, R. S. O. c. 223; and, upon the evidence and findings of the County Court Judge, that it was a proceeding taken by the respondents "through another." Something more than membership in the organization was necessary to render the members answerable for expenditures or acts done in the name of the association; but their assent to and participation in the proceedings were shewn by the evidence. *Rex ex rel. Davis* v. *Campbell*, 22 Occ. N. 118.

Disqualification — *Vote on By-law — Pecuniary Interest — Liquor License.*]—A member of a municipal council is disqualified from voting in the council upon any subject in which he has a personal or pecuniary interest, distinct from that which he has as a ratepayer in common with other ratepayers. A by-law to reduce the number of liquor licenses in a municipality was quashed because carried by the casting vote of the reeve, who was mortgagee of one of the properties likely to be affected by it. *In re L'Abbé and Corporation of Blind River*, 24 Occ. N. 126, 7 O. L. 230, 3 O. W. R. 162.

Disqualification of Mayor and Town Councillors—*"Current Expenditure"—Nature of Loans—Borrowing by Outgoing Council—Affidavits—Costs.*]—A mayor and five councillors of a town, having voted for borrowing money to meet the current expendi-

ture for 1903 in excess of the amount authorized by s. 435 of the Consolidated Municipal Act, 1903, and having had proceedings taken against them by a relator to unseat them, disclaimed, and a new election was held, at which the mayor and four of the old councillors, together with another, were elected by acclamation. The same relator then took further proceedings against the mayor and four old councillors, on the same grounds, to have them unseated again:—Held, in answer to the contention that sums expended for school purposes and debentures and other special charges were not "current expenditure," that the by-laws recited that the loans were to meet "current expenditure;" and that there was no power to borrow for any other purpose without a vote of the duly qualified ratepayers; that the sums borrowed were in the estimates and were part of the current expenditure for 1903; and similar charges were in the regular levy for 1902 and formed part of the sum on which the 80 per cent. was calculated:—Held, also, that a sum of $5,000 borrowed under a by-law passed in January, 1903, by the outgoing council of 1902, should be taken into account:—Held, also, that the personal motives of the relator had no bearing on the motion or any part of it; and affidavits and counter-affidavits as to his motives were not read; and the mayor and four councillors were unseated and ordered to pay the costs. *Rex ex rel. Moore v. Hamill*, 24 Occ. N. 271, 7 O. L. R. 600, 3 O. W. R. 642.

Election Officer—*Negligence—Depriving Elector of Vote—Liability.*]—An action will lie where one is deprived of his right to vote at a municipal election by the negligence of another. A municipal corporation is answerable for the negligent performance of his duties by one of its officers, who is appointed and removable by it, even where the duties, the negligent performance of which gave rise to the action, were imposed by the legislature and not by the corporation; Hanington, J., dissenting. *Crawford v. City of St. John*, 34 N. B. Reps. 560.

Illegal Payments to—*Recovery Back.*]—A municipal corporation were held entitled to recover from councillors moneys illegally paid to them for services on a resolution of the council. *Town of Amherst v. Read, Town of Amherst v. Fillmore*, 23 Occ. N. 139.

Interest in Matter before Council—*Shareholders in Company—Bonus—By-law—Invalidity.*]—Article 4301, R. S. Q., declares that councillors who have a personal interest in a question before the council are incompetent to take part in the deliberations of the council upon that question. No matter how small that interest may be, and whether an individual or collective interest, such as the interest which a councillor may have in a joint stock company of which he is a shareholder, if it exists, it is direct, immediate, and therefore sufficient according to the terms of the article, which does not make the distinction found in art. 4215, which relates only to candidates for municipal offices. 2. Therefore a councillor who is a shareholder in a company, cannot take part in a vote of the council granting a bonus to this company: and, if the majority is composed of councillors so interested, the by-law passed by their aid for such purpose will be quashed. *Town of Victoriaville v. Dubuc*, Q. R. 13 K. B. 109.

Mayor — *Disqualification — Employment as Solicitor—Quo Warranto.*]—The defendant was, before his election as mayor of a town, solicitor for the prosecutor appointed by the town to enforce the provisions of the Canada Temperance Act, the prosecutor receiving as salary from the town one-half of the fines collected, after deducting the expenses. His right to the office was attacked on the ground that he was disqualified under R. S. N. S. c. 71, s. 54 (c). The affidavits were in conflict as to whether the defendant had received any payment out of the funds of the town after his election as mayor, but it was conceded that he had acted for the prosecutor, having been retained by him:—Held, that on a motion for an information in the nature of quo warranto, the Court could not determine the disputed questions of fact, and leave to exhibit the information should be granted, as there appeared to be something to be investigated. The Court had some doubt as to whether the seat ought not first to be declared vacant by the council. *Rex v. Robertson*, 21 Occ. N. 413.

Money Payment to—*By-law—Violation of Procedure By-law — Discretion.*]—The Court, in the exercise of its discretion, refused, under the circumstances of the case (Street, J., dissenting), to restrain a municipal corporation from acting upon a by-law for the payment of money to the mayor as remuneration for services, the money not being provided for on the face of the estimates, and the by-law being passed by the council in the face of the protest of the minority and in contravention of the procedure by-law of the council, by being taken up by the council before being submitted to a committee of the whole. *Heffernan v. Town of Walkerton*, 23 Occ. N. 222, 6 O. L. R. 79, 2 O. W. R. 17, 434.

Payment for Services—*Recovery Back.*]—A municipal council which has knowingly and voluntarily paid a councillor the value of his services as inspector of roads has no right to recover back from him the sum paid. *Corporation of New Rockland v. Torrance*, Q. R. 21 S. C. 165.

Presence at Meetings—*Mandamus—Penalty—Nonfeasance—Discretion of Court.*]—A municipal councillor is a person occupying an office in a corporation, within the meaning of art. 992, C. P. 2. One of the duties attached to such office is that of being present at the sittings of the council. 3. A councillor who while he retains his office, conspires with others not to be present at the sittings of the council in order to prevent a quorum being present, and thereby to prevent the council from exercising rights or powers or functions which it is obliged to exercise within a certain time, is held to be a person occupying an office in a corporation who omits and neglects to perform a duty attached to such office, and, according to the terms of art. 992, he may be ordered by mandamus to be present at the sittings of the council. 4. The fact that a penalty is given for the non-fulfilment of such duty does not prevent the issue of the mandamus. Semble, that a municipal councillor is one of

the persons aimed at by Art. 50, C. P., subject to the rights of surveillance and direction under the orders and control of the Superior Court and its Judges. Semble, that, without a by-law therefor passed by the council, there is no penalty upon a councillor who is not present at the sittings of the council. Semble, that there is nonfeasance of office on the part of a councillor who conspires for the purpose aforesaid. Semble, that the writ of mandamus is a matter largely in the discretion of the court or Judge. *Legacé* v. *Olivier*, Q. R. 21 S. C. 285.

Pro-mayor of Village—*County Council.*] — A pro-mayor of a local municipal council has no right to sit in the county council. *Paré* v. *County of Shefford*, Q. R. 24 S. C. 50.

Recorder—*Removal of—Grounds for—Powers of Council—Statutes—Appointment—Seal.*] — The relator, who held the office of recorder of the town of T. during good behaviour, was removed from his office by the town council, and the defendant was appointed in his place and stead. An information in the nature of a quo warranto was filed to determine the right to the office. The grounds of dismissal were: 1st, non-attendance at meetings of the council; 2nd, refusal to prepare an Act for submission to the legislature unless paid therefor; and, 3rd, procuring alterations of this Act, after it had been prepared by another solicitor, whereby certain changes were made in the salary attached to the office of recorder and in the tenure of office. By the Act of incorporation numerous powers were given to the town council, but no power was given specifically in relation to the amotion of officers, and all the powers of the corporation generally were not vested in the council. The town council was given power to make by-laws, but only in relation to subjects specifically mentioned, and not including the amotion of officers:—Held, that, under all the circumstances, it could not be inferred that the power of amotion was given to the council by the charter and Acts of incorporation, but the same remained in the corporation at large as one of its incidents and could be exercised only by the corporation itself and not by any separate portion of it such as the town council:—Held, that, as the town council had no power to amove the relator from the office of recorder, the office was not vacant at the time of the appointment of defendant:—Held, that the appointment of the relator was not bad for not having been made under seal, such a method of appointment being unnecessary:—Held, that, if an appointment under seal were necessary, the objection was removed by Acts of 1889 c. 4, s. 30, by which appointments made by the councils under the Act of 1888 were declared to be valid and effectual. Semble, that if the town council had the power of amotion it was properly exercised and for good cause. McDonald, C.J., dissented. *Regina ex rel. Lawrence* v. *Patterson*, 33 N. S. Reps. 425.

IX. County Councils — Powers of.

Alteration of Boundaries of Local Municipalities — *Misdescription—Petition—Notice—Waiver — Arbitration and Award—Motion to Quash By-law—Application by Minor Municipality.*] — Under s. 18 of the Municipal Act, 3 Edw. VII. c. 19, when an application is made to a county council to detach a portion of one municipality and annex it to another, the county council is not confined in its powers to the boundaries of the lands mentioned in the application, but may detach any lands it may deem proper from the one municipality and attach them to the other, subject, in case of the dissent of the municipality the area of which is reduced, to the award in the 2nd sub-section mentioned. It would, therefore, be no objection to a by-law of a county council detaching two parcels of land from one municipality and adding them to another, that the petition for the by-law described only one of the parcels and asked to have that parcel detached, for the council, being once set in motion, may, in the exercise of its discretion, detach all, or less, or more, than the territory described. The municipalities affected, however, have a right to require that there shall be a real exercise of discretion before the power is acted upon, it being judicial in its nature. The by-law of the county council was bad when passed because it altered the limits of the village of Southampton without intending to alter them to the extent actually affected, and without considering the expediency of so altering them; and the objection was not waived by the act of the Southampton council in passing a by-law appointing their arbitrator, because they were misled by the untrue recitals in the county council's by-law that the petitioners covered the whole of the lands detached. They should not be held to have waived an objection going to the root of the by-law, of which they were not aware; in the face of the recital, they were not obliged to verify it before acting as they did. Notice of the application should have been given to the Southampton council before the county council acted upon the petitions. It seems to be the intention of s. 18 of the Municipal Act of 1903 that the by-law of the county council should provide for the reference of boundaries to the arbitrators only where the municipality from which territory is detached opposes it, and notice to that municipality is necessary for the purpose of ascertaining whether it opposes or agrees to the proposed alteration of its boundaries. That objection, however, was apparent on the face of the county by-law in the present case, and was, therefore, waived by the appointment of an arbitrator. It was objected that this was not a case in which one municipality could apply to quash the by-law of another, but it is manifestly within s. 378a of the Municipal Act. Appeal allowed and by-law quashed with costs. Order of MacMahon, J., 24 Occ. N. 353, 3 O. W. R. 729, 8 O. L. R. 106, reversed. *In re Village of Southampton and County of Bruce*, 4 O. W. R. 341, 25 Occ. N. 12, 8 O. L. R. 664.

Appeal from Decision of Local Council.] — A county council, sitting in appeal from the decisions of local councils, has neither the privileges nor the powers which municipal councils exercise as the executive of municipal corporations; it only fulfils quasi-judicial functions, by virtue of the powers which the legislature has delegated to it, to adjudicate upon appeals from the decisions of local corporations; and for such purpose a county council is a tribunal which in no way warrants the validity of its decisions; and for its decisions or judgments the county council

is not responsible. *Young* v. *Township of Hereford*, Q. R. 19 S. C. 120.

Appeal from Decision of Local Council — *Jurisdiction — Irregularity — Contradictory Decision.*]—A local council had adopted a procès-verbal ordering the opening of a road. In his report to the council the superintendent had stated the date of appointment as the 13th instead of the 12th June. An appeal was taken to the county council to quash this procès-verbal on the merits. The petition in appeal gave the true date of the appointment of the superintendent, and did not invoke the clerical error. Before the county council the appellants demanded a declaration of want of jurisdiction by reason of the error in the report and procès-verbal, and the council decided that it had no jurisdiction, and at the same time quashed the procès-verbal:—Held, that this contradictory decision was illegal; that the informality in the date was of no consequence, and, besides, had not been invoked before the local council, nor by the petition in appeal; that the county council could not, by relying upon such an informality, refuse to take cognizance of the merits of the procès-verbal and at the same time quash it, so long as it was regular on its face; and the decision of the county council was a denial of justice to the respondents. *Ricard* v. *Lemyre*, Q. R. 19 S. C. 172.

Appeal from Decision of Local Council — *Way — Maintenance and Opening — Powers of Special Superintendent — Municipal By-law — Petition — Discretion of Council — Powers of Superior Court — Quashing.*]—1. By virtue of art. 794, C. M., if the special superintendent is of opinion that a petition for certain works should be refused, he should report accordingly; but if, on the contrary, he is of opinion that this petition is well founded in demanding certain works, it would be proper to make a procès-verbal to that effect. 2. It is not necessary that the works demanded should be mentioned in the prayer of the petition; it is sufficient, to give the county council authority to act, that they should be mentioned in the body of the petition as things suggested to the council upon which the council should exercise its discretion. 3. The Superior Court, by virtue of powers, which are conferred upon it by art. 2329, R. S. Q., may take cognizance of the proceedings of municipal councils, whatever they may be, and quash them; and it may exercise these same powers in the case of a decision of a county council sitting in appeal, in spite of art. 1061, C. M., which denies the right of appeal in such a case. Judgment in Q. R. 17 S. C. 131 corrected. *Piché* v. *County of Portneuf*, Q. R. 17 S. C. 589.

X. Debentures.

Bonus — *Special Rate — Railway.*]—By a by-law passed under the provisions of ss. 386, 694, and 696 of the Municipal Act, R. S. O. 1897 c. 223, a township corporation was authorized to raise a sum by issuing debentures, to be met by special rate, to provide a bonus in aid of a railway company, payable upon its compliance with certain conditions, no time for compliance being limited. The debentures were duly executed, but remained unissued in the possession and under the control of the municipality:—Held, that until the sale or negotiation of the debentures there was no debt on the part of the township, and that the special rate was not leviable, though the time fixed for payment of some of the debentures had passed. Judgment below, 32 O. R. 135, 2 Occ. N. 384, reversed. *Bogart* v. *Township of King*, 21 Occ. N. 229, 1 O. L. R. 496.

Borrowing Powers—*Condition Imposed by Statute — Purchaser — "Provided."*]—Under the N. S. Acts of 1898, c. 65, s. 13, the city of Halifax was authorized to borrow certain sums of money, including "the sum of $6,500 for the extension north of the Esplanade, provided the owners of the property north of the contemplated extension give and convey to the city the necessary land required for such extension." The work was required for the abatement of a nuisance of which the property owners in the vicinity had been complaining for some time, and, it being understood that the property owners would convey to the city the land required for the purpose, the city treasurer recommended to the council that all sums required during the year 1898-99, including that required for the carrying on of the work at the Esplanade, be borrowed at the same time, as, by doing so, the expense would be lessened, and a better price obtained for the debentures. This recommendation was adopted by the city council, and the amount in question was included with other amounts to be borrowed, and debentures issued for the whole. The plaintiff, a ratepayer, whose rates were increased by the amount of 84 cents annually for interest on the loan, applied for a writ of certiorari to remove into the Supreme Court the record of proceedings of the committee on public accounts, the tenders committee, and of the city council relative to the borrowing of the amount represented by the loan, as part of the consolidated fund of the city, and the estimates of income and expenditure of the city for the year 1902, the principal ground being that the rate which was made upon the basis of the estimates included interest on the sum of $6,500:—Held, that, with respect to the issue of bonds for the amount in question, there was not merely a defective execution of a power, but a total want of it; that the word "provided" in the Act was intended to create a condition precedent to the exercise of the borrowing power; that the purchaser of the debentures was bound to examine the statute under the authority of which they were issued, and, had he done so, would have been made aware of the fact that the terms of the statute had not been satisfied, there being nothing in the face of the debentures, or in any of the proceedings of the council, so far as disclosed, to convey any intimation that the condition subject to which the power was to be exercised had been performed; that the word "provided," as used in the Act, was an apt word to create a condition, being synonymous with "if," "when," and "as soon as." *Hart* v. *City of Halifax*, 35 N. S. Reps. 1.

By-law — *Estimates—Sinking Fund.*]—A by-law to raise $3,000 by debentures to build a $10,000 bridge will be set aside when not in conformity with the provisions of arts. 494 and 495, M. C. Such by-law should be based upon precise estimates and provide for the levying of a sinking fund as well as interest upon the loan. *Pritchard* v. *Township of Wakefield*, Q. R. 24 S. C. 100.

By-law Guaranteeing — *Approval of Ratepayers — Approval of Lieutenant-Governor.*]—Judgment in Q. R. 11 K. B. 77, affirmed. *Hanson* v. *Village of Grand Mère*, 33 S. C. R. 50.

By-law Guaranteeing—*Statute—Construction — Approval by Ratepayers and Lieutenant-Governor.*] — A by-law enacted under the Towns Corporation Act (c. 4, tit. 11, Revised Statutes of Quebec, 1888), by the respondent corporation guaranteed debentures to a specified amount to be issued by a company with which the corporation contracted for the execution of a public work within the municipality; but the same had not been submitted to the municipal electors for their approval or to the Lieutenant-Governor for his authority:—Held, in a suit by debenture-holders against the corporation, that the guarantee was in consequence ultra vires:—Held, also, with regard to the special Act (60 V. c. 78) under which the company was incorporated, that the above contract involved a financial obligation on the part of the corporation within the meaning of s. 7 (e). Both under that section and s. 27, which should be read together, a by-law must be approved by a majority of the whole body of ratepayers. Judgment in 33 S. C. R. 50, affirmed. *Hanson* v. *Village of Grand Mère*, [1904] A. C. 789.

Defective By-law — *Remedial Statute.*]—A municipal by-law was passed in 1892, on which debentures were issued, which provided for payment of the interest, but failed to provide for payment of the principal. The statute 3 Edw. VII. c. 18, s. 93 (O.), enacts that "where in the case of any by-law heretofore or hereafter passed, the interest for one year or more on the debentures issued under such by-law and the principal of the matured debentures (if any) has or shall have been paid by the municipality, the by-law and the debentures issued thereunder remaining unpaid shall be valid and binding:"—Held, that the effect of this is to make one payment of interest validate the debenture in respect to which it is paid, and one payment of principal validate the debenture in respect to which it is paid; and that accordingly the debentures here in question fell within the scope of this remedial enactment. *Standard Life Assurance Co.* v. *Village of Tweed*, 23 Occ. N. 324, 6 O. L. R. 653, 2 O. W. R. 731, 747, 922, 983.

Form of—*Sinking Fund—Assent of Lieutenant-Governor.*]—A by-law (not being for local improvements) which provides for the postponement of the payment of the principal to the end of the term over which the debentures are to run, and for the same being met by a sinking fund, instead of providing for the payment of the principal by equal instalments, is not in accordance with the Municipal Ordinance (C. O. 1898 c. 70), and for that reason the Lieutenant-Governor in Council is warranted in withholding his assent thereto. *In re Edmonton By-law*, 21 Occ. N. 100, 4 Terr. L. R. 450.

Guaranteeing—*Approval of Ratepayers.*]—Held, following Corporation de la Pointe Gatineau v. Henson, Q. R. 10 Q. B. 346, that a by-law authorizing a municipal corporation to guarantee debentures issued by a company, is not valid until it has been approved by a vote of the ratepayers, and by the Lieutenant-Governor in Council. And compliance with these conditions is not affected or dispensed with by s. 27 of 60 V. c. 78 (Q.) *Hanson* v. *Village of Grand Mère*, Q. R. 11 K. B. 77.

Illegal Assessment — *Validity of Debentures — Motion to Quash Whole Rate—Certiorari.*]—By c. 65 of the Nova Scotia Acts of 1898, the council of the city of Halifax were authorized to borrow on the credit of the city of Halifax a sum not to exceed $6,500 for the extension north of the esplanade; provided the owners of property in front of the contemplated extension should give and convey to the city the land required; and it was enacted that the sum when borrowed should form part of the consolidated fund of the city, and debentures should be issued by the city therefor under the provisions of c. 24 of the Acts of the legislature of Nova Scotia for 1880. The said sum of $6,500, together with other sums, was subsequently borrowed, and debentures issued to cover the amount of the loan. There was nothing to distinguish the debentures issued in respect of the sum of $6,500 from those issued with respect to the balance of the loan. The owners of property in front of the proposed extension refused to convey, and it was not disputed that the loan was prematurely made. The application was for a writ of certiorari to remove the whole rate for 1901 into the Supreme Court. On behalf of the city corporation it was contended that the holders of the debentures could enforce against the city payment of the debentures and the interest, and therefore the rate should not be quashed. By reason of the loan the rate of the applicant was increased 84 cents a year:—Held, that the application must be refused. *In re Hart and City of Halifax*, 21 Occ. N. 480.

XI. Drainage.

Alteration of Report and Plans.]—Before the report, plans, and assessment of the engineer for a drainage scheme have been adopted by the council, it can refer them back to him for further consideration or for amendment, but after they have been adopted it cannot of its own motion change or amend them; and if the drainage scheme is carried out with a material change the municipality are not protected, and are liable to make good any damages resulting from the work. *Priest* v. *Township of Flos*, 21 Occ. N. 113, 1 O. L. R. 78.

Artificial Drain — *Repairs—Outlet.*]—Section 75 of the Drainage Act, R. S. O. 1897 c. 226, applies only to drains artificially constructed, and does not apply to the repair or improvement of a natural watercourse. Sutherland-Innes Co. v. Romney, 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. *In re Townships of Mersea and Gosfield North and*

Township of Rochester, 21 Occ. N. 558, 2 O. L. R. 455.

Artificial Obstruction — *Failure of Scheme—Report of Engineer.*] — In 1884 a petition was presented to the plaintiffs' council asking for the removal of a dam and other obstructions to Mud Creek, into which the drainage of the township and of Augusta, adjoining, emptied. The council had the creek examined by an engineer, who presented a report with plans and estimates of the work to be done and an estimate of the cost and proportion of benefit to the respective lots in each township. The council then passed a by-law authorizing the work to be done, which was afterwards set aside on the ground that the removal of an artificial obstruction was not contemplated by the law then in force, s. 570 of the Municipal Act, 1883. In 1886 the Act was amended, and a fresh petition was presented to the council, which again instructed the engineer to examine the creek and report. The engineer did not again examine it (its condition had not changed in the interval), but presented to the council his former report, plans, specifications, and assessment, and another by-law was passed, under which the work was done. In an action to recover from Augusta its proportion of the assessment:—Held, affirming the judgment of the Court of Appeal, 2 O. L. R. 4, 21 Occ. N. 375, Strong, C.J., dissenting, that the amendment in 1886 to s. 570 of the Municipal Act, 1883, authorized the plaintiffs' council to cause the work to be done, and claim from Augusta its proportion of the cost:—Held, further, reversing the judgment, that the report of the engineer was sufficient without a fresh examination of the creek and preparation of new plans and a new assessment. *Township of Elizabethtown* v. *Township of Augusta*, 22 Occ. N. 191, 32 S. C. R. 295.

Assessment of Lands in Adjoining Township—Outlet or injuring liability. *Re Township of Elma and Township of Wallace*, 2 O. W. R. 198.

By-law — Assessment of owners to pay damages and costs before benefit by-law passed—Drainage Act, s. 95. *Re McClure and Township of Brooke*, 6 O. W. R. 1021, 11 O. L. R. 115.

By-law — *Petition—Qualification of Petitioners — "Assessment Roll" — Farmers' Sons—Interest in Land—Damages.*]—In an action for an injunction to restrain a municipality from proceeding with the work under a drainage by-law:—Held, that the assessment roll last revised previous to the passing of the by-law is the one to be looked at for the purpose of ascertaining whether the petition for the work was sufficiently signed to authorize the passing of the by-law:—Held, also, that the words "exclusive of farmers' sons not actual owners," in s.-s. 1 of s. 3, R. S. O. c. 226, does not refer to farmers' sons who are not actual owners in fact, but to farmers' sons so shewn by the last revised assessment roll:—Held, also, that two sons to whom a father was willing and promised to grant his farm, taking back a life lease, had an interest in the land, of a freehold nature, entitling them to be assessed as joint owners, and were not "farmers' sons not actual owners:"—Held, also, following Connor v. Middagh, 16 A. R. 356, and McCulloch v. Township of Caledonia, 25 A. R. 417, that, the by-law not having been quashed, the plaintiff was not entitled to damages for work done under it although invalid. *Challoner* v. *Township of Lobo*, 21 Occ. N. 29, 32 O. R. 247.

Construction of Ditch without By-law — *Trespass — Negligence — Costs.*]—Section 470 of the Municipal Act, R. S. O. 1897 c. 223, applies only to actions brought to recover damages "for alleged negligence on the part of the municipality." In an action against a municipality for damages for diverting water upon the plaintiff's land by the construction of a ditch without any proper by-law authorizing the work:—Held, that s. 470 did not apply, as the plaintiff's claim was for trespass, and not for negligence; and that the trial Judge had power over the costs; and the Court would not interfere with his discretion in awarding costs up to the trial to the plaintiff, while directing a reference as to damages. Judgment of Ferguson, J., 1 O. W. R. 559, affirmed. *Lawrence* v. *Town of Owen Sound*, 23 Occ. N. 138, 5 O. L. R. 369, 1 O. W. R. 559, 2 O. W. R. 189.

Construction of New Drain—*Notice—Land Owners—Liability for Old Drain—Appeal to County Council.*]—A public notice given by a special superintendent of his appointment and of his proposed visit to places where it is proposed to establish a watercourse, is sufficient when it is addressed to the persons directly or indirectly interested in the proposed works, and the owners of a concession through which the watercourse must necessarily pass are sufficiently notified by such a notice. 2. Arts. 881 and 882 of the Municipal Code, passed in the interests of agriculture, override art. 501, C. C., and subject the owners of higher lands to submit to the establishment of a watercourse through their lands for the benefit of lower marshy lands. 3. Owners who assert that they are already under obligation in respect of works for a watercourse established by a procès-verbal, in order to escape liability for the work of making a new watercourse, must prove the homologation of this procès-verbal, and they may, besides, be made liable for the new watercourse in respect of the land which such new watercourse drains. 4. An appeal to the county council does not deprive a party of his right to move before the Superior Court to quash a procès-verbal on the ground of illegality or nullity. *Corporation of the Parish of Ste. Julie* v. *Massue*, Q. R. 13 K. B. 228.

Cost of Repairs—*Varying Apportionment—Powers of Referee.*]—Upon certain repairs to a drainage work becoming necessary, one of the townships interested directed their engineer to make a report, and he assessed the cost against the different townships in the proportions in which the original cost had been assessed, no proceedings having been taken under s. 69 or s. 72 of the Drainage Act to vary the assessment:—Held, that this was the proper mode of apportionment, and that, notwithstanding the wide wording of s. 71 of the Act, the Drainage Referee had no power to vary an apportionment made under such circumstances. *In re Township of*

Chatham and Township of Dover, 24 Occ. N. 307, 8 O. L. R. 132, 3 O. W. R. 882.

Cost of Work — *Procès-verbal — Ratepayers not Interested—Mis-en-cause—Costs.*] —At common law as well as by virtue of the Municipal Code, a procès-verbal cannot bind, nor effectively call upon to contribute to the costs of works ordered by the procès-verbal in regard to a watercourse, any ratepayer except those interested: arts. 811, 870, 871, 881, 882, C. M. 2. Therefore a procès-verbal which imposes upon certain ratepayers the duty of contributing to the cost of works in which they are not interested, is illegal and unjust, and should be quashed. 3. Costs cannot be given against a mis-en-cause unless he has joined issue with the plaintiff and asked for the dismissal of the whole or part of the plaintiff's claim. *Papuet* v. *Corporation of St. Nicolas*, Q. R. 13 K. B. 1.

County Road — *Watercourse—Special Superintendent — Procès-verbal.*] — Article 772 of the Municipal Code applies only to cases where it is necessary to dig a watercourse through lands fronting on a road duly established, and where such a watercourse is necessary not only for draining the water from the road, but also for draining the abutting lands. 2. In this case a watercourse serving the purpose of draining several lots in the vicinity of a road was not in question, but only a prolongation or continuation of road ditches into natural watercourses to facilitate the flow of water from the road; and consequently the special superintendent had a right to provide in his procès-verbal for the digging and maintenance of these outlets by virtue of arts. 799 and 803 of the Municipal Code. *County of Nicolet* v. *Tousignant*, Q. R. 12 K. B. 105.

Culvert in Highway—Existing drain—Reconstruction—Costs of. *Re Township of Camden and Town of Dresden*, 2 O. W. R. 200.

Destruction of Water Privilege — Easement—Compensation—Declaratory order —Injunction. *Re Farrand and Townships of Morris and Grey*, 6 O. W. R. 686.

Division of Township — *Damages for Construction—Joint Claim — Amendment of Statute — Limitation Clause—Recurrence of Damages.*]—Pursuant to the judgment of the Court of Appeal of the 2nd March, 1901 (1 O. L. R. 519, 21 Occ. N. 231), the Drainage Referee on the 25th July, 1901, added the corporation of the township of Gosfield North as defendants, and they filed a statement of defence on the 10th September, 1901. The Referee then heard the evidence and assessed damages against both townships in respect of the construction of the drain in question, which was completed before the division of the township of Gosfield. On the 15th April, 1901, 1 Edw. VII. c. 30 (O.) was passed, which repealed s. 93 of the Drainage Act, and made new provisions, one of which was that the notice claiming damages was to be filed within two years from the time the cause of complaint arose:—Held, that the plaintiffs' claim for damages was against the two defendants jointly, and that it must be taken to have been first made on the 10th September, 1901, and was confined to damages suffered by the original construction of the drain which had arisen within two years next before that date; and that the plaintiffs would be at liberty to take proceedings under s. 93 as often as any damages should arise in the future, until a remedy should be provided to prevent their recurrence. *Wigle* v. *Township of Gosfield South*, 24 Occ. N. 81, 7 O. L. R. 302, 3 O. W. R. 21.

Execution of Work by Persons Benefited — *Default—Officers of Corporation—Mandamus—Code of Procedure—Change in.*] —Municipal corporations have the direction and control of works necessary for the execution of procès-verbaux regulating the opening or maintenance of watercourses. 2. If persons liable to do work, neglect to do it, the municipal corporation should have it done by their officers. 3. Municipal officers are subject to the orders of the municipal corporation, but not to the orders of private persons interested in the works, and they are responsible for their acts only to the corporation. 4. The Superior Court has the right to compel municipal corporations by mandamus to execute what they have ordered by their own procès-verbaux, and this right exists whenever there is no other remedy equally appropriate, advantageous, and efficacious. 5. The new Code of Procedure, so far from restricting the cases where mandamus may be obtained against corporations, renders the use of the writ applicable to a larger number of cases than the old Code of Procedure. See art. 1022 of the old code, and art. 992, No. 1, of the new. *Gauvin* v. *Parish of St. Patrice de la Rivière-du-Loup*, Q. R. 23 S. C. 318.

Flooding Private Lands—Culvert—Increase in rapidity of flow of water—Cause of action. *Swayzie* v. *Township of Montague*, 1 O. W. R. 742.

Injury to Land — *Trespass — Officer of Corporation — Limitation of Actions — Continuing Trespass.*] — Action for trespass by the municipal corporation constructing and maintaining a drain through the plaintiff's land. The jury found that the drain had been constructed in 1886 "by virtue of the street commissioner's power of office." The plaintiff, although aware of the existence of the drain at the time, made no objection till 1896, when the land caved in. The judgment in 33 N. S. Reps. 401, holding that the defendants having constructed the drain by their agent, the trespass, being a continuing one, was not barred by the Towns Incorporation Act, 1895, was affirmed. *Town of Truro* v. *Archibald*, 31 S. C. R. 380.

Inter-municipal Works — *Contract — Damages—Guaranty — Continuing Liability.*] —The city of Montreal having a sewer sufficient for all its purposes within its limits through lands lying on a lower level than those of three adjoining municipalities, entered into an agreement in writing with one of them, St. C., by which it was permitted to connect its sewers with the Montreal sewer in question for drainage purposes, and, by the same agreement, Montreal consented that the two other municipalities should make connections with St. C.'s sewers, so connected, in such manner that waters coming from such three higher municipalities should be drained through the Montreal sewer, on condition that the connection should be made by St. C. at its own cost and to the satisfaction of the Montreal engineers; and that Montreal should

be guaranteed against damages:—Held, that the guaranty bound the several higher municipalities not only for all damages resulting from the act of making the actual connection of the sewers, but also for damages that might be subsequently occasioned from user. Held, also, that, as Montreal had not obliged itself to construct additional or new works within any fixed time in case of insufficiency, the adjoining municipalities were not relieved from any of their liabilities on account of postponement of construction of such works by Montreal. Held, further, that the judgment awarding damages against Montreal being a matter between third parties and not *res judicata* against the other municipal corporations interested, Montreal was only entitled to recover from St. C. such damages as might be shewn to have resulted from the connection and user of the sewers under the agreement; that Montreal, when sued, was not obliged to summon its warrantor in the action for damages, but could, after condemnation, recover such damages by separate action under the contract; that it was not a condition precedent to action by Montreal, by the terms of the contract, that it should first submit to a judicial condemnation in liquidation of such damages; and that, as between St. C. and the arrière garants, their contracts bound them to pay damages in proportion to the areas drained by them into the Montreal sewers. *City of Montreal* v. *City of Ste. Cunegonde*, 22 Occ. N. 251, 32 S. C. R. 135.

Maintenance — *Improvement of Natural Watercourses—"Benefit" assessment—"Outlet" Liability.*]—Lands from which no water is caused to flow by artificial means into a drain having its outlet in a municipality other than that in which it was initiated, cannot be assessed for "outlet liability" under 57 V. c. 56 (O.). 2. Where a drainage work initiated in a higher municipality, obtains an outlet in a lower municipality, the assessment for "outlet liability" therein is limited to the costs of the work at such outlet. 3. Every assessment, whether for "injuring liability" or for "outlet liability," must be made upon consideration of the special circumstances of the case, and restricted to the mode prescribed by the Act. There must be apparent water which is caused to flow by an artificial channel from the lands to be assessed into the drainage work or upon other lands, to their injury, which water is to be carried off by the proposed drainage work. 4. Assessment for "benefit" under the Act must have reference to the additional facilities afforded by the proposed work for the drainage of all lands within the area of the proposed work, and may vary according to circumstances. 5. Section 75 of the Act only authorizes an assessment for repair and maintenance of an artificially constructed drain. The cost of widening and deepening a natural watercourse is not assessable upon particular lands under s. 75, but is a charge upon the general funds of the municipality. 6. Works for the reclamation of drowned lands in a township on a lower level than that of the initiating municipality are not drainage works, within the meaning of s. 75, for which assessment can be levied thereunder, nor are they works by which the lands in the higher township can be said to have been benefited. Decision in 26 A. R. 495, 19 Occ. N. 381, reversed. *Sutherland-Innes Co.* v. *Township of Romney*, 21 Occ. N. 1, 30 S. C. R. 495.

Maintenance of Ditch—*Action against Ratepayer—Prescription—Forum—Justices of the Peace—Residence — Summons — Conviction.*]—The prescription of six months provided by art. 2558, R. S. Q., does not apply to an action begun by a municipal corporation against a ratepayer, for the recovery of his share of the cost of maintenance of a line ditch. 2. Such a suit may be begun by the corporation after having paid the account of the rural inspector, but not before a justice of the peace, the right of recourse to that tribunal being a right personal to the rural inspector, which he cannot assign. 3. In this case, the summons calling upon the appellant to appear before two justices of the peace of the district of Montreal, without indicating their residence, and the conviction having been made by such justices without stating their residences, the summons and convictions were held void, the competence of justices of the peace under art. 1042, M. C., depending upon their place of residence, which, therefore, must be mentioned. *Tourville* v. *Parish of St. Francois de Salles*, Q. R. 23 S. C. 67.

Mandamus—*Notice—View—Damages.*] — A letter written by the complainant's solicitor to the council of the municipality, stating that the land in question had been flooded by water from a drain constructed by the municipality, but not saying anything as to the drain's condition, and asking them to construct and maintain such drainage work as is required to relieve the land, is not a sufficient notice under s. 73 of the Drainage Act to justify the issue of a mandamus. It is the claimant's duty to shew that proper notice has been given if a mandamus is asked for, and objection to the sufficiency of the notice may be taken by the defendants at any stage of the action without pleading want of notice. The Drainage Referee in trying an action may proceed partly on view, but in so doing must follow strictly the directions of the Act, and not make the view without appointment or notice to the parties. If he does so proceed, however, his finding, though based partly on the view, may be upheld if the evidence supports it. A complaint is entitled to recover for any injury to the use and enjoyment of his land or for its depreciation in value, if caused by failure to keep a drain in repair, but not for depreciation in value based upon the alleged insufficiency in size of the drain as originally made, and the Court holding, on the construction of the Referee's judgment, that this element had been allowed to enter into the computation of the damages, reduced them from $250 to $50. *McKim* v. *Township of East Luther*, 21 Occ. N. 113, 1 O. L. R. 89.

Neglect to Maintain and Repair Drain—Damages — Mandamus. *O'Hara* v. *Township of Richmond*, 4 O. W. R. 178.

Non-repair—Injury to private property—Damages—Findings of referee—Appeal—Notice of non-repair. *Rayfield* v. *Township of Amaranth*, 2 O. W. R. 69.

Petition—Alteration of route—Engineer—By-law—Quashing—Costs. *Re Macdonald and Village of Alexandria*, 2 O. W. R. 637.

Proces-verbal—*Construction of Drain — Private Interest.*]—A municipal corporation has no power to order, by a procès-verbal, the

construction of a watercourse begun in the interest of a private person and not in the interest of the public. *Fontaine* v. *Corporation of Sherrington*, Q. R. 23 S. C. 532.

Pumping Machinery—*Drainage—Injury to Land and Crops—Overflow of Water—Inefficient Operation of Pumping Plant—Appointment of Engineer and Commissioners of Works—Construction of Works — Negligent Operation—Want of Repair — Provisions of Drainage Act — Damages—Costs—Source of Payment—Drainage Area—General Funds of Municipality.*] — A municipality negligently operated their pumping machinery used for drainage purposes so as to cause damage to the lands of certain persons. Corporation held liable under Drainage Act, R. S. O. 1897 c. 226, s. 73 and 1 Ed. VII. c. 3, s. 4 (O.). One-half of the damages awarded were imposed on the general funds of the municipality, and one-half on the area benefited by the drainage machinery causing the damage. *Bradley* v. *Township of Raleigh*, 6 O. W. R. 267, 10 O. L. R. 201.

Qualification of Petitioners — "*Last Revised Assessment Roll*"]—The "last revised assessment roll" which governs the status of petitioners in proceedings under the Drainage Act is the roll in force at the time the petition is adopted by the council and referred to the engineer for inquiry and report, and not the roll in force at the time the by-law is finally passed. Judgment of Meredith, C.J., 32 O. R. 247, 21 Occ. N. 29, reversed. Challoner v. Township of Lobo, 21 Occ. N. 108, 1 O. L. R. 156, 292; and this judgment was affirmed. Appeal dismissed with costs to respondents the township of Lobo, but without costs to the respondent Oliver. *Challoner* v. *Township of Lobo*, 23 Occ. N. 35, 32 S. C. R. 595.

Report of Engineer—Appeal to drainage referee—Appeal to Court of Appeal—Status of appellant—Land owner—Township corporation—Right of appeal—Amount of assessment—Scope of report—Petition—Area—Enlargement—Multiplication of drains—Injury to land — Absence of benefit — Unjust assessment—Outlet. *Re Township of Aldborough and Township of Dunwich*, 4 O. W. R. 159.

Status of Petitioners — *Finality of Assessment Roll—Farmer's Son.*] — In proceedings under the Drainage Act the assessment roll is conclusive as to the status of the persons mentioned in it, and evidence is not admissible to shew that a person entered on the roll as owner is in fact a farmer's son and has been entered on the roll as owner by the assessor's error. Judgment below on this point reversed: Armour, C.J.O., dissenting; but affirmed per curiam on other grounds. *Township of Warwick* v. *Township of Brooke*, 21 Occ. N. 231, 1 O. L. R. 433.

Township Drain—*Division of Township—Damages before Division—Action for.*] — A township, in which extensive drainage works had been constructed, was divided into two townships by a statute which provided that the assets and debts of the original municipality should be divided between the new municipalities, each remaining liable as surety for the portion of the debts it was primarily liable to pay, and the provisions of the Municipal Act as to the separation of a junior from a senior township to be applied as far as possible:—Held, that an action for damages caused by the drainage works, incurred before the division and asking to have the drains kept in repair, must be brought against both townships and not against that one only in which the plaintiff's land was situate. *Wigle* v. *Township of Gosfield South*, 21 Occ. N. 231, 1 O. L. R. 519.

Watercourse Traversing Two Counties—*Naming of Special Superintendent—Request—Quashing—Costs — Res Judicata.*] — The defendants had presented a petition to the county council of Hochelaga for the authorization of the opening and maintenance of a watercourse crossing the counties of Hochelaga and Jacques Cartier. The council granted the request and named a special superintendent, who, after having visited the locus and heard the parties, drew up a report in favour of the proposal. This report was submitted for homologation to the board of delegates of the two counties, who, after consideration, quashed it with costs of the report against the defendants, the petitioners. These costs were forthwith taxed and paid by the plaintiffs, who now claimed payment of them from the defendants:—Held, that the decision of the board of delegates had the force of res judicata against the defendants, and could not be incidentally reformed in a suit for the costs. 2. That the council of Hochelaga had, in this case, the power to name a special superintendent, and even supposing such nomination to be illegal, the corporation would not be responsible for errors in procedure induced and accepted by interested parties. *County of Hochelaga* v. *Laplaine*, Q. R. 20 S. C. 165.

XII. Expenditure.

Acquisition of Lands at Tax Sale — *Sale by Tender — Resolution of Council to Accept Lower Tender—Action by Higher Tenderer to Restrain Sale—Insufficient Reasons for Accepting Lower Tender.*]—This was a motion to quash appeal by defendant corporation to a Divisional Court from the judgment of Magee, J., upon an action to restrain defendants, the corporation of the City of Belleville, from proceeding with a sale to defendant Caldwell of certain lots acquired by the corporation under the Assessment Act in satisfaction of arrears of taxes. This action was dismissed by Street, J., and the plaintiff appealed to a Divisional Court, which held (5 O. W. R. 310), that the plaintiff was entitled to succeed, unless the defendant corporation could prove at a further trial good reasons which induced them to sell to defendant Caldwell. The defendant corporation elected to have a further trial, and it took place before Magee, J., without a jury, at Belleville, on 2nd May, 1905:—Held, plaintiff not entitled to have his offer accepted nor to prevent the corporation from selling for less than the amount of his offer, but he was entitled to an injunction to restrain them from closing the sale to Mr. Caldwell on the basis only of the action of the special committee or of the council, 6 O. W. R. 1. Upon motion to quash above appeal, it was held that the mere payment of money as directed by a judgment is not a bar to an appeal from that judgment by the party making such payment (reference to Pierce v. Palmer, 12 P. R. 308), and if the existing injunction was removed and the appellants were declared to be

at liberty to carry out the sale, there was nothing to support the contention that the defendant Caldwell could not purchase the lands in question; also that there was nothing to prevent his co-defendants from taking steps by appeal to relieve themselves from an onerous judgment which they allege to have been pronounced in error. *Phillips* v. *City of Belleville*, 6 O. W. R. 129, 10 O. L. R. 178.

Borrowing Powers—"*Ordinary Expenditure*"—*School Purposes — Costs.*] — The power conferred upon a municipality by the Municipal Act, R. S. O. 1897 c. 223, s. 435, of borrowing money to meet current expenditure is distinct from the power conferred by that section of borrowing money for school purposes, and the amount borrowed for the former purpose must not exceed eighty per cent. of the amount collected in the preceding municipal year for the current expenditure of the municipality, apart from the expenditure for school purposes. Where this limit had been exceeded, but before the action was tried the money had been repaid, the plaintiff, who sued on behalf of himself and all other ratepayers, was held entitled to have the merits of the case disposed of, and, in the result, his costs awarded to him, and this although the borrowing had taken place to enable the municipality to carry on prior litigation pending between the plaintiff and the municipality. *Holmes* v. *Town of Goderich*, 23 Occ. N. 12, 5 O. L. R. 33.

Compulsory Audit — Appointment of auditor—Payment for services — Demand — Attorney-General. *Williamson* v. *Township of Elizabethtown*, 2 O. W. R. 977.

Credit Legally Voted — *Expenses Incurred—Payment—Treasurer—City Charter.*] —What art. 336 of the charter of the city of Montreal forbids to its council and its committees, and what art. 338 punishes, is not the ordering of payment of expenses already incurred without their being covered by a credit legally voted, but the incurring of them without such a credit. The prohibition against paying these expenses is only directed to the treasurer of the city. 2. The restrictions provided by arts, 336, 338, and 339 of the charter only apply to the expenses which the council has discretion to incur, and do not apply to disbursements which are provided for by statute or by a contract legally made by the council. *Stephens* v. *Préfontaine*, Q. R. 22 S. C. 11.

Expenses of Criminal Justice — *Liability for—Certificate—Powers of Provincial Legislatures.*]—A municipality is liable for the fees and expenses of a justice of the peace or a constable, payable in relation to the prosecution of indictable offences, only where they have been certified to be correct by the Attorney-General or other counsel acting for the Crown, and have been ordered to be paid by the Judge presiding at the Court in which the indictment is presented. The Act of Assembly 57 V. c. 19, s. 1, whereby certain expenses in criminal prosecutions are made chargeable upon the municipalities, is not ultra vires of the Provincial Legislature. *McLeod* v. *Municipality of Kings*, *Morison* v. *Municipality of Kings*, 35 N. B. Reps.163.

Illegal Payments—*Action by Ratepayer —Defence of Action Brought against Constable—Resolution of Council—Ratification—Parties — Costs.*] — A constable appointed by by-law of a town arrested a man as a vagrant, and for so doing was sued for false arrest and imprisonment :—Held, that he was not acting as the servant of the corporation, and "respondeat superior" did not apply; that the corporation were not liable to the person arrested; that a resolution of the council retaining an advocate to defend the constable and agreeing to indemnify him, was ultra vires, and payment by the corporation to such advocate of his costs and to the advocate for the person arrested his costs of such action, was illegal. 2. That the payment by the corporation of a fee to an advocate for his opinion as to the liability of the council and councillors was a legal payment. 3. That, though the resolution of the council and the payments thereunder might amount to a ratification of the act of the constable so as to render the corporation liable to the person arrested, the payment could not be so made legal as against a complaining ratepayer. 4. That the constable was a proper party to an action by a ratepayer. 5. That ss. 268 and 269 of the Municipal Ordinance of 1898, c. 70, are merely permissive, and do not oust the general jurisdiction of the Court, in an action to quash by-laws, resolutions, &c. 6. That s. 273 affords protection for acts done under a by-law or resolution, but does not bar an action to restrain the corporation from enforcing it. 7. That a ratepayer, on behalf of himself and all other ratepayers, has a right to bring an action for a refund of the moneys illegally paid. 8. That the corporation not having paid the moneys under mistake, and having no right to recover them from the constable as moneys paid to his use, the plaintiff had no greater right. *Pease* v. *Town of Moosomin*, 5 Terr. L. R. 207.

Ordinary Current Expenditure — Borrowing money to use as security for appeal in previous action—Appeal for costs—Status of plaintiff. *Holmes* v. *Town of Goderich*, 1 O. W. R. 367, 814.

Payment of Money—*Instalments — Debentures—Sinking Fund.*]—Since the amendment of the N. W. T. Municipal Ordinance, 1894, part VI., ss. 10 and 11, by the amending Ordinance of 1897, whereby s. 11 was left out and s.-s. (b) of s. 10 was repealed and a new sub-section substituted, and a new section, 222 (now 218), was enacted, a money by-law (not being for local improvements) which provides for the postponement of the payment of the principal to the end of the term over which the debentures run, and that such payment is to be met by a sinking fund, instead of providing for the payment of the principal by equal instalments, is invalid. In this case the by-law not being in accordance with the Ordinance, the Lieutenant-Governor in council was warranted in withholding assent to it. *In re Town of Edmonton*, 21 Occ. N. 100.

Public Parks Act, Man. — *Municipal Act—Expropriation—Powers of Board—Entry —Trespass — Remedy of owner — Action—Arbitration.*]—1. Section 755 of the Municipal Act, R. S. M. 1902 c. 116, giving power to the council of a city to acquire by purchase or expropriation land for park purposes, read together with s. 769, does not authorize the council to enter upon the land, without the consent of the owner, without first taking steps to expropriate the land and obtain an

award of arbitrators and paying the amount awarded for compensation. 2. Section 44 of the Public Parks Act, R. S. M. 1902 c. 141, does not warrant the parks board of a town in entering upon land, or doing anything to injuriously affect it, without the consent of the owner, until after they have regularly expropriated and paid for the property; and a person whose land has been thus entered upon or injuriously affected has a right of action for damages against the parks board, and is not restricted to the remedy by arbitration under the expropriation and arbitration clauses of the Municipal Act. *Smith* v. *Public Parks Board of Portage la Prairie*, 15 Man. L. R. 249, 1 W. L. R. 237.

Purchase of Land for Industrial Farm—Delivery and registration of conveyance—Refusal to pay purchase money—Executed contract—Deed of re-conveyance—By-law—Statute of Frauds—Powers of corporation—Extraordinary expenditure—Estimate—Assessment. *Macartney* v. *County of Haldimand*, 6 O. W. R. 805, 10 O. L. R. 668.

Sanatorium — *Proposed Expenditure — Submission of Question to Electors — Injunction.*]—There is nothing in the Municipal Act permitting a municipal council to take a plebiscite, and there is no express prohibition against doing so. Taking a vote of the electors upon questions or upon authorized by-laws is open to grave objections. And where a council sought to take such a vote on the question of a money grant in aid of a sanatorium, which they had not power to make, with a view to inform the Legislature of the result, and, if favourable, to use the result as an argument in attempting to obtain for the council legislative authority to make the grant, they were restrained by injunction from so doing. Helm v. Town of Port Hope, 22 Gr. 273, followed. *King* v. *City of Toronto*, 23 Occ. N. 92, 5 O. L. R. 163, 1 O. W. R. 843.

Statute Authorizing—Dam—Temporary structure—Injury to lands—Independent contractor — Control by corporation — Maintenance of dam—Navigable river—Unlawful act—Nuisance—Abatement—Request. *Clipsham* v. *Town of Orillia*, 5 O. W. R. 298, 786.

Valid Debt—By-law—Contract—Injunction—Costs. *Whelihan* v. *Hunter*, 1 O. W. R. 788, 2 O. W. R. 20.

XIII. Expropriation.

Abandonment — *Damages — Costs.*] — The city commenced expropriation proceedings, and forthwith took possession of the plaintiff's land, constructed works thereon, and incorporated it with a public street. Subsequently, in virtue of a statute granting permission to do so, the city abandoned the expropriation proceedings without paying indemnity or returning the lands so occupied and used:—Held, that the plaintiff had been illegally dispossessed of his property, and was entitled to have it returned to him in the state in which it was at the time it had been so taken possession of, and also to recover compensation for the illegal detention:—Held, further, that in the present case the measure of damages, as representing the rents, issues, and profits of the lands usurped by the city, should be the equivalent of the interest upon the value of the property during the period of its illegal detention. Judgment below, Q. R. 8 Q. B. 534, varied, with costs against the appellants. *City of Montreal* v. *Hogan*, 21 Occ. N. 6, 31 S. C. R. 1.

Arbitration and Award—Appeal from award — Injury to land owner — Proposed diversion of stream—Water Privileges Act—Evidence on appeal — Affidavits — Testimony before arbitrators not taken down—View of premises—Local knowledge. *Re Inglis and Town of Owen Sound*, 3 O. W. R. 209.

Compensation—*Arbitration and Award—Conclusiveness of Award—Variation on Appeal—Examination of Evidence—Valuation of Lands.*] — In a matter of expropriation at Montreal, under the provisions of 54 V. c. 78, s. 11, 1890, the commissioners' report has not the character of "chose jugée" any more than it had before the passing of that Act; and, on appeal from the decision of the commissioners to the Court of Review, the Court has a right, in order to understand the award, to refer to the evidence which accompanies it; but the Court will only change the amount of compensation awarded when it appears that no allowance has been made for part of the claim, or in case of manifest error in arriving at the value of the property. The Court of Review has no right to take as a basis of its judgment, the opinions as to valuation given by the witnesses of the parties. In arriving at the value of lands and the damage sustained by reason of its expropriation, the revenue derived from the land ought to be taken into account as well as the sales which have been made in the neighbourhood. *City of Montreal* v. *Gauthier*, Q. R. 26 S. C. 351.

Compensation—*Increase on Appeal—Interest.*]—Where, under the charter of the city of Montreal, a land-owner whose land has been expropriated has obtained from the Court of Revision, on appeal from an award of compensation, an increase of the amount fixed by such award, he may receive from the city corporation, the expropriating municipality, the amount of interest accrued upon the amount by which the award is increased from the time when the corporation took possession of the land down to the date of payment of the amount of the increase. *Grand Trunk R. W. Co.* v. *City of Montreal*, Q. R. 18 S. C. 534.

Compensation—*Vancouver Incorporation Act, 1900, s. 133—Award—Jurisdiction—Enforcement.*]—The right to compensation cannot be determined by arbitrators appointed under s. 133 of the Vancouver Incorporation Act, 1900, as their jurisdiction is limited to the finding of the amount of compensation. An award of such arbitrators cannot be enforced summarily under s. 13 of the Arbitration Act. *In re Northern Counties Investment Trust, Limited, and City of Vancouver*, 22 Occ. N. 127, 8 B. C. R. 638.

Construction of Sidewalk on Private Property — *Act of Possession — Compensation.*]—The plaintiff owned a building which did not extend to the street line. The city having authorized the construction of a permanent sidewalk in the street, it was laid close to the plaintiff's house wall, occupying a small strip of his land. The plaintiff having

sued the city for the value of this land:—Held, that the only act of possession being the construction of the sidewalk up to the wall of the plaintiff's house, and the placing of the sidewalk in this position not having been authorized by the city, which prayed acte of its willingness to surrender to the plaintiff possession of any property which might belong to him, his action to recover the value of the strip of land could not be maintained. *Burland* v. *City of Montreal*, Q. R. 19 S. C. 574.

Costs of Proceedings by Claimant for Compensation—*Inclusion in Damages — Procedure—Taxation.*]—Although the charter of the city of Montreal, in dealing with municipal expropriation, makes no provision for the costs properly incurred by the person seeking compensation in establishing his claim, yet these form part of the damages suffered by him and ought to be included in the compensation awarded, but the commissioners ought to limit themselves to declaring in their report that the person to be compensated has incurred such costs and to filing a statement of them; they have no right to determine and tax the amount. The costs thus incurred are taxed according to the law and the ordinary practice, upon a bill prepared for the purpose, following the tariff established by the Judges of the Superior Court, as to the proceedings in expropriation, actually in course, and the amount of this bill ought to be added to the amount of the compensation. Consequently the only fees taxable against the party expropriating are those which are provided by the tariff. *City of Montreal* v. *Gauthier*, Q. R. 26 S. C. 361.

Overholding Tenant — *Right to Compensation as Occupant — Elements of Damage.*]—A tenant whose lease has terminated by effluxion of time, and who, notwithstanding that an order decreeing expropriation has been made, and public notice has been given nearly a year before such expropriation, continues nevertheless in occupation of the lands as a simple occupant, day by day, on the sufferance purely of the owner, who, anticipating expropriation, did not wish to renew the lease, has only a precarious occupation of the land subject to be terminated from one day to another; consequently he cannot be considered an occupant within the meaning of art. 1608, C. C., and is not entitled to compensation because the expropriation interrupted his occupation. Such an occupant can only recover damages for loss of profits from the time the order is made to the expiration of the lease, and, therefore, he has no right to the cost of moving, to the expense of transferring a hotel license, or to the damage resulting from deterioration of his chattels, these losses not being occasioned by the expropriation, but happening solely through the termination of an uncertain occupancy. *City of Montreal* v. *Poulin*, Q. R. 26 S. C. 367

Purchase of Gas Works — "*Works, Plant, Appliances, and Property*" *of Company—Arbitration—Franchise and Good-will —Voluntary Agreement—Ten per cent. Addition.*]—By agreement between the city and the company, the former was to have the option of purchasing and acquiring "the works, plant, appliances, and property of the company used for light, heat, and power purposes," upon giving to the company notice as therein provided, at a price to be fixed by arbitration under the Municipal Act. The majority of the three arbitrators, in fixing the value of the works, plant, appliances, and property, included nothing for the earning power or franchise and rights of the company:—Held, that they were right, for by the fair interpretation of the agreement "property" must be limited by the preceding words, the rule of ejusdem generis applying. Held, also, that there being here no expropriation, but a voluntary agreement and submission, s. 99 of R. S. O. 1887 c. 164, as to adding ten per cent. to the amount ascertained by the arbitrators as the value, had no application. *In re City of Kingston and Kingston Light, Heat, and Power Co.*, 22 Occ. N. 181, 3 O. L. R. 637, 1 O. W. R. 194, 2 O. W. R. 55, 3 O. W. R. 769.

Statutory Authority — *Manufacturing Site—Survey—Location — Trespass.*] — The corporation of the town of Sydney were empowered by statute to expropriate as much land as would be necessary to furnish a location for the works of the appellants, a plan shewing such location to be filed in the office for registry of deeds, and on the same being filed the title to the lands to vest in the town. Engineers of the company were employed by the town to survey the lands required for the site and to make a plan, which was filed as required by the statute. M., two years later, after the company had excavated a considerable part of the land, brought an action for trespass, claiming that it included five chains belonging to him, and at the trial the main contention was as to the boundary of his holding. He obtained a verdict, which was affirmed by the full Court: — Held, reversing the judgment, 36 N. S. Reps. 28, that the only question to be decided was whether or not the land claimed by him was a part of that indicated on the plan filed; that the sole duty of the engineers was to lay out the land which the town intended to expropriate; and whether it was M.'s land or not was immaterial, as the town could take it without regard to boundaries. *Dominion Iron and Steel Co.* v. *McLennan*, 24 Occ. N. 169, 34 S. C. R. 394.

XIV. Highways.

Bell Telephone Company — *Underground Wires.*]—The plaintiffs, whose system of communication had been in operation in the town of Owen Sound for some years, changed their office, and in connection with the change wished to carry their wires to that office across the street in which it was situated underground in a conduit, instead of overhead by poles and the defendants refused to consent:—Held, on the evidence, that no danger of injury to the street or inconvenience to the public having been shewn, the defendants were not justified in fact in refusing their consent:—Held, also, that there was not justification in law for the refusal, s. 3 of the plaintiffs' Act of incorporation, 43 V. c. 67 (D), not, as was contended by the defendants, empowering municipal councils to determine as they may see fit where and how the plaintiffs shall construct their lines. *Bell Telephone Co.* v. *Town of Owen Sound*, 24 Occ. N. 320, 8 O. L. R. 74, 4 O. W. R. 69.

Closing Highway—Private interests — Notice — Publication—Compensation. *Re Waterous and City of Brantford*, 2 O. W. R. 897.

Closing Street — *By-law — Registered Plan—Sale of Road Allowance—Approval of Lieutenant-Governor in Council—Promulgation.*]—When the owner of land has registered a plan of subdivision of it into lots and shewing a street, and has sold lots lying alongside and facing on the street, he is bound by the plan, and cannot, without the consent of the purchasers, close up the street and retake the land composing it, and what he could not do himself the council of the municipality has no right to do for him by passing a by-law effecting that result; nor has such council a right under s. 667 and s.-s. (d) of s. 693 of R. S. M. 1902 c. 116, to sell roads stopped up by them, save original road allowances and public roads which have been duly dedicated as such, and over which the council has established its jurisdiction; and a by-law having such ends in view will be quashed, and is not validated by the approval of the Lieutenant-Governor in council pursuant to s.-s. (c) of s. 694 of the Municipal Act, nor by its promulgation under the provisions of ss. 425 and 426 of the Act. *In re Knudson and Town of St. Boniface*, 15 Man. L. R. 317, 1 W. L. R. 281.

Closing Street — Damage to property abutting—Deprivation of access—Other access—Quantum of damages. *Re Tate and City of Toronto*, 6 O. W. R. 670, 10 O. L. R. 651.

Construction of Sidewalk—*Encroachment on Abutting Property—Straightening of Street — Compensation—Petitory Action — Prescription.*]—The respondents were owners of houses situated upon a street in Quebec. The lots sloped at this place, and the houses were originally constructed upon the alignment of the street, that is to say, they were not square except those of the respondents. The consequence was that the corner of the west side of their house upon the street was thirteen feet behind the neighbouring house to the west; as to the east corner, it was in line with the property to the east. So that there was between the alignment of the street and the front of the house a strip of land in the form of a triangle upon which had been built two flights of steps to give access to the houses. In 1896 the appellants, the city corporation, in order to enlarge the street and make it regular, had acquired the property of one C. adjoining on the west those of the respondents, had pulled down the house and built a new one in line with the houses of the respondents. The appellants constructed the sidewalk up to the new building, and at the same time made a sidewalk in front of the respondents' houses up to the houses, thus taking possession of the triangular strip, but without touching the flights of steps. The respondents claimed the value of the land which the appellants had so taken, and the latter pleaded that the land did not belong to the respondents, but was part of the street and had been so for more than 30 years:—Held, that in these circumstances the respondents could claim from the appellants the value of the land of which they had thus taken possession, and that without having recourse to a petitory action. *City of Quebec* v. *Caron*, Q. R. 13 K. B. 52.

County or Local Work — *Procès-verbal —Resolution of Council—Notice—Status of Local Corporation.*]—A bridge which had been treated and considered as a county bridge, by virtue of old procès-verbaux, cannot be declared to be a local bridge, in spite of the fact that it is such by its situation, unless a resolution is adopted or a procès-verbal homologated to that effect; and a simple notice of taking into consideration the procès-verbal in which such a declaration is made, does not fulfil the requirements of the law. 2. A local corporation charged with maintaining a bridge in the condition required by the statute, by the procès-verbal, and the by-laws which govern it, if it has been declared to be a local bridge, has a sufficient interest to apply, to set aside the procès-verbal which makes the bridge a local bridge. *Corporation of St. Ignace du Coteau Landing* v. *County of Soulanges*, Q. R. 25 S. C. 153.

County Road — —*Board of Delegates — Highway Between Counties—Proceedings — Jurisdiction.*]—In the absence of a declaration in pursuance of arts. 758 and 759 of the Municipal Code, it is competent for the board of delegates to take all the proceedings in reference to a road, such as that of the Grande Ligne, situate between two local municipalities belonging to two different counties, such as those of St Jean and Chambly. 2. The board of delegates is a municipal authority quite distinct from the county corporation, although it has ex officio for secretary the secretary of the corporation of one of the counties interested. *Arbec* v. *Lussier*, Q. R. 21 S. C. 204.

County Road—*By-law Declaring it Local —Amendment —Notice — Restoration as County Road — Maintenance — Land-owners.*]—A notice given by a municipal body to amend a by-law or to passing another relating to a public road, without in any way mentioning the amendment or amendments to be made, or the nature of the by-law to be passed, is not sufficient, especially when those who complain of it are prejudiced. 2. By virtue of art. 755, C. M., a road situated between two local municipalities is a county road, and when, by virtue of art. 758, C. M., the county council has declared it a local road under the direction of one of such municipalities, it has no jurisdiction afterwards to amend such by-law so as to declare it again to be a local road, but at the charges of the two municipalities separated by it; but it has the right to restore the road as a county road, and then, in accordance with art. 758 (3), C. M., it may reapportion the work by specially indicating the property of the owners in each municipality liable for the maintenance of such road. Corporation of St. André Avelin v. Corporation de Ripon, Q. R. 4 Q. B. 167, followed. *Corporation du Canton de Nelson* v. *County of Mégantic*, Q. R. 20 S. C. 334.

County Road—*Parish Council — Ratepayers—Liability for Work on Road—Inspector of Roads—County Council — Board of Delegates — Circuit — Court — Removal of Action to Superior Court—Pleading.*]—A parish council (St. Joseph de Chambly) is incompetent, ratione materiæ, to have made and homologated a procès-verbal of a road situated between two counties (the Grande Ligne between the county of Chambly and that of St. Jean.) 2. Such incompetence is d'ordre public, having for its object the maintenance of the administrative hierarchy,

and makes the procès-verbal (1867) absolutely void, and it may be invoked notwithstanding acquiescence at any time, even in 1895, by one of the ratepayers who is sued for contribution to the cost of fencing works undertaken by the parish pursuant to such procès-verbal, on the refusal of such ratepayer to do them himself. 3. It is for the inspector of roads, and not for the agrarian inspector, in all cases to cause the fencing works called for by such procès-verbal to be constructed, such works not being mitoyens; the incompetence of such officer is also d'ordre public. 4. The road in question, according to the municipal statutes in force prior to the Municipal Code, came under the jurisdiction of the county council of Chambly, and then of the board of delegates of the counties of Chambly and St. Jean; such board alone can exercise such jurisdiction. 5. An action begun in the Circuit Court against a ratepayer for such contribution may be removed to the Superior Court. 6. The corporation ought to allege payment by it for these works in order to sustain an action against such ratepayer. *Parish of St. Joseph de Chambly* v. *Arbec*, Q. R. 21 S. C. 80.

Dangerous Machine in Street—*Use by Independent Contractors — Precautions—Injury to Passer-by—Liability of Corporation and Contractors.*]—In a public and busy street of a city a horse became frightened by a steam roller engaged in repairing an intersecting street, and, swerving suddenly upon the plaintiff, who was passing on a bicycle, injured him. The roller was the property of the city corporation, and was being used by paving contractors under a provision in the contract. The work was being done for the corporation, and it necessitated the use of the roller. It was shewn that the roller was a machine likely to frighten horses of ordinary courage and steadiness; that of this the city corporation's servants were aware; and that proper precautions were not taken on the occasion in question to warn persons of the approach of the roller to the street on which the horse was passing:—Held, that the place where the work was to be done and the means by and the manner in which it was to be performed made it incumbent on the city corporation, if they had been doing the work otherwise than through a contractor, to see that proper precautions were taken to guard against danger to the public from the use of the roller; and the corporation could not rid themselves of this obligation by intrusting the work to a contractor. Penny v. Wimbleton Urban District Council, [1898] 2 Q. B. 212, [1899] 2 Q. B. 72, followed:—Held, also that the contractors were bound equally with the corporation to take notice that the roller was likely to cause danger to the public, and their failure to take proper precautions occasioned the accident. *Kirk* v. *City of Toronto*, 25 Occ. N. 29, 8 O. L. R. 730, 4 O. W. R. 496.

Establishment of Highway — *Assessing Lands not Benefited—By-law—Action to Set Aside—Appeal to County Council—Petition to Quash.*]—Held, that the defendants, a municipal corporation, could not subject the lands of the plaintiff, which had a road in front of them at a distance of less than 30 arpents, to a contribution, in proportion to their area, to the expense of opening up and maintaining a road which was of no use to such lands and was projected only for the benefit of other lands; and a by-law passed by the defendants for this purpose, thereby causing a grave injustice to the plaintiff, was set aside in an action brought in the ordinary way in the Superior Court. 2. The fact that the plaintiff had first appealed to the county council, who had confirmed the by-law, did not deprive him of his right of action. 3. The remedy given by the Municipal Code by way of petition to quash did not exclude the proceeding by action. *Theriault* v. *Parish of St. Alexandre*, Q. R. 20 S. C. 45.

Expropriation of Land for Highway —*Procès-verbal—Ultra Vires—Pleading.*] — Where an action is brought by a municipal corporation to compel the defendant to convey land for a road, the defendant cannot plead that the procès verbal of the municipal inspector is void and ultra vires, and has been annulled by the Court; that the county council has not been consulted on the subject of the opening of the road; and that the defendant has sued the corporation for possession; such allegations will be struck out on demurrer. *Corporation of the Parish of Ste. Jude* v. *Malo*, 5 Q. P. R. 217.

Expropriation of Land for Road—*Valuation — Compensation.*]—A municipal corporation cannot expropriate land for a public road without first having a valuation made. The formalities required for expropriation ought always to be followed even if the owner has no right to compensation. *Laramie* v. *Township of Hinckx*, Q. R. 27 S. C. 27.

Extension of Streets — *Municipal Works — Delay—Injury to Individuals.*]—Municipal corporations, in deciding upon the extension of streets and municipal works generally into new districts, and acting in good faith, are not responsible for damages caused to individuals by delay in resolving upon such works, especially where such delay was occasioned by due regard to economy and prudent administration. *Rochon* v. *City of Montreal*, Q. R. 22 S. C. 42.

Laying Gas Pipes Under—Permission of council—Resolution—By-law. *Bowerman* v. *Town of Amherstburg*, 1 O. W. R. 16.

Liability to Repair Highway—*Roadbed Washed Away by Natural Stream—Construction of New Roadbed — Diversion of Stream—Depreciation in Value of Property Abutting on Highway — Delay in Repairing Bridge.*]—A swift natural stream ran through the defendants' town. The stream changed its course but owing to no fault of the defendants, and in so changing its course carried away a portion of the street on which the plaintiff had land situated:—Held, the municipality was not bound to replace the portion of the street so carried away under their statutory duty to repair highways. Nor could the plaintiff recover for damages to his property. *Cummings* v. *Town of Dundas*, 6 O. W. R. 168, 10 O. R. R. 300.

Maintenance of Road—*Mandamus.*]—When a municipal corporation has caused a road to be opened, it is obliged to keep it in repair, no matter of what importance the amount of taxes raised on the adjoining

property may be; and this obligation may be enforced by means of a mandamus. *Goulette* v. *City of Sherbrooke*, Q. R. 25 S. C. 387.

Non-repair—*Penalty — Informer — Action — Affidavit.*] — By virtue of art. 1046, C. M., any adult person may in his private name claim the penalty imposed by art. 793, C. M. 2. The affidavit required by art. 5716, R. S. Q., is not necessary in such a case. *Tourigny* v. *Corporation of St. Paul de Chester*, 5 Q. P. R. 199.

Opening Highway — *Procès-verbal — Particulars of Route — Persons Affected — Right to Attack — Municipal Council—Homologation — Amendment—County or Local Road.*]—A procès-verbal, which provides for the opening of a road, satisfies the law if it sets out where the road is to be opened and that it is to have ditches and trenches everywhere necessary, even if it does not indicate precisely the places where they are to be made nor their width and depth. 2. If the procès-verbal of a road states that it will pass through a place where a cheese factory stands, or any other place which it cannot pass through without the consent of the owner, or if it provides that fences shall be at the expense of persons who cannot be forced to make them, such owner or such person illegally charged with the fences, may attack the procès-verbal upon that ground. 3. In a procès-verbal numbers and dates may be indicated by figures. 4. A municipal council called together to adopt a procès-verbal may amend it by adding particulars, the absence of which would have made it void. 5. A road which extends through more than one municipality, is not a county road; it is only a local road of each one of the municipalities in which a part of it is situated. *Mondoux* v. *County of Yamaska*, Q. R. 22 S. C. 148.

Opening Highway—*Procès-verbal—Petition to Quash — Service — Time for Presentation.*]—When a petition to quash a procès-verbal has been served within thirty days following its adoption, it need not necessarily be presented to the Court at the next term. *St. Aubin* v. *Parish of St. Jerome*, 5 Q. P. R. 317.

Opening Highway—*Report of Superintendent — Notice — Parties Interested — Adoption by Council.*]—The report of a special superintendent upon the opening of a road will not be set aside, in spite of the want of a new special notice of the day upon which he is to visit the locality in question, if the interested parties are present, and submit to him all their grounds for or against the report. 2. A procès-verbal adopted by the council will not be set aside because it is adopted at a general sitting of the council and without notice that it was to come up, if all the parties interested were present and stated their grounds for and against. *Paquet* v. *Township of Durham*, Q. R. 22 S. C. 233, 5 Q. P. R. 229.

Opening Road — *Procès-verbal—By-law Amended to Charge Plaintiff's Lands—Notice —Sufficiency — Application to Quash.*] — Neither the plaintiff nor his lands were charged in any way with the expense of opening and maintaining a road created by a confirmed procès-verbal. The municipal council cannot by by-law amend such procès-verbal in such a way as to subject the plaintiff or his lands to such charges unless in the first place public notice has been given stating clearly that by the proposed by-law the plaintiff or his lands might be rendered liable to contribute to such expense. A notice addressed "to whom it may concern," stating that the "municipal council of the parish of St. Alexandre, at a session which will be held Tuesday October 13th next, at 8 a.m., will consider a by-law to amend the procès-verbal of . . . with respect to arranging as to the cost of the roads authorized and the owners benefited," was held insufficient as regarded the plaintiff, who was not hitherto a party concerned in the procès-verbal nor interested in these roads nor benefited by them. As a result the plaintiff would be entitled, in an action in the Superior Court, to have this by-law declared void so far as he was concerned, in view of the fact that he had not had an opportunity of being heard before the council, and of shewing that he ought not to be subjected to these charges. *Bouchard* v. *Corporation of the Parish of St. Alexandre*, Q. R. 25 S. C. 415.

Petition for Opening of Road—*Discretion of Township Council — Appeal to County Council—Special Meeting of Council —Notice — Resolution—Minutes.*]—A township council has a discretionary power to grant or refuse a petition for the opening of a road, and however unjust its decision may appear, if the formalities required by law have been observed, the Superior Court will not interfere to set aside the decision; the remedy being by appeal to the county council. 2. Notices of a special meeting of a municipal council orally given by the secretary-treasurer are sufficient. 3. Resolutions of municipal councils are valid, although they are not entered in the minute book of the meetings of the council nor in the procès-verbal of the meeting at which they were adopted. *Martin* v. *Corporation of Windsor*, Q. R. 24 S. C. 40.

Raising Level of—Injury to adjoining land — Backing water on—Culvert—Inappreciable injury. *Turner* v. *Township of York*, 1 O. W. R. 723.

Report of Special Superintendent—*Invalidity—Oath Administered Without Jurisdiction.*]—The report prepared by a special superintendent as to a new road petitioned for, is void, where the officer (a justice of the peace for a neighbouring district) who has administered the oath to the superintendent, had not jurisdiction in the place where the oath was administered. *Pinsonault* v. *County of Laprairie*, Q. R. 20 S. C. 525.

Road Work — *Charge on Lands—Servitude—Interest—Decision of Council—Powers of Court.*]—Municipal councils have no power to create servitudes on lands; they can only give effect to those already created by law. 2. Those lands can only be charged with servitude of road work which have an interest in such work. 3. The interest required by law is not the personal interest of the owner of the lands, but that arising from the situation of the lands. 4. Article 795, M. C., does not give to municipal councils the power arbitrarily to charge land with road work

irrespective of any legal interest arising from the situation of the lands. 5. The Superior Court has the right to interfere with decisions or municipal councils, whenever any question of legality is involved therein. *Theriault* v. *Corporation of Nôtre-Dame du Luc*, Q. R. 24 S. C. 217.

Road Work Done on Owner's Default not a Tax—*When Collectible as Such—Sale for Taxes—Prescription.*]—The cost of road work done at the expense of an owner in default under arts. 397 et seq., C. M., is assimilated to a tax and collectable as such only when it has been ascertained by a judgment rendered in a suit brought under these articles. The abstract furnished by the secretary-treasurer of a local municipality to the secretary-treasurer of the county, by virtue of art. 373, C. M., and the notice given and published by the secretary-treasurer of the county, by virtue of arts. 998 and 999, C. M., ought to contain, on pain of being void, the amounts of the taxes affecting the lands mentioned in it. A sale made under arts. 1000 and 1001, C. M., of land mentioned in such extract and notice, as for a sum exceeding that actually owing for taxes, is void. The prescription of two years provided for an article 1015, C. M., applies only to sales which are voidable, and not to those which are effected with absolute illegality. *Dent* v. *County of Labelle*, *Gagnon* v. *Township of Lochaber*, Q. R. 27 S. C. 171.

Sidewalk — Alteration in grade—Injury to adjoining land — Absence of by-law — Remedy — Arbitration — Sale of land after injury—Right of vendor to compensation. *Re Dunn and City of Stratford*, 5 O. W. R. 65.

Sidewalks—*By-law Authorizing Issue of Debentures to Pay for Work—Time Specified for Completion of Work—Width of Sidewalks Specified — Construction of Sidewalks after Time Expired and of Less Width—Injunction—Damage to Property—Remedy by Arbitration under Municipal Act.*]—A municipal corporation passed a by-law and was approved by the electors. The by-law provided for construction of sidewalks five feet wide, along certain streets and to raise money by way of debentures to pay for the same. The city engineer was placed in charge of matters of grade, etc. The work was to have been completed in 1904. In 1905, objection being raised as to the validity of the by-law the council passed two other by-laws which were not submitted to the people. They adopted the city engineer's plans and reduced the sidewalk to only four feet:—Held, these two by-laws were ultra vires as the council had not the power to extend the time allowed in the first by-law for the construction of the walks, nor to vary the width and purpose of them. Injunction granted to restrain the money being raised on debentures. *Cleary* v. *Town of Windsor*, 6 O. W. R. 192, 10 O. L. R. 333.

Toll Road — Expropriation—Arbitration—County corporation—Costs — Liability of township corporations—Defendants severing. *United Counties of Northumberland and Durham* v. *Township of Hamilton and Haldimand*, 6 O. W. R. 814, 10 O. L. R. 680.

Township Bridge Crossing River — Maintenance and repair—Use by inhabitants of other municipalities—County bridge — Declaration — Order — Appeal — Apportionment of cost of maintenance and repair. *Re Township of McNab and County of Renfrew*, 6 O. W. R. 523, 11 O. L. R. 180.

Winter Road—*Location of — Art. 840, C.M.*]—In laying out winter roads at some distance from the summer roads, a municipality is only exercising the right conferred on it by art. 840, C. M., and, therefore, an owner of property abutting on a summer road cannot be heard to complain of the location chosen by the municipality for the winter road. *Pesant* v. *Parish of St. Leonard de Port Maurice*, 7 Q. P. R. 220.

Work — *Initiative — Ratepayers — Petition—Board of Delegates—Summoning.*] — When it is a question of adopting a by-law, or causing work upon a road or bridge to be executed, conformably to the provisions of the statutes or procès-verbaux, municipal corporations may take the initiative in the measures necessary to obtain such a result, without waiting for the ratepayers to put them in a position to act. 2. But when it is a question of changing or modifying the obligations or charges which the statute or by-laws impose upon the ratepayers the corporations exercise judicial functions, and have not then the same initiative, and must wait until the ratepayers complain and establish their grievances; and if the latter do not succeed in their demand, the corporations may condemn them to pay the expenses which they have occasioned. 3. Even if the board of delegates has acted so illegally as to render its proceedings void, the county corporations which it represents are responsible for the consequences of its error and its illegality, and must be held responsible for expenses incurred by its secretary. 4. The board of delegates may be summoned in several ways, but not necessarily by writing. *Lord* v. *County of Maskinonge*, Q. R. 10 Q. B. 20.

XV. Local Improvements.

Apportionment of Cost — *Railway Companies—Court of Revision — Appeal to County Court Judge by Municipality—Prohibition.*] — By s. 41 of R. S. O. 1897 c. 226 and s. 75 of R. S. O. 1897 c. 224, an appeal lies to the County Court Judge not only from a decision of the Court of Revision, but also from the refusal to decide an appeal; and by s. 6 of 62 V. (2) c. 27, the appeal in such case may be at the instance of the municipal corporation or of the assessment commissioner or assistant assessment commissioner. After a petition had been presented to a city council for the construction, as a local improvement, of certain bridges over the tracks of certain railways where they crossed one of the streets, and asking that a proportionate part of the cost should be imposed on the railways and on the city generally, and after lengthened procedure in which the validity of by-laws passed for the carrying out of the said work were questioned, a by-law was passed purporting to be made in pursuance of a petition of ratepayers under s. 664 of the Municipal Act, whereby the matter of the assessment for the cost of the said work was referred to the city engineer, under which the

city engineer made his report and a reference thereof was then made to the Court of Revision, whereupon that Court determined that such assessment was invalid and refused either to confirm it or to make any assessments under it: — Held, that the County Court Judge could properly entertain an appeal from the decision of the Court of Revision at the instance of the city and the assistant assessment commissioner; and an application for prohibition was therefore refused. Decision of Meredith, J., 3 O. W. R. 170, affirmed. *In re Hunter and City of Toronto, In re Dundas Street Bridges*, 24 Occ. N. 336, 8 O. L. R. 52, 3 O. W. R. 660.

Assessemnt of Property Owners — By-law—"Cost" of works — Price of lot acquired for prolongation of street—Interest—Commuted payment—Time for making — Tender after time expired—Extention—Resolutions of council. *City of Victoria* v. *Meston* (B. C.), 2 W. L. R. 384.

By-law — *Personal Service of Notice — Waiver—Court of Revision.*]—It is a fatal objection to the validity of a municipal by-law authorizing a work as a local improvement, that notice of the intention of the council to undertake the work was not given to the owners of the properties benefited thereby, by personal service, etc., as provided by s. 669 (1a) of the Municipal Act, 1903. Semble, that an owner might waive such notice, but held, that in this case there was no conduct amounting to waiver. Semble, also, that while the direction of the statute (s. 64 of the Assessment Act, R. S. O. 1897 c. 224), that the members of the Court of Revision are to be sworn, should not be ignored, it does not follow that neglect or failure to take the oath renders their acts void. Order of Boyd, C., 7 O. L. R. 146, 24 Occ. N. 129, 3 O. W. R. 233, reversed. *In re McCrea and Village of Brussels*, 24 Occ. N. 346, 8 O. L. R. 156, 3 O. W. R. 868.

By-laws—Extension of street—Expropriation—Petition against—Status as petitioner of owner of land expropriated—Withdrawal of petitioner—Internal regulations of council—Discretion as to quashing by-laws—Substantial compliance with statute—Expropriation of land not shewn on plan—Non-assessment of property benefited—Report of assessor—Finality in absence of fraud—Cost of sidewalks. *Re Cameron and City of Victoria* (B. C.), 2 W. L. R. 387.

Expropriation — *Assessment — Rating for Benefit—Trivial Objections.*]—Where a statute for the widening of a street directs that part of the cost shall be paid by the owners of property bordering on the street, the apportionment of the tax should be made upon a consideration of the enhancement in value accruing to such properties respectively, and the rate levied in proportion to the special benefit each portion has derived from the local improvement. When an assessment roll covering over half a million dollars has been duly confirmed without objection on the part of a ratepayer that his property has been too highly assessed by a comparatively trival amount, he cannot be permitted afterwards to urge that objection before the Courts upon an application to have the assessment roll set aside. Judgment in Q. R. 9 Q. B. 142, reversed; and that in Q. R. 15 S. C. 43, restored. Gwynne, J., dissenting. *City of Montreal* v. *Belanger*, 21 Occ. N. 4, 30 S. C. R. 574.

Expropriation for Widening Street —*Action for Indemnity—Assessment of Damages—Evidence.*]—Where the city of Montreal, under the provision of 52 V. c. 79, s. 213, took possession of land, for street widening, in October, 1895, under agreement with the owner, the fact that the price to be paid remained subject to being fixed by commissioners to be appointed under the statute was not inconsistent with the validity of the cession of the land so effected, and, notwithstanding the subsequent amendment of the statute in December of that year, by 59 V. c. 49, s. 17, the city were bound, within a reasonable time, to apply to the Court for the appointment of commissioners to fix the amount of the indemnity to be paid, and having failed to do so, the owner had a right of action to recover indemnity for his land so taken. Hogan v. City of Montreal, 31 S. C. R. 1, distinguished. The assessment of damages by taking the average of estimates of the witnesses examined is wrong in principle. Grand Trunk R. W. Co. v. Coupal, 28 S. C. R. 531, followed. *Fairman* v. *City of Montreal*, 21 Occ. N. 330, 31 S. C. R. 210.

Payment out of General Funds—*Illegality—Liability of Councillors—Trustees—Breach of Trust—Excuse — Relieving Statute.*]—By a special Act of the legislature of Ontario incorporating a town it was provided that all expenditure in the municipality for improvements and services for which special provisions were made in ss. 612 and 624 of the Consolidated Municipal Act, 1883, should be by special assessment on the property benefited and not exempt by law from taxation; and the construction of sidewalks upon the local improvement plan was one of the matters provided for by s. 612. In an action by a ratepayer, on behalf of all ratepayers other than the defendants, against the members of the council who sanctioned the payment out of the general funds of the town for work done in reconstructing a sidewalk, and against the corporation of the town, the claim was that the individual defendants might be ordered to pay to the corporation the moneys expended in the construction of the sidewalk, and that the defendants might be enjoined from paying any further moneys in respect thereof:—Held, that the members of the council who were sued, having acted in good faith and under the bona fide belief that they were doing their duty as trustees for the body of ratepayers in paying out of the general funds of the municipality for what was practically a new sidewalk, even if they had misconstrued the meaning of the statutes, which was by no means clear, at all events acted honestly and reasonably and were entitled to be excused for the alleged breach of trust. Semble, that 62 V. (2) c. 15, s. 1, applied to these defendants; but, if it did not, they should not be more hardly dealt with than ordinary trustees, and should be treated as within its equity. *King* v. *Matthews*, 23 Occ. N. 109, 5 O. L. R. 228, 2 O. W. R. 18.

Petition for — *Majority of Petitioners—Exempt Property — Value — Land—Buildings.*]—A petition for local improvements is sufficiently signed under s. 668 of the Municipal Act when signed by six out of nine owners to be benefited, who appear on the

assessment roll, notwithstanding that the city within which the improvement is to be made also appears as an owner of property on the roll in respect to property which is exempt from taxation; and the value of the buildings as well as the land is properly taken into consideration in ascertaining the requisite one-half in value. *Macdonell* v. *City of Toronto*, 22 Occ. N. 294, 4 O. L. R. 315, 1 O. W. R. 433, 494.

Purchase of Electric Light Plant—Compulsory expropriation. *Iroquois Electric Light Co.* v. *Village of Iroquois*, 1 O. W. R. 306.

Sidewalk — Assessment for—Action to restrain—Estoppel—Appeal to Court of Revision and County Court Judge—Irregularities—Costs. *Canada Co.* v. *Town of Mitchell*, 2 O. W. R. 732.

XVI. Meetings of Council.

Minutes—*Signature of Presiding Officer.*]—One who presides at a meeting of a municipal council should, without delay, sign minutes which correctly record the proceedings, whether these proceedings be regular or not. *Macdonald* v. *Chevrier*, 7 Q. P. R. 160.

Notice — *Time* — *Resolution* — *Statute* —*Finance Committee.*]—A delay of at least 24 hours between the day on which the notice is given of the holding of a special session of the council of a town corporation, and that fixed for such session, is necessary, and all resolutions adopted, in the absence of one councillor, at a session irregularly called are void. 2. The statute governing the city of Sherbrooke, providing that all resolutions concerning expenditure beyond the amount of credits voted, must first be submitted to the finance committee, must be observed on penalty of nullity. *Farwell* v. *City of Sherbrooke*, Q. R. 25 S. C. 206.

Procedure — *Local Option By-law* — *Second Reading without Formal Motion* — *Approval by Vote of Ratepayers—Motion to Quash—Discretion—Delay.*]—A local option by-law was introduced in a town council on the 5th October, 1903, and a motion that it be read a first time was carried, after discussion, on a division of eight to two. On the 17th November a motion that the second reading should be deferred till January was lost on a division of three to seven. The council then went into committee of the whole and reported the by-law, which was then "read and passed as having had its second reading," but without any motion that it be read a second time. The by-law was then submitted to the electors, as provided by the Liquor License Act and the Municipal Act, and was approved by a vote of 869 to 679. On the 11th January, 1904, the by-law was, on motion, read a third time in the council, and, also on motion, adopted as final. On the 23rd April, 1904, a motion to quash the by-law, on the ground that there was no motion for a second reading, was launched. The procedure by-law of the council contained a provision that in proceedings of the council the law of parliament should be followed in cases not provided for. The procedure followed in this case was, however, the usual procedure of the council:—Held, that the matter was one of internal regulation, of which the mayor was the judge, subject to the appellate jurisdiction of the council; that, even if there was an irregularity, a by-law passed pursuant to a statute and adopted by vote of the people should not be quashed by reason thereof; and further, that as a matter of discretion, and in view of the delay in moving, the motion should be refused. *In re Kelly and Town of Toronto Junction*, 24 Occ. N. 352, 8 O. L. R. 162, 3 O. W. R. 765.

Procedure at — *Passing By-law* — *Suspending Rule of Order—Notice.*]—It is not necessary that a thirty days' notice should be given to permit the council of the city of Montreal to suspend the rule which forbids more than one reading of a by-law at the same sitting, such suspension, with the consent of three-fourths of the members of the council, being authorized by the orders and by-laws of the city. *Société des Ecoles Gratuites* v. *City of Montreal*, Q. R. 19 S. C. 148.

Resignation of Member—Sufficiency of resolution accepting—Filling vacancy under statute. *London Street R. W. Co.* v. *City of London*, 2 O. W. R. 44.

XVII. Nuisance.

Factories — *By-law* — *Injunction* — *Penalty.*] — A municipal corporation has a right to prevent factories or mechanisms moved by steam being erected within its limits, to pass by-laws to that effect, and to exercise, in order to have such by-laws observed, all the remedies known to the law, and particularly injunction. 2. A municipal corporation is not bound to impose a penalty for contravention of such by-laws. *Village of St. Agathe des Monts* v. *Reid*, 6 Q. P. R. 3.

Street Nuisance—*Neglect to Enforce By-law—Injury to Person—Liability—Nonfeasance.*]—The passing by a municipal corporation, under the powers conferred by the Municipal Act, of a by-law prohibiting the setting off of fire-works, fire-crackers, &c., on the public streets, does not cast any duty on the municipality to see to its enforcement. An action to recover damages from a corporation on account of injuries sustained by the plaintiff by reason of the setting off of fire-works, in alleged contravention of a by-law, will not lie. *Brown* v. *City of Hamilton*, 22 Occ. N. 324, 4 O. L. R. 249.

XVIII. Officers, Servants, and Others—Liability for Acts of.

Aldermen of City—*Illegal Acts—Ratepayer—Right of Action—Damages—Notice of Action—Qui Tam Action.*]—Ratepayers and proprietors of the city of Hull are qualified to take action against any of the aldermen who by their votes have illegally spent the city's money, to force them personally to refund the same to the city. Aldermen of the city of Hull are persons fulfilling a public function or duty; the present action was an action in damages, and the defendants were entitled to one month's notice under art. 88, C. C. P. The present action was not a "qui tam or popular action." *Trudel* v. *Thibault*, Q. R. 26 S. C. 342.

Commissioner of City Court—*Salary—Reduction—Consent—Public Policy.*]—An arrangement entered into by the plaintiff, the Commissioner of the City Court of Moncton, an officer appointed by the Lieutenant-Governor in council, with the city council of the city of Moncton, to accept a reduction of his salary, which arrangement had been assented to by both parties and acted upon for a period of five years, is binding and can not be repudiated on the ground that it is void as against public policy. *Kay* v. *City of Moncton*, 36 N. B. Reps. 377.

Commissioner of City Court—*Salary—Statutory Liability—Pleading.*]—The declaration alleged that under 53 V. c. 60, a Court for the trial of civil causes was established in the city of M.; that a commissioner of the said Court was to be appointed by the Governor in council; that the salary of the said commissioner was to be fixed by the city of M. and paid out of their funds; that pursuant to the Act the plaintiff was appointed commissioner, and his salary was fixed by the city council at $600 per annum; that he had performed the duties of the office and was entitled to be paid the salary, but the defendants had refused to pay:—Held, on demurrer, that the declaration was good, as it alleged a statutory liability to pay the plaintiff out of the city funds. *Kay* v. *City of Moncton*, 36 N. B. Reps. 202.

Inspector of Works—*Authority of.*]—A special inspector duly appointed to superintend the construction of a ditch or watercourse ordered by by-law of a municipality to be made of a specified depth and width and at a specified place, has full power to cause the work to be carried out, without a special authorization of the council. *Leroux* v. *Parish of St. Mark*, 7 Q. P. R. 225.

Liability for Acts of Treasurer—Power to pledge credit—Advertising tax sale. *Canadian Bank of Commerce* v. *Town of Toronto Junction*, 1 O. W. R. 74, 3 O. L. R. 309.

Mayor—*Disqualification of—Election of Illiterate Councillor as—Removal after 30 Days Allowed for Contesting—Quo Warranto.*]—A municipal councillor who could neither read nor write was elected mayor. The 30 days within which to contest his election before the Circuit Court had expired, and it had not been contested. The mayor, although he could not read or write, took the oath of office, and, after the 30 days had expired, he acted and continued to act as mayor:—Held, that any person interested could, by the quo warranto proceedings provided in arts. 987 et seq., C. P. C., depose this councillor from the mayoralty and prevent his continuing to act as mayor. *Bedard* v. *Venet*, Q. R. 25 S. C. 537.

Mayor—Refusal to sign by-law and contract—Mandamus—Stay to enable ratepayer to bring action—Demand and refusal—Other remedy. *Re Kennedy and Boles*, 6 O. W. R. 836.

Park Commissioner —*Action against—Parties — Attorney-General — Ratepayers.*]—Ratepayers who are affected thereby only to the same extent as all other ratepayers in the city cannot bring an action against the park commissioners of the city to set aside resolutions as to the management of a city park; such an action must be brought by the Attorney-General. *Hope* v. *Hamilton Park Commissioners*, 21 Occ. N. 230, 1 O. L. R. 477.

Secretary-Treasurer — *Illegal Assessment—Execution for — Imprisonment.*]—A municipal corporation is liable to respond in damages for the act of its secretary-treasurer in sending to a collecting justice, the name of the plaintiff as having made default in the payment of a rate, which had been illegally imposed upon him, at the same time instructing the justice to enforce payment of the same, which the justice did by issuing an execution against the plaintiff, under which, for want of goods and chattels whereon to levy, he was lodged in prison. *Mellon* v. *King's County*, 35 N. B. Reps. 153.

Superintendent — *Negligence—Personal Injuries—Drains and Sewers.*]—The Act incorporating the town of St. Louis, Quebec, gives power to the council to regulate the connection of private drains with the sewers, "owners or occupants being bound to make and establish connections at their own cost, under the superintendence of an officer appointed by the corporation:—Held, that the municipality cannot be made liable for damages caused through the acts of a person permitted by the council to make such connections, as he is neither an employee of the corporation nor under its control. Judgment in Q. R. 11 K. B. 117 affirmed. *Dallas* v. *Town of St. Louis*, 22 Occ. N. 194, 32 S. C. R. 120.

Tax Collector—*Tenure of Office—Removal — Notice — Tax Sale—Commission—By-law.*]—Under s. 45 of the Municipal Clauses Act a municipal officer holds office "during the pleasure of the mayor or council," and so may be removed at any time without notice or cause shewn therefor. A tax sale by-law provided that the collector should be entitled to a commission on all arrears of taxes collected:—Held, that where lands were bid in by the municipality because the amount offered at the sale was less than the arrears of taxes and costs owing on the lands, the collector was not entitled to a commission on the price of lands so bid in. *Municipality of North Vancouver* v. *Keene*, 24 Occ. N. 197, 10 B. C. R. 276.

Treasurer—*Tax Sale—Power of Treasurer to Pledge Credit of Corporation.*]—A treasurer of a town has no authority to bind the municipal corporation by a contract to pay the cost of advertising his list of lands for sale for arrears of taxes. Under the Assessment Act, R. S. O. 1897 c. 224, s. 224, he is only persona designata to act on behalf of the municipality, and the municipality has no authority to interfere with him in the performance of his defined duties. A creditor in respect to the publication of such advertisements must look to him personally. Warwick v. County of Simcoe, 36 C. L. J. 461, approved of and followed. *Canadian Bank of Commerce* v. *Town of Toronto Junction*, 22 Occ. N. 97, 3 O. L. R. 309, 1 O. W. R. 74.

Valuators — *Appointment — Re-appointment—Implication.*]—By art. 373 of the charter of the city of Montreal, the city council appoints, in the month of December

of every year, 8 valuators, who remain in office until their successors are appointed. In this case the plaintiff, appointed valuator on the 7th January, 1901, received notice on the 27th February, 1902, that his services were no longer required:—Held, that, in the circumstances, he could not maintain that his services had been engaged for the year 1902, nor that there had been a tacit renewal of the engagement. *Hamilton* v. *City of Montreal*, Q. R. 24 S. C. 535.

XIX. Police Officers.

Corruption — *Inquiry — Jurisdiction to Order—Quashing Resolutions—Ratepayer—Promise of Immunity.*]—The board of police commissioners of the city of M. resolved to call a special session of the board to interrogate under oath all the members of the police force appointed or promoted by the board as to the circumstances which had led to their appointment or promotion, in order to satisfy the public and to demonstrate the falsity of the allegations of newspapers which alleged that every appointment or promotion was due to the influence of money. The city council ratified this resolution of the board, and adopted a resolution instructing the board to give an assurance of full protection to the officers and constables who should be interrogated, so as to get at the whole truth:—Held, that, as no matter had been submitted to the council, nor any representations made to the council concerning matters within its jurisdiction, the board and the council had no power to order the inquiry. 2. That the resolution assuring immunity to those who should admit criminal acts done to secure their appointment or promotion was void. 3. That the plaintiff, as a municipal elector and ratepayer, was entitled to have these resolutions quashed, and the defendants restrained from putting them into execution. *Martin* v. *City of Montreal*, Q. R. 18 S. C. 30.

Liability for Acts of.]—A police officer is not the agent of a municipal corporation. 2. A municipal corporation is not responsible for the acts of its police officers, unless it has authorized or adopted such acts. *Tremblay* v. *City of Quebec*, Q. R. 23 S. C. 266.

Liability for False Arrest—*Hours of Duty.*]—The corporation of the city of Sherbrooke were held responsible for the damages caused by an arrest made without reasonable or probable cause by a policeman in the employ of and wearing the uniform provided by the city. The fact that, at the time the arrest was made, the policeman had been relieved and was off duty, is no defence to the action. Rousseau v. Town of Levis, 14 Q. L. R. 376, and Corporation of Quebec v. Oliver, 15 Q. L. R. 319, distinguished. *Bourget* v. *City of Sherbrooke*, Q. R. 27 S. C. 78.

Liability for Unlawful Acts of—*Ratification.*]—The defendants, a city corporation, were held not liable for the act of a police officer who unlawfully broke and entered the premises of the plaintiff and carried away therefrom certain intoxicating liquors there kept for sale by the plaintiff contrary to the provisions of the Canada Temperance Act, although the officer had been specially appointed to see that the Act was enforced. When the servant of a municipal corporation does an act in which the corporation have no peculiar interest, and for which they derive no benefit in their corporate capacity, but which is done in pursuance of some statute for the general welfare of the inhabitants of the community, the servant cannot be regarded as the agent of the corporation for whose wrongful acts they would be liable, and the doctrine of respondeat superior does not apply. The defendants could not make themselves liable for the acts of the officer unless they ratified and adopted them with a full knowledge of their illegality. *McCleave* v. *City of Moncton*, 35 N. B. Reps. 296.

Negligence—*Principal and Agent.*]—A police officer is not the agent of the municipal corporation which appoints him to the position, and, if he is negligent in performing his duty as a guardian of the public peace, the corporation is not responsible. *McCleave* v. *City of Moncton*, 22 Occ. N. 199, 32 S. C. R. 106.

XX. Public Health.

Exercise of Right—*Quarantine of House—Damage to Owner—Liability.*]—The plaintiff had leased his house, situated in the city of Montreal, upon a lease to begin on the 1st May, 1901. In the month of April one of the persons who lived in the house contracted smallpox, and the municipal authorities, after removing him, put the house in quarantine, preventing all access to it, and kept it so until the 14th May. The plaintiff's tenant, therefore, was not able to take possession, and the plaintiff was obliged to cancel the lease. He now claimed damages from the city corporation for the loss of his rent:—Held, that, although the municipal authorities had acted in the exercise of a right and even of a duty, the corporation must pay the plaintiff for the injuries which he had suffered. *Dalbec* v. *City of Montreal*, Q. R. 22 S. C. 23.

Liability for Expenses Incurred by Local Board of Health.]—A medical practitioner, employed by the local board of health of the city of Moncton to attend to cases of smallpox, cannot recover for his services in an action against the city. The Public Health Act, 1898, imposes upon the cities or municipalities wherein local boards of health are established, no liability, which can be enforced by action, for the expenses or contracts of such boards. *Cruise* v. *City of Moncton*, 35 N. B. Reps. 249.

Local Boards of Health—*Action—Parties—Corporations.*]—Local boards of health constituted under ss. 48 and 49 of the Public Health Act, R. S. O. 1897 c. 248, are not corporations, and cannot be sued by any corporate name: Britton, J., dissenting. *Sellars* v. *Village of Dutton*, 24 Occ. N. 311, 7 O. L. R. 646, 3 O. W. R. 664.

Sanitary By-law — *Conviction—Summons—Reference to Wrong Action of By-law.*]—A city by-law making the owner of a house responsible for the unsanitary condition of a yard leased by him, is intra vires. 2. A conviction will not be quashed because

the summons refers to a provision of a statute or by-law which is not the one applicable to the case. *Beauchamp* v. *Weir*, 7 Q. P. R. 174.

XXI. Public Libraries.

Aid by Municipality—*Grant for Site—Validity of By-law—Assent of Electors.*]—A mechanics' institute having been converted into a library, and a board of management organized under R. S. O. 1897 c. 232, part II., a grant of a sum of money for the purchase of a site was made by by-law of the corporation of the town in which the library was situate, without the assent of the electors to either the appointment of the library board or the grant:—Held, that the power to grant aid to free libraries is absolutely in the hands of the local municipality under the general provisions of the Municipal Act, and that the by-law was valid notwithstanding s. 18 of R. S. O. 1897 c. 232, which may have its full and legitimate scope by being applied to the raising of ways and means by means of the requisitionary powers intrusted to particular free library boards under ss. 14 and 17 of the Act. *Hunt* v. *Town of Palmerston*, 23 Occ. N. 66, 5 O. L. R. 76, 1 O. W. R. 791.

Gift—*Breach of Contract—Injunction—Ratepayer—Attorney-General.*]—A. C. made an offer to the defendants that "if the city will pledge itself by resolution of council to support a free library . . . and provide a suitable site," he would furnish $75,000 to erect free library building. The defendants obtained legislation enabling them to give the guarantee, and afterwards the council passed a resolution accepting the offer and giving the guarantee, which resolution was communicated to A. E., and the receipt thereof acknowledged by him. At a later meeting of the city council a resolution was passed to rescind all previous resolutions in relation to the matter:—Held, that there was a binding contract between the defendants and A. C., and the Court would interfere by injunction, at the suit of the Attorney-General, upon the relation of a ratepayer, to restrain a breach of the contract. The passing of the statute gave a vested interest to every citizen. *Attorney-General* v. *City of Halifax*, 23 Occ. N. 24.

XXII. Resolutions.

Confirmation of Hotel License—*Action to Quash Resolution—Collector of Revenue—Issue of License—Interest of Ratepayer—Irregularity.*]—A municipal council, when it confirms a certificate to obtain a hotel license, under art. 18 of the License Act, does not represent the municipal corporation, but is a special authority created by that Act. 2. Such corporation cannot be sued in an action to quash the resolution confirming the certificate. 3. The collector of revenue is the sole judge of the legality of such resolution. 4. One who, by an action before the Superior Court, seeks the quashing of such resolution, must have an interest as a contributory or elector to do so, and such interest no longer exists after the collector of revenue has, upon production of the confirmed certificate, issued a license in favour of the person named in the certificate. 5. A resolution of a municipal council should not be annulled no matter what irregularity it may be tainted with; it should be annulled only by reason of the absence of essential formalities; or for irregularities which are of such a nature as to cause prejudice. 6. The indication of its date upon a certificate for a hotel license, and the competence of the officer who takes the affidavit accompanying it, are not essential things, and any defect in these regards does not constitute an irregularity which causes prejudice. *Duhaime* v. *Parish of St. Francois du Lac*, Q. R. 19 S. C. 162.

Privilege to Private Person.]—A municipal council has no power to permit a private person to construct a reservoir in the ditch at the side of a public road, even if it causes no inconvenience; and a resolution authorizing such a thing will be declared illegal. *Roy* v. *Corporation of St. Anselme*, Q. R. 19, S. C. 119.

XXIII. Sewers.

Communication of Disease—*Evidence—Inference—Nonsuit.*]—Although the defendants were guilty of a nuisance in conducting sewage and depositing it or allowing it to be deposited at the outlet of that sewer on the shore of the Toronto harbour, there was no evidence from which a jury might fairly and reasonably infer that the plaintiff's family, who lived in a house built upon cribs near such outlet, were infected with the germs of diphtheria by reason of such sewage, and therefore the case should have been withdrawn from the jury. *Connacher* v. *City of Toronto*, 21 Occ. N. 172.

Discharge into Navigable Waters—*Special Damage.*]—The defendants' sewer emptied into navigable water, in which the plaintiff's vessel was lawfully moored for the winter. The defendants, although notified of similar previous occurrences, allowed a factory to send hot water down the sewer, which melted the ice on one side of the vessel, causing damage:—Held, that the defendants were liable, as the plaintiffs were lawfully using the waters, and the discharge of the hot water was a public nuisance which caused special damage to the plaintiff. *Mathews* v. *City of Hamilton*, 6 O. L. R. 198.

Extending into Adjoining Municipality—*Injunction to Restrain.*]—A municipal corporation, unless specially authorized by statute, has no right to construct sewers or other works across or under the public streets of another municipality, without having obtained the consent of such municipality, or a right of way; and may be restrained by injunction from proceeding with such works, where the same will cause great or irreparable damage to the other municipality. *Village of Ahuntsic* v. *City of Montreal*, Q. R. 26 S. C. 291.

Extending into Adjoining Municipality—*Terms and Conditions — Award—Municipal Act.*]—Arbitrators made an award, purporting to be under s. 535 of the Municipal Act, 3 Edw. VII. c. 19 (O.), permitting an extension of a sewer from one municipality into another, but no by-law had ever

been passed by the former defining the lands to be taken or affected, or the route of the sewer, and there were, moreover, no terms or conditions as imposed upon the former by the award:—Held, affirming the decision of Teetzel, J., 24 Occ. N. 89, 7 O. L. R. 3 O. W. R. 145, that the award was bad and should be set aside; Moss, C.J.O., and Maclennan, J.A., dissenting. *In re Town of Berlin and Township of Waterloo*, 24 Occ. N. 333, 3 O. W. R. 903; *S. C., sub nom. Township of Waterloo* v. *Town of Berlin*, 8 O. L. R. 335.

Negligence — *Insufficiency — Damage Caused by Back Flow—Compulsory User of Sewer—Statutory Authority.*]—In 1894 the plaintiff built a house on R. street, in the city of M., and, pursuant to city by-law, connected the same with the sewer system provided by the city in the exercise of their statutory duties. Several times the tidewater backed up into the plaintiff's and other cellars on the same street, and, in 1901, the corporation, with a view, if possible, of preventing damage in future by back flowage, continued the sewer on R. street southwardly to the P. river, the outlet being still below high water mark. The new sewer was constructed according to plans prepared by the city engineer and approved of by the city council, and with the same device at the outlet to prevent back flowage, as in other sewers in the city, and similar in principle and mode of operation to those used in other places where sewers discharge into tidal rivers. The new sewer did not prevent back flowage, and the action was brought for loss and damage occasioned thereby:—Held, that the city, having the statutory authority to construct the sewer, and having built it after plans made by a competent engineer and adopted by the council, were not guilty of actionable negligence on account of the insufficiency of the sewer to answer its purpose, and a person thereby injured has no remedy by action at law; and it makes no difference in this particular whether the use of the sewer is voluntary or under compulsion. *Lirette* v. *City of Moncton*, 36 N. B. Reps. 475.

Permit to Enter—*Frontage and Entry Fees—Non-payment—Mandamus.*]—The city of M. by their Act of incorporation were authorized to levy on the owners of lots frontage fees for sewers, and to collect them as ordinary city taxes; the Act also gave authority to make by-laws to regulate the way and manner of entering the sewers, and to prevent the entry of any sewer, unless the entry and frontage fees were first paid. A by-law was made providing that no person should enter any public sewer until all entry and frontage fees were paid. E., the owner of a lot by purchase from the sheriff under an execution by the city of M. for general city taxes (not frontage fees), on which frontage fees had been rated against a former owner and not paid, applied for a mandamus to compel the city to grant him a permit to enter a sewer without payment of the frontage fees:—Held, refusing the mandamus, that the city could not be compelled to issue the permit until the fees were paid, even though they had lost the right to enforce payment against the owner of the lot. *Ex p. Edgett*, 36 N. B. Reps. 224.

Vancouver Incorporation Act—*Entry on Land—Compensation—Condition Precedent.*]—Before entering on land for the purpose of putting a sewer through it, the city of Vancouver must, under their Act of incorporation, compensate the owner of the land through which it is proposed to lay the sewer. *Arnold* v. *City of Vancouver*, 10 B. C. R. 198.

XXIV. Transient Traders.

By-law—*Conviction—Negativing Exception — Evidence before Magistrate—Certiorari.*]—Conviction of the defendant under a by-law of a town respecting transient traders. The by-law was in the terms of R. S. O. c. 224, s. 31. The defendant was convicted because he, not being entered on the assessment roll, offered goods for sale without having paid a license fee:—Held, that the by-law in the terms of the section was intra vires, and the use of the word "effect" instead of "affect" was immaterial; (2) that since 1 Edw. VII. c. 13, s. 1, it is not necessary to negative an exception; and Regina v. Smith, 31 O. R. 224, is no longer useful; (3) that the objection that the evidence shewed that the defendant was managing the business of his wife, and was not a transient trader nor occupant of the premises, was not open upon certiorari. *Rex* v. *Allan*, 21 Occ. N. 585.

Conviction — Form—Costs — Imprisonment—Evidence. *Rex* v. *Swanton*, 2 O. W. R. 106.

Conviction—*Hawking Goods—License—Traveller with Sample.*]—One who travels about from house to house for the purpose of selling sewing machines, carrying with him only one machine as a sample, his stock being stored in a shop rented for the purpose, cannot be convicted under 58 V. c. 39, s. 4 (N.B.), of hawking or peddling goods without license. Semble, that proof of a single act of sale of goods or merchandise against a man does not constitute him a hawker or peddler within the meaning of the above Act. *Regina* v. *Phillips*, 35 N. B. Reps. 393.

Conviction—*Penalty — Costs — Distress—Imprisonment—Uncertainty as to Time and Place — Amendment — "Butcher"—By-law.*]—Upon motion to quash the conviction of the defendant, a transient trader, for offering meat for sale in quantities less than the quarter carcase, without having paid a license fee, contrary to a by-law of a village:—Held, that it was not necessary that the by-law or conviction should contain the words "for temporary purposes" and "assessment roll for the then municipal year," as they relate to the regulation of transient traders under clause 30 of s. 583 of the Municipal Act, R. S. O. 1897 c. 223, which refers to the payment of a license fee before beginning operations; nor was it necessary to refer to or negative the provisions of 58 V. c. 42, s. 22 (O.), making the term "transient trader" applicable to one who has resided less than three months in the municipality before beginning business, the evidence shewing brief visits periodically and regularly to sell meat for a given time at a particular place in the village. 2. The objection that the penalty of

$1 was not apportioned under s. 708 failed, because the application was otherwise provided for by the by-law. 3. The objection that the conviction and by-law were in excess of the statute because power of distress was given for both penalty and costs, and because of the commitment, in default of payment, to the common gaol, was not well taken, having regard to the powers given by s. 702, s.-ss. 2 and 3. 4. The uncertainty of the offence in the conviction as to date, place, and meat sold, should be cured by amendment, upon the facts in evidence, under 2 Edw. VII. c. 12, s. 15 (O.). 5. Although ss. 580 and 581 deal specifically with the sale of meat, a transient trader, under s. 583, might include a butcher or dealer in meat. *Rex* v. *Myers*, 23 Occ. N. 286, 6 O. L. R. 120, 2 O. W. R. 533.

Conviction—*Proof of By-law—Offence—Certiorari—Costs.*]—The Municipal Ordinance (R. O. 1888 c. 8, s. 68, s.-s. 31) authorizes municipal councils to pass by-laws for "licensing, regulating, and governing transient traders and other persons who occupy premises in the municipality for temporary periods, and whose names have not been duly entered on the assessment roll in respect of income or personal property for the then current year, and for fixing the sum to be paid for a license for exercising any or all such callings within the municipality, and the time the license shall be in force."—The defendant was convicted "for that he, the said (defendant), whose name had not been entered on the last revised assessment roll of the municipality on, etc., within said municipality, was a sewing machine agent, carrying on his business occupation, and calling as such sewing machine agent without first having obtained a license so to do, contrary to the provisions of by-law No. 25 of the said municipality." On an application for a writ of certiorari it appeared from affidavits filed that the original by-law was produced before the convicting justice, but that neither the original nor a copy was put in as evidence, and it was sought to prove the by-law on this application by affidavit:—Held, that the by-law could not be proved by affidavit on the application for the writ of certiorari. 2. That therefore the only means available of ascertaining the provisions of the by-law was by reference to the information and conviction. 3. That the offence stated in the conviction was not one which could be created by a by-law passed under the above quoted clause of the Municipal Ordinance, inasmuch as it did not allege that the defendant was "a transient trader or other person occupying premises in the municipality for a temporary period." 4. That costs of quashing a conviction on certiorari will not be granted, unless there be misconduct on the part of the informant or of the justice. *Regina* v. *Banks*, 2 Terr. L. R. 81.

License—*Travelling Salesman of Trading Corporation.*]—A person in the employ of a trading corporation (the latter having a place of business and paying the usual business and other taxes), who sells by wholesale to retail dealers and not to consumers, is not a peddler, and therefore is not obliged to take out a license or pay a special tax as such. Semble, that the calling of a peddler carries with it the idea of petty trade, or of sale by outcry and itinerancy. *City of Montreal* v. *Emond*, Q. R. 23 S. C. 77.

Licensing Powers—*Hawkers—License Fee—Statutes—Effect on By-laws.*]—The authority granted to the city of Montreal by 52 V. c. 79 (art. 140, s. 36), to empower any person to sell elsewhere provisions usually bought and sold on public markets, by granting him a license upon payment of such sum as shall be fixed by by-law, is equivalent to authority to levy a special tax, and justifies the exaction of a license fee or tax of $50 from such person. 2. By-laws of the city of Montreal validly passed in virtue of 52 V. c. 79, remain in force until formally repealed, notwithstanding the passing of the new charter, 62 V. c. 58. *City of Montreal* v. *Hatton*, Q. R. 21 S. C. 68.

Taking Orders for Goods.]—There is no power to pass a by-law or to convict under the transient traders' clauses of the Municipal Act in respect to a person living at an hotel and taking orders for clothing to be made in a place outside of the municipality, out of material corresponding with samples exhibited. *Rex* v. *St. Pierre*, 22 Occ. N. 233, 4 O. L. R. 76, 1 O. W. R. 365.

Tax on—*Ultra Vires—License.*]—A by-law imposing a tax of $50 on every peddler or seller of beer within the municipality is ultra vires of a municipal corporation, unless the right is specially given by statute. 2. Arts. 582 and 582a, M. C., do not authorize a tax, but a license. *Hamel* v. *Parish of St. Jean Deschaillons*, Q. R. 20 S. C. 301.

XXV. Waterworks.

Board of Commissioners—*Statutory Body—Powers—Contract—37 V. c. 79 (O.)—Action—Parties.*]—By 37 V. c. 79 (O.) the waterworks system of Windsor is placed under the management of a board of commissioners, who are to collect the revenue, paying over to the city any surplus therefrom, and to initiate works for improving the system, the city supplying the funds to pay for the same. The total expenditure is not to exceed $300,000, and not more than $20,000 can be expended in any one year without a vote of the ratepayers:—Held, affirming the judgment of the Court of Appeal, 27 A. R. 566, 21 Occ. N. 14, that the board was merely the statutory agent of the city in carrying out the purposes of the Act, and a contract for work to be performed in connection with the waterworks, and authorized by by-law of the council, and incurring an expenditure which would exceed the statutory limit, was not a binding contract:—Held, also, that, if an action could have been brought on such contract, the city corporation would have been a necessary party:—Quære, whether the city corporation would not have been the only party liable to be sued. *McDougall* v. *Windsor Water Commissioners*, 21 Occ. N. 366, 31 S. C. R. 326.

Breweries—*Distilleries—Illegal Rate—Discrimination.*]—The rate which, by 24 V. c. 56, the city of Hamilton is empowered to charge proprietors, occupants, or others, for water supplied to them, must be an equal rate. Attorney-General for Canada v. Corporation of Toronto, 23 S. C. R. 514, followed. Where, therefore, by a by-law passed therefor, a higher rate was imposed on dis-

tillers and on brewers than on other manufacturers, such rate was held to be illegal. *Hamilton Distillery Co.* v. *City of Hamilton, Hamilton Brewery Co.* v. *City of Hamilton*, 10 O. L. R. 280, 6 O. W. R. 143.

Conveyance of Water through Private Lands—Compensation—Special statute—Claim made after 20 years—Statute of Limitations — Interruption—Repairing water pipes—Free entry—Assignment of claim for compensation—Champerty. *Re Dyer and Town of Brampton*, 5 O. W. R. 668.

Right of Outsider to Water Supply — Contract — Easement — Discrimination. *Mackenzie* v. *City of Toronto*, 4 O. W. R. 457.

Special Tax—*Submission to Ratepayers—Debentures—Attacking By-law—Parties—Ratepayer—Corporation.*]—A by-laws of a municipal council for the purchase of an aqueduct and a system of sewers should contain a clause imposing a special tax and be submitted to the vote of the ratepayers. 2. Such a by-law containing only a clause for the issue of debentures, not providing for the imposition of a special tax, and not submitted to the ratepayers, is void. 3. The nullity of such a by-law extends not only to the part which provides for the issue of debentures, but also to the other parts which provide for the purchase of the aqueduct and the system of sewers; the by-law is, therefore, void in toto as well as the contract of purchase which it authorizes. 4. Such by-law may be attacked by any ratepayer of the municipality. 5. Semble, that the corporation cannot itself take proceedings in its own name to have the nullity of the by-law declared. *Gagnon* v. *Village of Point-au-Pic*, Q. R. 22 S. C. 396.

Water Supply—Use by contractors—Implied license—By-law — Rates—Damages—Penalty. *City of Guelph* v. *Guelph Paving Co.*, 2 O. W. R. 587.

XXVI. Other Cases.

Act of Incorporation—*Repeal—General Act—Constitution of Corporation—Municipal Council.*]—By an Act of the Legislature passed in the year 1875, c. 47, the "inhabitants of the town of T.," within the limits thereby defined, were constituted "a body corporate and politic by the name of the town of T." In the year 1888 a general Act was passed in relation to incorporated towns (c. 1) whereby previous Acts of incorporation were repealed and the towns incorporated under such Acts, including the town of T., were made subject to the provisions of the Act of 1888:—Held, that, under a proper construction of the terms of the original charters and the general Act of 1888, the inhabitants of each of the incorporated towns, including those incorporated under the repealed Acts, as well as those subsequently incorporated under the Act of 1888, were created a body corporate under the name of the town within the limits of which they respectively resided. By s. 5 of the repealed Act in relation to the town of T., it was enacted that "the corporation shall consist of a mayor and six councillors," etc.:—Held, that, even if this section had not been repealed by the Act of 1888, it could not, in the face of s. 1 of the Act of 1875, incorporating "the inhabitants of the town," be held to mean that the corporation at large consisted merely of the mayor and the six councillors:—Held, that the inhabitants of T. constituted the corporation at large, and that the town council was only a portion of it. *Regina ex rel. Lawrence* v. *Patterson*, 33 N. S. Reps. 425.

Action against Corporation — *Corporate Name.*]—A municipal corporation may be sued under the name which the statute establishing it gives it, even if that is not its corporate name. *Milton* v. *Parish of Coté St. Paul*, 6 Q. P. R. 446.

Action against Corporation — *Deposit—Default—Leave to Make.*]—A plaintiff who did not, at the time of the issue of a writ of summons, make the deposit required by art. 793, C. M., in an action against a municipal corporation, may obtain permission to make such deposit at a later stage. *Prevost* v. *Village of Ahuntsic*, 5 Q. P. R. 171.

Action against Corporation—*Deposit—Condition Precedent—Husband and Wife—Parties to Action — Injuries to Wife.*]—The deposit of $10 required from persons, not ratepayers, who sue a municipality for damages caused by the bad state of the pavements, is required only as security for costs; it is not a condition precedent to the right of action, and may be made in the course of the action. 2. There is nothing improper in a wife, common as to property, being joined as a party along with her husband claiming, is chief of the community, compensation from a municipality, one part of which is based upon personal injuries suffered by her. *Prevost* v. *Village of Ahuntsic*, 6 Q. P. R. 17.

Annexation of Town and City—Petition for submission of by-law—Investigation as to number and qualification of petitioners—Delegation—Withdrawal of names—Addition of—Mandamus—Time — Statute—Directory or imperative. *Re McLeod and Town of East Toronto*, 4 O. W. R. 26, 220.

Annexation of Village Lands to Township—*County By-law—Detachment of Lands—Petition — Description—Schedules.*]—Under s. 18 of the Municipal Act, 1903, 3 Edw. VII. c. 19 (O.), which provides for the detachment of a special area in a village, and for its annexation to an adjoining township, it is not essential that the whole area sought to be detached should be set out in one petition, but there may be separate petitions setting out distinctive portions, nor is it essential that the area so detached, and the metes and bounds of the new limits, should be set out in the by-law, but they may be set out in schedules attached thereto. *In re Village of Southampton and County of Bruce*, 24 Occ. N. 353, 8 O. L. R. 106, 3 O. W. R. 729, 4 O. W. R. 341.

Audit of Accounts — *Appointment of Auditor—Payment—Premature Action—Attorney-General — Tariff.*] — A person appointed by the provincial auditor, pursuant to the provisions of the Act respecting the audit of municipal accounts, R. S. O. 1897, c. 228, to audit the accounts of a municipality, has no right of action against the municipality for his fees and expenses until three

months after the amount thereof has been specifically determined by the provincial auditor with the approval of the Attorney-General or other Minister, as required by s. 16 of the Act. The approval by the Attorney-General of a tariff according to which the fees and expenses are made up and allowed by the provincial auditor, is not sufficient. Judgment of Boyd, C., 2 O. W. R. 977, reversed. *Williamson* v. *Township of Elizabethtown*, 24 Occ. N. 313, 8 O. L. R. 181, 3 O. W. R. 742.

Board of Delegates—*Rights and Liabilities of—Entity—Action against.*] — Although the board of delegates is created a responsible entity, and recognized by the law, it is not a body corporate and politic capable of suing and being sued, any more than is the council of a county or municipality; and the members of such a board form in reality a council created for two or more counties for the purposes specified by the law, and as such the delegates sitting for the counties which they represent cannot be sued in a court of justice. *Parish of St. Stanislas de Kostka* v. *Bureau of Deputies of the Counties of Huntingdon and Beauharnois*, 7 Q. P. R. 256.

Bonds — *Liability of County for Parish Almshouse — Certificate of Indebtedness — Common Counts—Mandamus.*]—By 41 V. c. 102 (N.B.), it was provided that the defendants should appoint commissioners to lease or purchase lands and erect thereon an almshouse for the parish of B. and to support and manage the same; that the cost was to be assessed by the county council on the parish; that the county council might cause bonds to be issued which should be wholly chargeable on the parish and be disposed of for the purposes of the Act; that the county council should levy upon the parish a sum sufficient to pay the principal and interest of the bonds; and that sums, when collected, should be held by the secretary-treasurer of the county for the purposes of the Act. Pursuant to this Act instruments were issued, signed by the secretary-treasurer and warden of the county, sealed with the county seal, certifying that the parish was indebted to the holder in the sum of, etc. One of these was purchased by the plaintiffs' intestate, who was named in it as the holder, and the plaintiffs sued the county corporation to recover the principal and interest thereof:—Held, that the defendants were not liable on a count framed on the instrument itself, nor upon the common counts, nor under 62 V. c. 67; that by 41 V. c. 102 the defendants were not authorized to issue any instrument that would create an indebtedness between them and the person advancing money upon such instrument. Semble, that the plaintiffs' remedy was by motion for a mandamus to compel the defendants to assess the parish for the amount of the loan and interest. *Grimmer* v. *County of Gloucester*, 35 N. B. Reps. 255.

Bond—*Form of—Statute Authorizing — Parish Commissioners—Liability.*]—An Act of the New Brunswick Legislature authorized the county council of Gloucester county to appoint almshouse commissioners for the parish of Bathurst, in that county, who might build or rent premises for an almshouse and workhouse, the cost to be assessed on the parish. The municipality were empowered to issue bonds, to be wholly chargeable on the parish, under their corporate seal and signed by the warden and secretary-treasurer, the proceeds to be used by the commissioners for the purposes of the Act. G. purchased from the secretary-treasurer of the county a bond so signed and sealed, and headed as follows: "Alms House Bond—Parish of Bathurst." It went on to state that "this certifies that the parish of Bathurst, in the county of Gloucester, Province of New Brunswick, is indebted to George S. Grimmer . . . . pursuant to an Act of Assembly" (the above-mentioned Act.) In an action by G. on the bond:—Held, reversing the judgment of the Supreme Court of New Brunswick, that, notwithstanding the above declaration that the parish was the debtor, the county corporation were liable to pay the amount due on the bond. *Grimmer* v. *County of Gloucester*, 22 Occ. N. 276, 32 S. C. R. 305.

City Charter — *Transient Traders — License—"Assessed as a Resident"—Conviction.*]—Case stated by a magistrate, after the conviction of the defendant, a non-resident of the province of Nova Scotia, for soliciting orders in Halifax for a Glasgow, N. S., firm of tailors. Chapter 57 of the Acts of 1899 enacts that "no person on his own account or as agent for any person, firm, or body corporate residing or doing business outside of the province of Nova Scotia, shall solicit orders or take measurements or make an agreement or agreements for the furnishing or supplying of clothes or other garments in the city of Halifax, unless he or it has been assessed as a resident of the said city," in the previous general assessment, without first taking out a license therefor from the said city. The defendant did not take out any license, but his principals purchased property in Halifax and were assessed therefor in the same manner as residents of the city. On behalf of the prosecution it was contended that the principals should be residents of the city:—Held, that the conviction must be quashed. The defendant's principals were assessed in the same manner as residents, and the statutory prohibition therefore did not apply to them. *Rex* v. *Murray*, 24 Occ. N. 183.

Control of Streets — *Railway Crossing —Regulation Requiring Gates—Resolution of Council—Injunction — Attorney-General — Parties—Assent of Governor-in-Council.*] — By the Act amending the Act of incorporation of the defendant company, they were given the right to lay their tracks across the streets of the plaintiffs provided that before doing so the consent of the town council should have first been obtained. On application by defendants to the town council for permission to cross one of the streets of the town, a resolution was passed granting the application "subject to such regulations as the town council may, from time to time, make to secure the safety either of persons or property." Subsequently, the town council passed a resolution requiring the company to forthwith erect and maintain two gates, of the latest approved pattern of railway gates, on and across the street on either side of the track. The defendants failed to comply with the regulations so made, and this action was brought to restrain them from running trains across the street until they should comply with the regulation:—Held, that the regulation was one within the powers

of the town council to make. The town council having a special interest in the subject matter, the action could be brought in the name of the town, without joining the Attorney-General. The regulation in question, being made by virtue of a power given by a special Act, was not, in the absence of express words to that effect, a by-law of the town which required the assent of the Governor-in-Council before going into operation. Such assent was required only in connection with the cases specially mentioned in the Act: Towns Incorporation Act, R. S. N. S. 1900 c. 71, ss. 263, 264. *Town of Liverpool* v. *Liverpool, &c., R. W. Co.*, 35 N. S. Reps. 233.

Electrical Works — Statute authorizing—Imperative or permissive—Damage to lands by dam—Temporary structure—Independent contractor—Control by corporation. *Clipsham* v. *Town of Orillia*, 4 O. W. R. 121.

Ferry — *Powers of Municipality—Appliances of Ferry—Sale — Duty to Purchaser —Liability.*]—The authority conferred on a municipality to make by-laws for establishing, licensing, and regulating a ferry, authorizes it to provide a boat and other appliances for operating the same. And where a ferry so established, with the boat and appliances, is sold at public auction by the municipality, they are bound to put the vendee in possession, and are liable in an action of damages for failure to do so, and to an action to recover back the purchase money. *Currey* v. *Municipality of Victoria*, 35 N. B. Reps. 605.

Fines — *Conviction — Fine Payable to Officer.*]—When it is provided by a statute that a fine shall belong to a municipal corporation, a conviction which condemns an offender to pay such a fine to an officer of the corporation, and not to the corporation itself, is void and will be quashed upon certiorari. *Wilcox* v. *City of Montreal*, Q. R. 23 S. C. 38.

Formation of Village Municipality —*Petition for—Withdrawal of Signatures — Jurisdiction.*]—After two-thirds of the residents of a locality have signed a petition demanding the formation of their territory into a village municipality, the county council is sufficiently seised of such petition, and the fact that certain of the signers withdraw their signatures so that there no longer remain two-thirds of the residents upon the petition, does not take away the jurisdiction of the council; and the proceedings which it subsequently takes are not in excess of its jurisdiction. Judgment in Q. R. 20 S. C. 329, reversed. *Martin* v. *County of Arthabaska*, Q. R. 21 S. C. 119.

Inquiry into Municipal Election — *Powers of council—"Good Government of the Municipality" — Ratepayer — Injunction — Conduct of Inquiry—Evidence—Witnesses — Ballot Papers.*]—Held, that the council of a city had power under s. 324 (1) of the Municipal Act, 1903, to order an inquiry by a County Court Judge into an election for members of the council and board of education, at which it was alleged that corrupt practices had prevailed; the election being a "matter connected with the good government of the municipality," within the meaning of the enactment:—Held, also, that the High Court could not, in an action by a ratepayer for an injunction, interfere with the conduct of the inquiry by the Judge in regard to the admission or rejection of evidence, the examination of ballot papers, compelling witnesses to answer incriminating questions, etc. *Lane* v. *City of Toronto*, 24 Occ. N. 228, 7 O. L. R. 423, 3 O. W. R. 269.

Liability for Arrest—*Warrant of Mayor — Execution by Special Constables.*] — The execution of a warrant of arrest, signed by the mayor of a municipality, and intrusted to special constables of the municipality, does not make the municipal corporation responsible for the consequences of the arrest; the constables in making the arrest acting only in the execution of the functions for which they are employed. *Milton* v. *Municipality of Coté St. Paul*, Q. R. 24 S. C. 541.

Liability for Flooding of Lands — Culvert — Negligence — Owner — Evidence. *Jephson* v. *City of Niagara Falls*, 3 O. W. R. 938.

Loans—*Appropriations—Sinking Fund — Mandamus—Deposit — Interest — Action — Status of Plaintiff.*]—Mandamus lies to compel the corporation, but not the treasurer, a mere official acting under the orders of the council, to deposit in an incorporated bank, or the hands of the provincial treasurer, appropriations in hand, but not those of previous years diverted to other uses, to the credit of interest and sinking funds on loans made in virtue of by-laws, passed under the provisions of 56 V. c. 52, ss. 374, 375, 376, 380, and 412. 2. It is a duty imposed by law, and not discretionary with the council, to make such deposit, and once appropriations are made to pay interest and sinking funds, the council cannot afterwards change such appropriations, nor divert the funds. 3. After payment of the absolutely necessary expenses of municipal government, the balance of the revenue should be applied to payment of interest and sinking funds, and not to improvements, betterment of streets, etc., debts for which are not privileged and take no preference over sinking funds. 4. Where appropriations for payment of interest and sinking funds for previous years, had been collected from the tax-payers, and diverted, and no money remained in the treasury to pay except the current year's interest and sinking funds—as the city had exceeded the limit of its borrowing powers—to order the city to pay the previous years' interest and sinking funds so diverted, from the current year's appropriations, would be to suspend its function of municipal government; and the petitioners' demand was granted for the current year's appropriation only. 5. An occupant not an elector paying municipal taxes, is, with the electors, interested in municipal administration, and has the right to compel the city to perform the duties imposed by law upon the corporation. *Trudel* v. *City of Hull*, Q. R. 24 S. C. 285.

Misnomer—*Amendment—Penalty—Affidavit.*]—Where a corporation whose true name was "La corporation de la paroisse de St. Columban de Sillery" commenced an action under the name of "La corporation de la municipalité de St. Columban de Sillery," its action was dismissed upon exception to the form, though the writ might have been amended had application been made for

leave to do so. A municipal corporation which sues for a penalty incurred by the infraction of one of its by-laws, ought to furnish the affidavit required by art 5716 of the consolidated statutes of Quebec. *Corporation de Sillery* v. *McConc*, Q. R. 26 S. C. 464.

Notice—*City Charter.*]—The requirement of notice under s. 301 of the charter of the city of Montreal (62 V. c. 58) applies only to by-laws enacted under s. 12 of the charter. *Wilder* v. *City of Montreal*, Q. R. 26 S. C. 504.

Operation of Railway—*Use of Streets — By-law or Resolution.*] — By the Nova Scotia statute 63 V. c. 176, the appellant company were granted powers as to the use and crossing of certain streets in the town, subject to such regulations as the town council might from time to time see fit to make to secure the safety of persons and property:—Held, that such regulations could only be made by by-law, and that the by-law making such regulations would be subject to the provisions of s. 264 of the Towns Incorporation Act. R. S. N. S. 1900, c. 71. *Liverpool and Milton R. W. Co.* v. *Town of Liverpool*, 23 Occ. N. 180, 33 S. C. R. 180.

Parks—*Establishment of—By-law—Dedication of Land Held by Corporation in Fee—Subsequent Leases for Building Purposes—Injunction—Private Plaintiff—Interest.*] — A by-law was passed by the defendant corporation in 1880 purporting to establish a park on the "Island," which was granted to the corporation by the Crown in fee in 1867, and certain lots were designated therein which, "with such other lands as may hereafter be obtained from lessees or otherwise," were to form a park. Other lands were in 1887 directed to be taken and expropriated in order to enlarge the "Island Park," but no general plan or scheme for park improvements was considered till 1901, when a special committee was appointed to elaborate a plan. The defendant corporation from 1880 till 1901 acted on the belief that there was power to deal with the land designated as park land, by leasing it, imposing and collecting rent and taxes, approving of the laying out of new streets on registered plans, and otherwise exercising the control of owners. The park scheme was not abandoned, but the details and the area were modified from time to time by successive councils:—Held, that the corporation had not exceeded their powers in so dealing with the land designated. The doctrine of irrevocable dedication is not applicable to the case of a park which is established by by-law out of land belonging to the corporation as owners in fee. The fact of corporate action being embodied in a by-law implies its revocability:—Held, also, that S., who was joined as a plaintiff, claiming under a lease made prior to the park scheme, and renewed in 1895, after registration of plans made in 1883 and 1890, which shewed that the corporation had sanctioned the subdivision of the lands in question into building lots, had not such an interest, by reason of a special grievance, as would entitle her to have the corporation restrained from granting to the defendant L. a building lease of part of the lands. *Attorney-General* v. *City of Toronto*, 23 Occ. N. 284, 6 O. L. R. 159, 2 O. W. R. 539.

Personal Injuries—*Notice of Action — Pleading.*]—In an action for the recovery of damages against the corporation of a town, the absence of previous notice, required by the charter of such corporation, must be specially pleaded. *Sullivan* v. *Town of Magog*, Q. R. 18 S. C. 107.

Powers of Councils—*Right to Censure Member—Municipal Code—Illegal Resolution —Damages.*]—An appeal from a decision of the local council of the defendants having been taken to the county council, and no session to consider this appeal having been called by the mayor, secretary-treasurer, or councillors, and the appeal in question having been allowed by the county council when the mayor of the local council concerned was present, the local council at a subsequent meeting passed the following resolution: "That the mayor deserves the censure of the council for having neglected to call a meeting of council so that the council should have an opportunity to resist the appeal:" — Held, reversing the judgment of the Superior Court, Q. R. 26 S. C. 447, that municipal councils have no rights or prerogatives other than those conferred on them by the Municipal Code; and, there being nothing in the said Code giving municipal councils the right to pass judgment on their members, they cannot arrogate to themselves the right to do so; and, in this case, a vote of censure of the mayor was, consequently, illegal, ought to be rescinded, and for this purpose the judgment of the Court declaring the resolution illegal should be inserted in the minute books of the council in the margin where the said resolution appears. Furthermore the corporation are liable for the act of their council and may be adjudged to pay exemplary damages. *Vallières* v. *Corporation of the Parish of St. Henri of Lauzon*, Q. R. 14 K. B. 16.

Public Dock — *Invitation to Use—Collapse.*]—Under the authority conferred by s. 562 of the Municipal Act, R. S. O. c. 223, the defendants, a municipal corporation, built a dock on the Detroit river, and passed a by-law providing for the collection of wharfage fees from those using the dock, one item of the tariff of fees being ten cents per thousand for loading and unloading bricks; a period of forty-eight hours was allowed for removing freight placed on the dock, and fifty per cent. was to be added if that period was exceeded. The plaintiff unloaded 34,000 bricks from a vessel upon the dock, whereupon the dock, being by reason of some defect incapable of sustaining such a weight, collapsed, and the greater part of the brick were sunk and lost to the plaintiff:—Held, that the defendants, having placed the dock in such a position as invited any vessel owner desiring to unload a cargo to do so, if prepared to pay the dock charges which the statute gave the defendants authority to levy, and having passed a by-law establishing tolls for the use of it, thereby invited the public to make use of it for such purposes as public docks are ordinarily used for, and, if they wished to limit the use of it, they should have made that known in some public way; and, the evidence shewing that the mode adopted in this case of unloading and piling the bricks was that usually adopted at public docks, the defendants were liable for the loss. *Thompson* v. *Town of Sandwich*, 21 Occ. N. 206, 1 O. L. R. 407.

Public Works—*Procès-verbal—Ratepayer—Mandamus.*]—A municipal corporation, in an action by a ratepayer regularly brought, will be ordered to construct works, fences, &c., prescribed by a procès-verbal, and such ratepayer is not obliged to proceed against each one of the owners or occupants of the lands liable for such works; but in default of the corporation performing such works within a certain time, the Court will authorize such ratepayer to do them or cause them to be done at the expense of the corporation. *Rousseau* v. *Corporation of Blandford*, Q. R. 21 S. C. 464.

Quashing Proceedings of—*Powers of Superior Court—Petition of Ratepayers—Withdrawal of Signatures.*]—The Superior Court may always quash the proceedings of a municipal body when they are unjust, arbitrary, or not in the public interest, nor in that of the taxpayers for whose benefit the proceedings are intended. Semble, that by virtue of art. 52, C. M., the county council must have before it, during the whole time that it is proceeding upon a petition, at least two-thirds of those interested, in order to have jurisdiction; the taxpayers who have signed such petition in error or under false representations have the right to withdraw their signatures from the said petition. *Martin* v. *County of Arthabaska*, Q. R. 20 S. C. 329. Reversed: see ante.

Railway Embankment—Damages to adjacent property—Water—Liability of corporation. *Slinn* v. *City of Ottawa*, 1 O. W. R. 269.

Sidewalk—*Accident — Relief Over.*]—The corporation of the city of Montreal, being sued for damages for injuries sustained by reason of a fall upon one of its sidewalks, have the right to bring in en garantie the owner or occupant of the land in front of which the sidewalk is. *City of Montreal* v. *Sisters of Congregation of Notre-Dame de Montreal*, 3 Q. P. R. 475.

Trespass—*Taking Land for Sidewalk — Remedy — Ascertainment of Boundaries — Restoration — Amendment.*]—Action to recover the value of a strip of land in front of which a municipal corporation had laid a sidewalk. The real matter in controversy was the extent of the plaintiff's land. The Courts below dismissed the action on the ground that the proper remedy was by action en bornage or au petitoire. In order to put an end to litigation, the Supreme Court of Canada reversed the judgments below and directed that the record should be remitted to the trial Court to ascertain the property affected, all necessary amendments being made, and that plaintiff's property should be restored to him, defendants having offered this in their pleading. *Burland* v. *City of Montreal*, 33 S. C. R. 373.

Trimming of Trees in Streets.]—Under s. 574, s-s. 4, of the Municipal Act, R. S. O. 1897 c. 223, municipal corporations have power to deal with the trimming of all trees the branches of which extend over the streets of the municipality, but that it is a matter which should be dealt with not by resolution, but by by-law, as indicated by s. 575 of the Municipal Act. *In re Allen and Town of Napanee*, 22 Occ. N. 412, 4 O. L. R. 582, 1 O. W. R. 634.

Work Done—*Request of Land Owner — Assessment Roll—Particulars—Pleading.*]—In an action for work done by a municipal corporation (the plaintiffs), for land owners in the municipality, the plaintiffs will be ordered to declare whether the order for the work was oral or written, and if written to produce the writing. 2. A municipal corporation suing a religious community for work done in pursuance of an assessment roll, may be ordered to file an extract from such roll, and the defendants may demand that they be not required to plead before such filing. *Village of Lorimier* v. *Community of the Sacred Names of Jesus and Mary*, 6 Q. P. R. 368.

MUNICIPAL CONTROVERTED ELECTIONS.

Bribery or Undue Influence—*Evidence—Affidavits in Answer—Statute.*]—Upon an application in the nature of a quo warranto to set aside a municipal election upon the ground of bribery or undue influence, as defined in ss. 245 and 246 of the Municipal Act, R. S. O. c. 223, all the evidence both pro and con, and not merely the evidence adduced by the relator in support of the charge, is to be taken viva voce; this is the true construction of s. 248, to aid which the heading "evidence as to corrupt practices to be taken viva voce," may be read into the section; and affidavits in answer to oral evidence cannot be received. *Rex ex rel. Carr* v. *Cuthbert*, 21 Occ. N. 190, 1 O. L. R. 211.

Conduct of Presiding Officer—*Fraudulent Practices—Closing Poll.*]—In a municipal election, the facts that the presiding officer has given to a supporter of the candidate elected, privately and in a low voice, advice as to the election law; that shortly before four o'clock on the first day of the voting certain supporters of the candidate elected, who have not voted, withdraw from the hall in which the voting is going on, in order that, by reason of their presence in the hall, the voting may not be adjourned to the next day, that the presiding officer said to an elector, who afterwards entered the hall, "if you do not wish to have the poll go on to-morrow, vote immediately or go out," after which the elector, who swore that he did not wish to vote, retired without having voted—did not constitute fraudulent practices justifying the setting aside of the election. *Théoret* v. *Boileau*, Q. R. 21 S. C. 209.

Controller of City—Summary proceedings in nature of quo warranto—Application of—Construction of Municipal Act—Prohibition. *Re Rex ex rel. Snider* v. *Richardson*, 3 O. W. R. 276.

Controverted Election—Practice—Affidavit—Irregularity—Waiver—Notice of motion—Service—Mayor of town—Disqualification—Membership in school board—Construction of statute—Costs. *Rex ex rel. McCallum* v. *McKimm*, 2 O. W. R. 162.

Controverted Election—*Petition—Affidavit—Notice—Time—Abolition of Terms—Charter of Town—Incorporation of Code by Reference—Construction of Statute.*]—The affidavit mentioned in Rule 47 of the Rules

of Practice of the Superior Court, applies only to incidental motions or petitions in the course of a pending suit, and not to such as themselves form the commencement of suits. 2. The Act 61 V. c. 20, s. 3, having abolished the terms of the Circuit Court and the Superior Court, at Quebec, there are no longer, practically, terms or sessions of the Court at Quebec, or, to put it in another way, the whole year constitutes a single term, and, therefore, if notice of a petition in contestation of a municipal election is given within 15 days after such election, it may be presented to the Court at any time afterwards. 3. In this case the charter of the corporation of the town of Levis, referring, as regards contestations of elections, to arts. 348-358,, inclusive, of the Municipal Code, and declaring that they are to be regarded as forming part of it, these articles as they existed at the time the charter was passed by the Quebec Legislature, and not those which have since been substituted for them by the legislature, are to be considered as incorporated in the charter. *Mercier* v. *Belleau*, Q. R. 23 S. C. 136.

Controverted Election — *Petition—Affidavit—Security for Costs—Terms of Circuit Court.*]—It is not necessary that a petition in contestation of a municipal election should be accompanied by an affidavit. 2. The security for costs which the party contesting the election of a municipal councillor must give, in which the surety declares that he is the owner of an immovable of the value of $200 over and above all his debts, is sufficient. 3. Although it is declared in s. 2352, R. S. Q., that in the district of St. Francois all juridical days are term days, nevertheless, if the Bar of St. Francois has, by resolution, approved by all its members and accepted and followed for several years, fixed certain days as term days for the Circuit Court, that resolution has the force of law. *Labbe* v. *Morin*, Q. R. 23 S. C. 269.

Controverted Election — *Petition — Pleading—Amendment.*]—The insufficiency of a pleading in a contestation of a municipal election, governed by the provisions of the Municipal Code, is a cause of nullity. 2. After the expiration of the time for serving the contestation an amendment will not be allowed. *Brisson* v. *Pelletier*, 5 Q. P. R. 295.

Controverted Election—*Quo Warranto —Contestation — Deposit.*] — The right to a seat in the municipal council of the city of Quebec may be contested by quo warranto. 2. The remedy by quo warranto under the Code of Procedure is not affected by arts. 427 et seq., R. S. Q. 3. A petition invoking reasons against the validity of an alderman's claim to hold a seat in the city council of the city of Quebec, and asking that he be ousted and his seat given to the petitioner, and that the city clerk be ordered to proclaim him elected, is a contestation of the election, and therefore the deposit of $200 required by 58 V. c. 49 (Q.), as security for the costs of contestation, must be made. *Roy* v. *Martineau*, Q. R. 22 S. C. 1.

Corrupt Practices—*Effect on Election—Votes of Unqualified Persons — Scrutiny.*] — Promises, gifts, favours, or threats, which may induce an elector to vote for a candidate, are corrupt practices, the effect of which is to annul the election of the candidate for a municipal office, whatever be the number of voters whom he has thus corrupted. But illegal votes which are so because of want of qualification of the voter, do not invalidate the election, if, such votes being deducted, the candidate elected still has a majority of legal votes. *Labbé* v. *Morin*, Q. R. 23 S. C. 407.

Corrupt Practices by Candidate — *Place of Committing.*]—Corrupt practices by a candidate for the municipal council for the city of Montreal, in order to make void his election and cause the loss of his right to vote and sit in the municipal council, must have been committed in his own ward and not in another. *Tanguay* v. *Vallières*, 6 Q. P. R. 228.

Corrupt Practices by Candidate — *Particular Election.*] — The corrupt practice referred to in s. 249 of the charter of the city of Montreal, 62 V. c. 58, is a corrupt practice committed by the candidate in the election in which he is a candidate, and not in another election in which he is not a candidate. *Tanguay* v. *Vallières*, Q. R. 26 S. C. 122.

Councillor — *Disqualification of — School Trustee—Term not Expired—Motion to Set Aside Election—Costs—Disclaimer.*]—The respondent was elected school trustee in January, 1903, for two years, and took the oath of office on 21st January, 1903; (2) that on 26th December, 1904, he was nominated as councillor, and on the same day was nominated (with four others) as school trustee; but next day filed with the secretary of the school board a memorandum in these words: "I hereby tender my resignation as candidate for trustee for 1905;" (3) that the first meeting of the new school board was held on 18th January, 1905, when the same was organized; (4) and that Mr. Cook took the oath of qualification as councillor on 27th December, 1904, made his declaration of office as councillor on 9th January, 1905, and took his seat in the council. On 7th February the relator caused a letter to be written to the respondent pointing out that he was disqualified by reason of 3 Edw. VII. c. 19, s. 80, s-s. 1, as having been a member of the school board at the time of his election, and inviting him to consult his solicitors as to the advisability of disclaiming so as to save costs of proceedings to have him unseated. O'Connor v. City of Hamilton, 8 O. L. R. on pp. 409 and 410, followed. Motion to set aside the election of the respondent as a town councillor granted, with costs, as the respondent did not avail himself of the notice to disclaim. *Rex ex rel. Jamieson* v. *Cook*, 5 O. W. R. 359, 9 O. L. R. 466.

Councillors—*Voting for — Procedure.*] — Where there are two councillors to elect and four candidates are proposed, the presiding officer ought to count the electors favourable to the four candidates and declare elected the two who have the greatest number of votes irrespective of the question whether the candidates have been nominated in opposition to one another. *Dean* v. *McFie*, 7 Q. P. R. 196.

Councillors for Township—Election of candidates duly nominated who had notified withdrawal—Names on ballot papers—Date of receipt of notice by clerk—Disclaimer — Costs. *Rex ex rel. Pillar* v. *Bourdeau*, 3 O. W. R. 245.

Disqualification of County Councillor—*Membership in School Board—Resignation—Relator's Claim to Seat — Notice to Electors.*]—By 2 Edw. VII. c. 29, s. 5 (O.), s. 80 of the Municipal Act, R. S. O. 1897 c. 223, is amended so as to provide that "no member of a school board for which rates are levied" shall be qualified to be a member of the council of any municipal corporation. The respondent was a member of a school board for a section which had no school or teacher of its own; but the board was organized, and paid over the rates levied on the section to the board of an adjoining section, which provided accommodation for the school children living within the first-named section:—Held, a school board for which rates are levied, within the meaning of the amendment:—Held, also, following Regina ex rel. Rollo v. Beard, 3 P. R. 357, and Regina ex rel. Adamson v. Boyd, 4 P. R. 204, that the respondent, being a member of a school board on the day of the nomination for the office of county councillor, was disqualified for the latter office, although he resigned his membership in the school board before the day of polling. No objection to the respondent's qualification was taken until the day of polling, on which day notices were posted up in five out of the twelve polling booths, warning the electors not to vote for the respondent:—Held, not sufficient to entitle the relator to the seat. *Rex ex rel. Zimmerman* v. *Steele*, 23 Occ. N. 196, 5 O. L. R. 565, 2 O. W. R. 242.

Disqualification of County Councillor—*Membership in School Board—Statutes—Saving Clause — Resignation — Relator Claiming Seat—Notice—Costs.*] — In a quo warranto proceeding in which it was sought to unseat the respondent as a county councillor because he was a member of a school board for which rates were levied, and to seat the relator:—Held, that the relator was not entitled to the seat, as he had not objected to the disqualification of the respondent at the nomination or given any notice on the election day to the electors that they were throwing away their votes on account of the respondent's disqualification. 2. That s. 76 of the Municipal Act does not apply to county councillors. 3. That at the time of the respondent's election he was a member of a school board for which rates were levied, and if he were then disqualified, his resignation after his election and before taking his seat would not remove his disqualification. Regina ex rel. Rollo v. Beard, 3 P. R. 357, followed. 4. That the words "for which rates are levied," used in 2 Edw. VII. c. 29, s. 5 (O.), disqualify any member of the council of any municipal corporation who was at the time of his election a member of a school board for which rates are levied, whether levied by the municipal corporation for which he was elected or by any other. 5. That the saving clause in s. 5 refers to the election of the member of the council of any municipal corporation, and not to the election of a school trustee. Rex ex rel. Zimmerman v. Steele, 23 Occ. N. 196, 5 O. L. R. 565, followed. Therefore at the time of his election as county councillor the respondent was disqualified; and a new election was ordered. The relator was allowed the costs of proceedings so far as he had succeeded, and the respondent his costs of opposing the application to seat the relator; such costs to be set off pro tanto. *Rex ex rel. O'Donnell* v. *Broomfield*, 23 Occ. N. 202, 5 O. L. R. 596, 2 O. W. R. 295.

Disqualification of Township Councillor—*Membership in School Board—Resignation—Non-acceptance — Designation of Board—Relator's Claim to Seat—Notice to Electors—Costs—Status of Relator—Discretion.*] — Held, that the respondent being a member of the school board for a union school section, a school board for which rates were levied, and his resignation as such not having been accepted by his co-trustees, was by 2 Edw. VII. c. 29, s. 5 (O.), disqualified for the office of township councillor; and it was not material whether the school corporation of which he was a member was called a "board of public school trustees of union section," etc., or a "public school board." The respondent's qualification not having been objected to at the nomination, so that the electors might have an opportunity of nominating another candidate, the defeated candidate was not entitled to the seat. Rex ex rel. Zimmerman v. Steele, 23 Occ. N. 196, 5 O. L. R. 565, followed. It appearing to be the fact, but there being no actual proof, that the relator was put forward by the clerk of the township, and the relator having put the respondent to expense by his unsuccessful claim to have the defeated candidate seated, while the election was set aside and a new election ordered, no costs were given to either party. *Rex ex rel. Robinson* v. *McCarthy*, 23 Occ. N. 206, 5 O. L. R. 638, 2 O. W. R. 298.

Illegal Voting — *Electors Voting More than Once—Presumption—Affecting Result of Election—Corrupt Practices—Illegal Voting by Respondent and Relator.*]—At a municipal election for reeve, at which upon a large vote the successful candidate obtained a majority of six, it was shewn that a widespread belief prevailed among the electors of the right to vote at each sub-division in which the name of the elector appeared; that four electors had in fact voted twice; and that several others had received ballot papers within a polling booth, after having already voted for reeve:—Held, that the statutory presumption arising under the Municipal Act, R. S. O. 1897 c. 223, s. 162, s.-s. 3, did not apply in proceedings to set aside an election, and that as, owing to the destruction by the clerk of the ballot papers pursuant to the provisions of the Act, it was impossible to tell whether more than four voters had voted twice, the election should not be set aside, the voting twice by four electors not having, in the opinion of the Court, affected the result:—Held, also, that if, as alleged, the respondent had himself voted twice, this was not a cause for setting aside the election; voting twice not being in itself a corrupt practice, and the commission of that offence not being, under the statute, a disqualification for office during the current year:—Held, also, that, there being strong reasons to believe that the relator had himself voted more than once, and there being undoubted evidence that he had advised other electors to vote more than once, he could not successfully urge this objection against the validity of the election. *Rex ex rel. Tolmie* v. *Campbell*, 22 Occ. N. 230, 4 O. L. R. 25, 1 O. W. R. 268.

Irregularity — *Quo Warranto Application—Status of Relator—Voting for Respondent—Disclaimer.*]—The relator attacked the

election of the respondents as county councillors for non-compliance with certain statutory formalities:—Held, that the relator, by voting for M., one of the respondents, who was in the same class with the others, acquiesced in and became a party to the irregularity, and could not be heard to complain. The fact that M., after service of the notice of motion, disclaimed office, was nihil ad rem. *Rex ex rel. McLeod* v. *Bathurst*, 23 Occ. N. 201, 5 O. L. R. 573, 2 O. W. R. 246.

Irregularity in Procedure — *Circuit Court—Discretion.*]—The Circuit Court has a discretion to exercise in the matter of the contestation of municipal elections, and will not annul an election, on the application of a defeated candidate, by reason of irregularities in form and in the procedure followed in the holding of the election, when such informalities have caused no prejudice to such candidate. *Jones* v. *Gauthier*, Q. R. 19 S. C. 100.

Lists of Municipal Electors—*Quashing—Injunction — Other Remedy.*] — Lists of municipal electors made under the provisions of art. 4515 et seq., R. S. Q., may be quashed on the ground of illegality, under the provisions of art. 4376, as provided by art. 4522. 2. A writ of injunction will not be granted when the law provides a special remedy for the grievances complained of. *Wallace* v. *Languedoc*, 4 Q. P. R. 361.

Mayor—*Inability to Read or Write—Petition to Avoid—Objection to Jurisdiction—Time for—Declinatory Exception—Costs.*]—The election by a rural municipal council of a mayor who can neither read nor write can only be attacked in the manner provided in the Municipal Code. The question of absence of jurisdiction, ratione materiæ, may be raised at any stage, but the party who has not raised it by a declinatory exception, if he succeeds, ought not to have the same costs as if he had so taken it. *Marois* v. *Lafontaine*, Q. R. 27 S. C. 174.

Nomination of Councillors—*Time of Holding — Irregularity—Saving Clause.*]—Notwithstanding the Municipal Amendment Act, 1898, the nomination of candidates for the office of councillor, in towns having a population of not more than 5,000 persons, and where the election is to be by general vote, may take place at the same time and place as the nomination for mayor, and therefore at ten o'clock in the forenoon:—Semble, that an error in this respect as to the time and place of the nomination would come within the curative provisions of s. 204 of the Municipal Act, R. S. O. 1897 c. 223, and would not be a fatal objection to the validity of the subsequent election. *Rex ex rel. Warr* v. *Walsh*, 23 Occ. N. 94, 5 O. L. R. 268, 2 O. W. R. 108, 129.

Petition — *Affidavit — Discretion—Service—Certificate of Bailiff.*]—It is for the Judge to whom a petition contesting a municipal election under the charter of the city of Montreal has been presented, to judge of the sufficiency of the affidavit accompanying the petition; and the Court cannot afterwards, upon an exception to the form, interfere with the exercise of discretion by the Judge. 2. The service on the defendant is not void because the bailiff who effected it certifies that he has served on the defendant the writ and declaration thereto annexed—the word "declaration" evidently referring to the petition. *Rencault* v. *Gagnon*, Q. R. 17 S. C. 542.

Petition — *Exception to Form—Status of Petitioner.*]—In the case of a petition to set aside a municipal election the objection that the petitioner is not an elector is not an objection to the form but to the merits. *Moreau* v. *Lamarche*, Q. R. 18 S. C. 34.

Petition—*Exception to Form—Status—Justification—Particulars.*]—If a petition contesting an election is served within 15 days from such election, and another service is ordered, the delay given for the presentation of the petition being insufficient, the petition shall not be dismissed on the ground that the second service of the petition was made more than 5 days after the election. 2. Such petition need not be accompanied by affidavit. 3. The absence of justification shewing a surety to be qualified as required by law is not a ground of nullity of the bond justifying a demand for dismissal of a petition in contestation of election, but the respondent is entitled to have the said surety justify that he complied with the requirements of the law. 4. The fact that some allegations of the petition are not sufficiently detailed does not constitute ground for the rejection of the petition. *Thérien* v. *Sénécal*, 4 Q. P. R. 66.

Petition — *Service — Return-day.*] — The delay between the service of a petition in contestation of a municipal election, and the presentation thereof, is the ordinary delay for the return of a summons, and not merely one clear day. *Trudel* v. *Guay*, 3 Q. P. R. 481.

Petition to Avoid — *Allegations—Particulars — Corruption — Treating—Committee Meetings—Undue Influence.*]—In a contestation of a municipal election a general allegation of fraudulent acts and corrupt practices will be struck out as too vague. 2. Acts of corruption by a candidate and his agents, consisting in payment of treats, cannot be proved unless the name of the keeper of the hotel at which these treats were paid for is mentioned. 3. If refreshments were offered at a committee meeting in support of a candidate, this fact can only be proved in relation to the committee mentioned in the petition. 4. All the persons accused of having unduly influenced the electors must be mentioned in the petition. 5. It is necessary to give the names of the electors having the right to vote who have been influenced. 6. Vague accusations, such as "a large number of persons" and "in a number of other restaurants" will be struck out on motion. *Pepin* v. *Vallières*, 6 Q. P. R. 364.

Petition to Avoid — *Exception — Lis Pendens.*]—An alderman whose election is contested cannot, by exception of lis pendens, plead that an analogous action, brought by another elector, is actually pending. *Tanguay* v. *Vallières*, 6 Q. P. R. 269.

Petition to Avoid—*Misnomer of Petitioner—Class of Action—Costs.*]—A petition in contestation of a municipal election will not be dismissed, upon exception to the form, because one of the petitioners is described sometimes by the Christian name of "Auguste," sometimes by that of "Augustine."

2. Contestation of municipal elections in cities and towns are actions of the third class. *Masson* v. *Hébert*, 6 Q. P. R. 342.

Petition to Avoid—*Qualification of Petitioner.*]—Where a candidate at a municipal election is not duly qualified for the office which he seeks, he may nevertheless be the petitioner in a petition contesting the election of his opponent. *Tétreau* v. *Beaudry*, 6 Q. P. R. 156.

Petition to Avoid — *Quo Warranto*—*Superior Court* — *Territorial Jurisdiction*—*Special Town Charter*—*Discretion.*]—A petition in the nature of a quo warranto, for the purpose of ousting a municipal councillor from his office, is a contestation of his election, and therefore, by art. 4276, R. S. Q., the jurisdiction of the Court is confined to the district where the election was held. 2. The charter of the town of Chicoutimi excludes the recourse by quo warranto to oust a municipal councillor from his office. 3. The granting of leave to file an information in the nature of a quo warranto is not a matter of strict right, but is subject to the exercise of a wise judicial discretion by the Court. *Guay* v. *Fortin*, *Guay* v. *Lépine*, Q. R. 24 S. C. 210.

Petition to Avoid—*Security for Costs*—*Examination of Surety.*]—Where the petitioner in a petition to set aside a municipal election gives notice that he will furnish two sureties at a certain hour, and does not come to the process office until a later hour, and then with only one of the sureties, after the solicitor for the respondent has departed, an order will be made for the appearance again of this surety to be interrogated by the respondent. *Pepin* v. *Vallières*, 6 Q. P. R. 280.

Petition to Avoid—*Security for Costs*—*Single Surety.*]—A bond for security for costs of a petition to avoid a municipal election will not be set aside on the ground that it is furnished by a single surety only, if the solvency of such surety is not contested, and this although the notice of filing the security mentions the names of two sureties. *Pepin* v. *Vallière*, 6 Q. P. R. 345.

Petition to Avoid—*Status of Petitioner*—*Allegation of*—*Amendment.*]—Upon a petition to quash the decision of a municipal council in an election matter, the petitioner should allege his status as an elector, or make it appear in his petition. He will not be permitted to amend his petition in this regard after the time for commencing proceedings has expired. *Brousseau* v. *Village of Ahuntsic*, 7 Q. P. R. 33.

Petition to Set aside Election—*Particulars of Corrupt Practices.*] — Upon motion of the defendant respondent, the petitioner in a petition to set aside a municipal action was ordered to declare: (a) At what date, at what places, and in what circumstances, by whom, and in what ways, certain funds, of which a named person was the depositary, had been employed for purposes of corruption. (b) Where, when, and how persons named had employed funds, of which they were the depositaries, for purposes of corruption. (c) What persons were intended to be designated under the names of "friends and agents of the defendant or duly authorized agents of the defendant, or his agents." (d) Where, when, and how drivers of conveyances, among whom were some electors, had been engaged and paid, and to distinguish the drivers to whom allusion was made. (e) Where, when, and how professional politicians had been engaged and paid to work on behalf of the defendant, which of such politicians were electors of the district in question, and which had voted for the defendant. (f) Who were the persons intended to be designated by the words "agents duly authorized of the defendant," and who were the persons to whom the defendant and his agents had paid out different sums of money. (g) At what dates, at what places, and in what circumstances, the defendant and his agents had induced divers persons to commit the offence known as "personation." That part of the motion seeking to obtain the names of the friends who had furnished money to the defendant, was not granted, because it was not important to know the names of such friends. *Levy* v. *Lamarche*, 5 Q. P. R. 16.

Petition to Set aside Election—*Security.*]—By virtue of the Act respecting town corporations, applicable to the town of Maisonneuve, a petition to avoid a municipal election, filed by a single elector, and not preceded by security, is illegal and will be dismissed upon exception to the form. *Dufresne* v. *Fortin*, 5 Q. P. R. 57.

Petition to Set aside Election—*Security* — *Particulars* — *Notice* — *Amendment* —*Signature of Attorney.*]—A security failed under art. 352 of the Municipal Code, in support of a petition against the election of a councillor, must set forth the name, Christian names, quality, occupation, and residence of the surety, and in default thereof the security is void. 2. The want of such particulars cannot be supplied by mentioning them in the notice in respect to which the security was given. 3. The security cannot, after the expiry of the time mentioned in art. 352 of the Municipal Code, be amended by adding the necessary particulars which are wanting. Semble, that a petition in contestation of a municipal election can be signed only by the attorney himself, and that a signature by another person, with the authorization of such attorney, is void. *Parizeau* v. *Thémens*, Q. R. 21 S. C. 222.

Petition to Set aside Election—*Trial* —*Procedure*—*Absence of Rules of Court.*]—A Judge has jurisdiction to fix a time and place for the trial of an election petition under the Municipal Elections Act, notwithstanding no rules for regulating such a trial have ever been made as provided by s. 86 (d) of the Act. Remarks as to the procedure to be followed at such a trial. It is not necessary that Judges should exercise power to make rules regulating the trial of election petitions, if the ordinary machinery of the Court is sufficient for that purpose. *In re Slocan Municipal Election*, 9 B. C. R. 113.

Qualification of Alderman — *Bare Ownership of Property*—*Assessment Roll*—*Inconclusiveness.*] — In an action to annul the election of an alderman of the city of Montreal, for want of the required real estate qualification, the fact that the defendant's name appears on the valuation and assessment roll as "proprietor" of the property

on which he qualifies, is not conclusive, and does not preclude investigation of the nature of his title, notwithstanding the final clause of s. 29 of 62 V. c. 58 (Q.), which says that the qualification is to be established by the valuation and assessment roll in force at the date of nomination. 2. Where it appears that the defendant is the donee of the immovable property on which he qualifies, and that by the terms of the deed of donation he has the mere ownership (nue propriété), the usufruct for life being reserved by the donor, he is not "seised of" and does not "possess as proprietor," within the meaning of s. 29. *Archambault* v. *Tansey*, Q. R. 23 S. C. 170.

Qualification of Candidate—*Mortgaged Real Estate—Plea to the Merits—Powers of Returning Officer.*]—Held, on a petition contesting a municipal election, in which the petitioner and respondent were nominated as candidates, and a poll was granted and held without protest or objection, and without notification of any kind to the electors, or its being shewn that those who nominated or voted for the petitioner had knowledge of his lack of qualification, that averments by the respondent to the effect that the petitioner had not the necessary property qualification to be put in nomination, and that the respondent was, consequently, the only candidate duly nominated, and was and should have been declared elected by acclamation, are matters of plea to the merits and not of exception to the form. 2. Where a candidate's real estate was hypothecated for payment of insurance premiums, as well as for the principal obligation, such accessory hypothec must be taken into account in ascertaining the net value of the real estate over the above hypothecary charges. 3. Notwithstanding the lack of property qualification on the part of one of the candidates, the returning officer, in the absence of any protest or objection, has no authority to reject his nomination paper, and consequently the other candidate is not entitled, ipso facto, to claim that his election was, and should be held, an election by acclamation. *Martin* v. *Ricard*, Q. R. 25 S. C. 461.

Qualification of Candidate—*Payment of Taxes.*]—In order to be elected a municipal councillor, a candidate must at the time of his election, whether there was polling or not, have paid all municipal and school taxes: arts. 283, 291, 309, C. M. *Rockingham* v. *Leith*, 6 Q. P. R. 77.

Qualification of Voter—*Tenant—Cesser of Occupancy by—Corrupt Act.*]—It is not the amount of rent paid, but the annual value of the premises occupied as appears in the assessment roll, which is the basis of qualification, as a voter, of a tenant. The position of the elector at the time of the election is what should be considered, and that which appears by the assessment roll, but if an elector, who takes the oath and votes as an occupant, has ceased for two months before the election to occupy the premises on which he qualifies, his vote ought to be rejected. In order that the payment of an elector's taxes or travelling expenses may be considered a corrupt act, either at common law or under the Municipal Code, it is necessary that it be made with corrupt intent, that is to say, for the purpose of influencing and inducing the voter to vote for a particular candidate; it is not sufficient that the payment is made for the purpose of enabling him to qualify only. To entitle an elector to vote it is only necessary that he pay the taxes for which he is rated on the collection roll, and it is not necessary that he should pay those owing on land which he has purchased from a third person some days before the election, nor is it necessary that he should have paid taxes levied for county purposes which have not been entered on the collector's roll of the local corporation and of which an estimate has not been sent to the latter. Proof of personal corruption by a candidate will only void an election when the result has been thereby affected. *Laframboise* v. *Ledoucur*, Q. R. 26 S. C. 85.

Quo Warranto Proceeding—*Affidavits—Cross-examination on — Discretion — Refusal.*]—In a proceeding to set aside a municipal election it is in the discretion of the Judge or Master to allow or refuse to allow the parties to cross-examine deponents on their affidavits. And in this case permission was refused by the Master in Chambers, who was of opinion that a cross-examination would not be helpful. *Rex ex rel. Ross* v. *Taylor*, 22 Occ. N. 183, 1 O. W. R. 265, 582.

Quo Warranto Proceeding—*Appeal—to Judge of High Court—Order of County Court Judge Quashing Proceedings—Right of Appeal—Power to Make Order.*]—In a quo warranto proceeding, in which the fiat giving leave to serve a notice of motion to set aside the election of a township reeve had been granted by a County Court Judge, and the proceedings were initituled in his County Court, a motion was made before him to set aside all the proceedings upon the relation, and he made an order setting them aside and quashing them with costs:—Held, that no appeal from such an order lies to a Judge in Chambers, as appeals from the County Courts in ordinary cases are to a Divisional Court, and the appeal from the decision of a County Court Judge to a Judge of the High Court given by 55 V. c. 42, s. 187, s-s. 3 (O.), "under this section," is from the decision of the County Court Judge upon the merits on the trial of the contested election, and not the quashing without a trial of the fiat upon which the proceedings were founded. Quære, whether the County Court Judge had power to make such an order. Regina ex rel. Grant v. Coleman, 7 A. R. 619, referred to. *Rex ex rel. McFarlane* v. *Coulter*, 22 Occ. N. 414, 4 O. L. R. 520, 1 O. W. R. 636.

Quo Warranto Proceeding—*Notice of Motion—Time—Wrong Day of the Week—Mistake—Amendment.*]—A notice of motion in the nature of a quo warranto to contest the validity of the election of the respondents as aldermen of a city, was, by fiat of the Master in Chambers under s. 220 of the Municipal Act, R. S. O. 1897 c. 223, allowed to be served upon the respondents, and was served on the 15th February (seven clear days' notice being required by s. 221) for "Tuesday the 24th day of February"—the 24th February being in fact a Monday. Afterwards the relator served upon the respondents a notice to the effect that the day on which the motion would be made was Tuesday the 25th February, but this notice was not a seven clear days' notice:—Held, that the no-

tice of motion was good and sufficient notice for Tuesday the 25th February, and that the sureties upon the relator's recognizance, as required by s. 220, would have no ground of objection because of the proceedings not being properly prosecuted. Eldon v. Haig, 1 Chit. 11, followed. Semble, that the practice in actions in the High Court is applicable to these quo warranto proceedings. *Rex ex rel. Roberts* v. *Ponsford*, 22 Occ. N. 146, 3 O. L. R. 410, 1 O. W. R. 223, 286, 590, 645.

Quo Warranto Proceeding—*Tampering with Ballots—Delivery of Ballot Box to Clerk—Evidence — Affidavits—How Voters Voted—Cross-examination.*]—Where in a quo warranto proceeding under the Municipal Act, R. S. c. 223, before a County Judge, to set aside the election of a town councillor, it was found by the Judge upon a scrutiny of the ballot papers, having regard to the character of the evidence, both viva voce and by affidavit, that such ballot papers had been tampered with, and that there was also a breach of the Act in the deputy returning officer taking the ballot box to his own house, instead of directly to the town clerk, and it was impossible to say that the result of the election was not affected thereby, an order of the Judge setting aside the election was affirmed. Affidavit evidence may be supported at the trial by viva voce evidence, although not mentioned in the notice of motion. Regina ex rel. Mangan v. Fleming, 14 P. R. 458, referred to. The provision of s. 200 of the Act that "no person who has voted at an election shall in any legal proceeding to question the election or return, be required to state for whom he voted," must be construed, in furtherance of the object of the Act, as absolutely excluding such testimony. After the trial of such proceeding has commenced, it is discretionary with the Judge to allow a person who has made an affidavit to be cross-examined, though before the commencement of the trial cross-examination may properly be had. *Rex ex rel. Ivison* v. *Irwin*, 22 Occ. N. 299, 4 O. L. R. 192, 1 O. W. R. 371.

Recognizance — *Allowance of—Appeal—Defective Nominations—Powers of Returning Officer—Statute — Directory or Imperative.*]—Where, in a controverted municipal election case, a recognizance has been duly entered into with sureties and affidavit of justification, as required by R. S. O. 1897 c. 223, s. 220 (2), the security is completed; but the Judge may postpone indorsing his allowance of it until objection raised. Such interlocutory procedure is matter of discretion, and not subject to appeal. The provisions of s. 128 (1), that every nomination is to state the full name, etc., of the candidate, are directory, not imperative; and the presiding officer cannot, after the close of the meeting for nominations, reject those made on account of non-compliance with such requirements. Semble, if objection is taken at the time, and the nominations are not amended, the presiding officer should then and there reject them. *Rex ex rel. Walton* v. *Freeborn*, 2 O. L. R. 165.

Rejection of Ballot Cast for Relator — Concurrence of relator — Incapacity through drunkenness. *Rex ex rel. Park* v. *Street* (N.W.T.), 1 W. L. R. 202.

Summons in Nature of Quo Warranto—Relation—Requirements of—Acceptance and oath of office—Term for which respondent elected. *Rex ex rel. Park* v. *Street* (N. W.T.), 1 W. L. R. 87.

Town Councillor — *Disqualification* — Contract with corporation — Exemption of partnership from taxation — Qualification—Interest in partnership property in part exempted—Status of relator — Voting for respondent — Secrecy of ballot. *Rex ex rel. Payne* v. *Chew*, 5 O. W. R. 389.

Voters' Lists—*Revision—Absence of Certificate—Injunction.*]—Where it appears that the lists of municipal electors of a town corporation have not been certified and signed by the secretary-treasurer, as required by art. 4516, R. S. Q., and that the board of revisors is proceeding to the revision and amendment of the lists without the same being so certified, there is sufficient ground for granting an interlocutory injunction, on the petition of a municipal elector, to prohibit the board of revisors from revising or homologating the lists, until the final hearing upon the petition, or until the interlocutory order be further judicially dealt with. *Wallace* v. *Languedoc*, Q. R. 21 S. C. 115.

Voters' Lists—*Revision—Injunction to Restrain—Remedy by Motion to Quash—Costs—Defendants Severing.*]—There is no ground for an injunction when the law gives a special remedy for the grievances complained of, and, therefore, recourse cannot be had to an injunction to prevent the revisors of a town corporation from revising and homologating a list of municipal electors on the ground that such list has not been prepared according to law; arts. 4376 and 4522, R. S. Q., allowing such list to be quashed on the ground of illegality. 2. Each of the revisors defendants, having filed a separate defence invoking the same grounds, the costs should be taxed against the petitioner as if the revisors had filed only a single defence. *Wallace* v. *Languedoc*, Q. R. 21 S. C. 298.

Voters' List—*Valuation Roll—Amendment by Council—Irregularity—Poll Book—Councillors — Voting for — Declaration of Poll.*]—An amendment made by a municipal council in the month of January of a valuation roll by adding new names to it without notice or previous demand in writing, is void. 2. At the time of the election of a municipal councillor the fact that the names of the voters have been entered by the returning officer upon detached sheets, and not upon the pages duly numbered and ruled of the poll book, does not constitute a sufficient irregularity to annul the election if no fraud or prejudice is proved. 3. When more candidates than there are councillors to elect have been nominated and a poll is held, the electors vote for as many candidates as there are councillors to elect, and the returning officer must declare elected those who have obtained the largest number of votes, without regard to whether a certain candidate has been proposed in opposition to another candidate. *Bourret* v. *Prévost*, Q. R. 24 S. C. 236.

MURDER.

See CRIMINAL LAW—EXTRADITION—INJUNCTION—INSURANCE.

MUTUAL INSURANCE CO.

See INSURANCE.

NAME.

See COMPANY—MISNOMER.

NATURALIZATION.

See CONSTITUTIONAL LAW.

NAVIGABLE WATERS.

See CONSTITUTIONAL LAW — WATER AND WATERCOURSES.

NAVIGATION, HARBOURS, AND FISHERIES.

See CONSTITUTIONAL LAW.

NE EXEAT PROVINCIA.

See ARREST.

NEGLECTING TO PROVIDE FOR FAMILY.

See CRIMINAL LAW, III.

NEGLIGENCE.

Absence of Direct Proof—*Leaving Unguarded Hole in Ice Formed upon Navigable Water—Evidence of Negligence—Death of Person Walking Over Ice — Contributory Negligence—Argumentative Finding of Jury —Interpretation of.*]—Defendants were owners of a large dock at Midland, lying alongside of which in the winter was their tug, which accidentally filled with water and sank at the dock, breaking the ice and leaving open water above her deck. The sunken boat was not immediately raised, and ice formed above it. In a short time they cut the new ice recently formed, and proceeded with the work of raising the tug. Defendants did not place any brush or obstruction or sign near the open water or in any way mark the place of open water or give any warning of danger. While in this condition on the morning of 7th February, 1903, the body of plaintiff's deceased husband was found near this tug. He was lying upon his back, his feet and legs were upon solid ice, his head in open water. On the evening before the morning when the body was found, the deceased had been drinking and there was no doubt that he was that evening in a state of intoxication. Certain questions were submitted to the jury, all of which were answered by the jury in favour of plaintiff except the 5th question, which was: "Could the deceased, by the exercise of ordinary and reasonable care, have avoided the accident which occasioned his death, and, if so, in what respect or how could the deceased have avoided the accident?" The latter part of the question was added at the request of counsel for plaintiff. To this question the answer was: "Yes. He might have taken another road, or if sober on a bright night he might have avoided the hole." — Held, there was no doubt that the deceased had a right to be on the ice in the vicinity of the hole. He was not a trespasser. He was upon the ice over navigable water. He was, when he lost his life, at a place "open to" but not "frequented by" the public. Defendants in making the hole through the ice did so in the exercise of their rights for the purpose of saving their tug, which, without fault of theirs, so far as it appeared, had sunk in navigable water. Defendants had no reason to suppose that in the ordinary course of business or travel any one other than those in their employment would be near enough to their boat or to this hole to be in any way in danger. While the public had the right to be, or travel upon the ice, there was no invitation by defendants to deceased or to any of the public to travel upon the ice or to go near the opening. There was not, apart from what was being done by defendants in the raising of the tug, any work or business being carried on, or any road or way defined by bushes or marks or by travel on the ice, that would give notice to defendants that any one would be likely to drive or ride or walk near to where the hole was, and the ice was not in condition to be skated upon. It was quite as reasonable to conclude from the evidence that the deceased voluntarily sat down or fell upon the ice, close to the edge, and perished from cold, as that he accidentally walked into the hole. Upon the evidence, the way in which Plouffe met his death was as consistent with the theory that he did not fall into the water as that he did, and, that being so, the case should not go to the jury: see Armstrong v. Canada Atlantic R. W. Co., 4 O. L. R. 590, 1 O. W. R. 612. *Plouffe* v. *Canada Iron Furnace Co.*, 5 O. W. R. 758, 6 O. W. R. 590, 10 O. L. R. 37.

Bridge—*Injury to—Navigable River—Sudden Rising—Floating Logs—Vis Major.*] —The plaintiffs were the owners of an iron bridge crossing a navigable river. The defendant was hurriedly floating his logs and timber down the river; and the river suddenly rising, as it often did, a jam was formed, and the plaintiffs' bridge was injured. The defendant pleaded that the damage was caused by an irresistible force over which he had no control:—Held, that, the river being navigable, the defendant had the right to use it as an ordinary highway only; that the defendant must be taken to have been aware of the fact that the river was subject to sudden rising; and that the accident was caused not by force majeure, but by the negligence of the defendant in placing too many logs in the river at once, without having at the same time a correspondingly sufficient number of men to keep abreast of them in order to prevent a jam. *Ward* v. *Township of Grenville*, 21 Occ. N. 444.

Building—Collapse—Injury to workmen —Liability of employers — Contractors — Municipal corporation—Architect—Independent contractor. *Hill* v. *Taylor*, 4 O. W. R. 284, 5 O. W. R. 85.

Building—*Falling of Walls—Exceptional Storm—Defective Construction—Knowledge of Owner—Employment of Competent Superintendent.*]—Defendants did not employ an architect to prepare plans and specifications for a mill, but adopted the plans and specifications which had been prepared by Allis Chambers & Co., of Chicago, a well known firm of architects and contractors, who had prepared the plans and specifications used for the St. Anthony Lumber Co. at Whitney, Ont. The defendants employed Mr. Proper, who, though not a professional architect, had had very extensive experience in mill construction work. Some variations were made by Mr. Proper in these plans. The plans for the roof were prepared by the Dominion Bridge Company, who under contract constructed and put on the roof. The brickwork was done under contract by defendant Garrock, who commenced his work early in March, 1903, and a portion of his work was done during frosty weather. The building was completed with the exception of putting in some interior machinery, in which the deceased was engaged under his employer Campbell on 6th August, 1903, when suddenly the end wall of the boiler house gave way and fell into the building, inflicting injuries to deceased which caused his death the next day. According to the evidence, a very severe gale of wind was blowing when the wall fell. The defendants contended that it was the suddenness and violence of the storm that caused the accident, and that they could not, by the exercise of the utmost care, foresee and provide against the irresistible force of the storm. The end of the power house was near the edge of a lake, and faced a stretch of 2 or 3 miles of open water:—Held, the defendants could not be expected to provide against storms of the violence of a cyclone or tornado, but it was reasonable to expect from the location and position of the boiler house that it would be subjected to more than ordinary wind strain at times. It was not unreasonable for defendants to adopt the plans and specifications which had been used in the construction of the building at Whitney, and also it was not unreasonable for them to employ Mr. Proper, although not an architect, to take charge of the construction; but the wall was not sufficient to withstand the wind pressure that might reasonably be expected in that locality:—Held, notwithstanding the fact that the defendants were not guilty of such negligence as to render them liable to plaintiffs, they were not liable to plaintiffs as insurers, or that the insufficiency of the designs or of the wall were so manifest that it could have been detected by any ordinary inspection; in fact, honest differences of opinion might very well occur between architects as to the sufficiency, as was shewn by the variety of testimony at the trial; and no obligation is to be implied by law that a building is absolutely safe; see Searle v. Laverick, L. R. 9 Q. B. 122. Action dismissed without costs. *Valiquette* v. *Fraser*, 4 O. W. R. 60, 543, 25 Occ. N. 36, 9 O. L. R. 57.

Chattel Mortgage—Race horse—Loss of —Agency of trainer—Evidence—Application of. *McCullough* v. *Alexander*, 2 O. W. R. 352, 3 O. W. R. 188.

Collision between Street Car and Fire Waggon—Injury to person on waggon—Excessive speed—Contributory negligence—Findings of jury. *Ardagh* v. *Toronto R. W. Co.*, 6 O. W. R. 940.

Collision of Vehicles—*Rule of Road—Runaway.*]—In an action on the case for negligence in driving the defendant's horse whereby his waggon came into collision with and damaged that of the plaintiff, it is not sufficient to prove merely that the defendant was driving on the wrong side of the road, especially as it was shewn that the defendant just before the collision had crossed from the left side of the road for the purpose of speaking to a man sitting on a doorstep on the other side, and that the plaintiff's horse at the time of the accident was running away, and beyond control. *Stout* v. *Adams*, 35 N. B. Reps. 118.

Contributory Negligence—*Quebec Law —Damages.*]—If the principal cause of an accident is the want of care of the victim, that does not take away all recourse against the party who has contributed to the accident by his negligence. 2. The only effect of the victim's carelessness is to reduce the amount of damages which he may be awarded. 3. It is not necessary in order to establish negligence in a party that the law should have imposed upon him the duty of doing what he has not done; it is sufficient that ordinary prudence imposed the duty upon him. *Jess* v. *Quebec and Levis Ferry Co.*, Q. R. 25 S. C. 224.

Damages—*Particulars.*]—In an action for injuries alleged to be caused by the gross carelessness and negligence of the defendant, the plaintiff will be ordered to furnish particulars of the alleged gross carelessness and negligence, and of the damages thereby suffered by him. *Forbes* v. *Montreal Street R. W. Co.*, 3 Q. P. R. 449.

Damage of Goods of Tenant on Demised Premises—Work done by order of agent of landlord—Authority—Independent contractors—Damages. *Malcolm* v. *McNichol* (Man.), 2 W. L. R. 515.

Dangerous Animal—*Dog—Injury to Child—Contributory Fault.*]—The respondent's son, aged thirteen, was provoking or exciting a bull-dog owned by the appellant, by stamping on the floor and calling him by name, when the appellant's daughter, aged nineteen opened the door and allowed the dog to fly at the child and bite him:—Held, that the appellant was responsible for the injuries inflicted on the boy, notwithstanding the fact that he had irritated the dog.—a child of that age not being expected to shew the prudence and thoughtfulness which would be expected and required from an adult under similar circumstances. *Bernier* v. *Généreux*, Q. R. 12 K. B. 24.

Dangerous Animal—*Horse on Highway —Injury to Child.*]—The defendant's horse being on the highway, a boy of twelve years of age approached to catch him by taking hold of a rope then around his neck, when the boy was kicked and injured. There was

no evidence that the defendant knew that the horse was accustomed to stray or had any vicious propensity, nor was the horse shewn to have such fault, and there was evidence that the horse had been interfered with by several boys, of whom the injured boy was one, and that the latter had more than ordinary intelligence and fully understood the risk he ran. In an action by the boy and his father:—Held, that they could not recover. Patterson v. Fanning, 2 O. L. R. 462, distinguished. *Flett* v. *Coulter*, 23 Occ. N. 111, 5 O. L. R. 375, 1 O. W. R. 775, 2 O. W. R. 142.

Dangerous Place on Premises—*Part of Premises Used by Licensee—Responsibility of Owner—Construction of License—Extent of Invitation.*]—Defendants were lessees of large grounds which they used for the purposes of holding an annual exhibition of arts and manufactures, admission to which grounds they charged a fee. There were several attractions by way of amusements on the grounds, the owners of which paid a license fee to the lessees of the grounds, for the right to charge a further fee, for admission to these several attractions. The plaintiff paid his general admission fee to the grounds and also a further fee for a ride on a merry-go-round, which was separate from the general grounds. Here he met with serious injuries, by the merry-go-round breaking by a defect in its construction: — Held, the owners of these several attractions were licensees and not lessees and the defendants had a right of supervision which they were negligent in not exercising, and they were liable to plaintiff for holding out an invitation to use the merry-go-round when it was negligently constructed. *Flynn* v. *Toronto Industrial Exhibition Association*, 5 O. W. R. 550, 9 O. L. R. 582.

Death of Person—*Pleading—Damages.*]—In an action for damages for the death of the plaintiff's father by the negligence of the defendant, the plaintiff may allege the services which the father performed, and the value of them. 2. In such an action the plaintiff must not allege the verdict of the coroner's jury upon the cause of death. 3. A plaintiff cannot claim damages for injuries to his sensibilities or feelings. 4. A plaintiff may claim a certain sum, at the same time alleging that the damages suffered cannot be compensated by money. *Thibault* v. *David*, 6 Q. P. R. 55.

Defect in Goods Sold—*Injury to Purchaser—Liability of Vendor—Accident.*] — The plaintiff's daughter, about eleven years of age, was injured by the bursting of a bottle containing cream soda, which had been sold to the plaintiff by the defendant, a manufacturer of soda water. The bottle had been carefully tested by the defendant before it was filled, and was more than ample to support the pressure to which it was subjected. The cause of the accident was not definitely ascertained, but it appeared to be the sudden exposure of a cold bottle in a refrigerator to a current of warm air, or, perhaps, to some unknown flaw or inequality in the glass itself:—Held, that, whether the accident was attributable to sudden change of temperature or to an unknown defect in the glass, the defendant, as the vendor, was not responsible, it being either the result of imprudence on the part of the plaintiff's daughter, or a case of inevitable accident. The extent of the obligation of persons selling gaseous waters, as to the receptacles which contain them, is to take every reasonable precaution that such receptacles shall be sufficient for the purpose. *Guinea* v. *Campbell*, Q. R. 22 S. C. 257.

Defective Appliances in Ship—*Injury to Passenger—Duty of Owners—Proximate Cause.*]—The plaintiff, a boy of four years of age, with his parents, was being carried as a passenger on a steamboat of the defendants. The child and his mother were in a house on the boat's deck, leading from which out on to the deck were doors fitted with appliances intended to keep them fastened back, when they should happen to be flung wide open. While the plaintiff was in the act of passing through one of the doorways, the door swung to and jammed his fingers, so that the tips of some of them had to be amputated. The plaintiff's father and elder brother swore that the fastening of the door was out of order, and would not hold it back. There was evidence to shew that the doors of the house were frequently being opened and shut by passengers and others, and that a very few minutes before the accident a passenger had gone through the doorway in question, leaving the door on the swing. It was also proved that the fastenings had been put on the doors in order to hold them open in warm weather for the purposes of ventilation:—Held, that there was no duty cast upon the defendants to provide the doors with the appliances mentioned or to maintain them in good working order; and, even if there were, the evidence went to shew that the proximate cause of the accident was the act of the passenger in leaving the door on the swing, for which the defendants could not be held liable. *Cormier* v. *Dominion Atlantic R. W. Co.*, 36 N. B. Reps. 10.

Demolition of Buildings—*Injury to Materials—Liability — Contract.*]—The appellants purchased from the respondent certain land with buildings erected thereon, which were to be demolished. The vendor reserved the timber and other materials in the buildings, with the exception of the brick and stone, the materials so reserved to be removed by him as the demolition of the buildings proceeded. The appellants, without notice to the respondent, employed contractors to demolish the buildings, and a considerable quantity of the material was carried away before the respondent was aware that the demolition had commenced, and the timber was so split and broken by the haste with which the work was carried on, that it was unfit for building purposes:—Held, that the obligation of the appellants to deliver the materials required the observance at least of ordinary care necessary for safe delivery under such circumstances, and that the appellants were responsible for the damage occasioned by the undue haste of the demolition, proper allowance being made for breaking and splitting unavoidably caused by the process of demolition. *Dominion Express Co.* v. *Cusack*, Q. R. 10 K. B. 307.

Driving Timber—*Injury to Bridge—Servitude—Watercourses—Floatable Rivers—Statutory Duty — Riparian Rights — Vis Major.*]—The Rouge river, in the Province

of Quebec, is floatable but not navigable, and is used by the lumbermen for bringing down saw-logs to booms, in which the logs are collected at the mouth of the river, and distributed among the owners. The plaintiffs constructed a municipal bridge across the river near its mouth where the collecting booms are situated. The defendant and a number of other lumbermen engaged in driving their logs, mixed together, down the river, did not place men at the bridge to protect it during the drive, and took no precautions to prevent the formation of jams of the logs at the piers of a railway bridge which crosses the river a short distance below the municipal bridge, nor did they break up a jam of logs which formed there, but they abandoned the drive before the logs had been safely boomed at the river mouth. The river Rouge is subject to sudden freshets during heavy rains, and, on the occurrence of one of these freshets, the waters were penned back by the jam, and a quantity of the logs were swept up stream with such force that the superstructure of the municipal bridge was carried away. In an action by the municipality to recover damages from the lumbermen, jointly and severally:—Held, that irrespective of any duty imposed by statute, the proprietors of the logs were liable for actionable negligence on account of the careless manner in which the driving of the logs was carried on, and were jointly and severally responsible in damages for the injuries so caused:—Held, further, that the right of lumbermen to float timber down rivers and streams is not a paramount right, but an easement or privilege which must be enjoyed and exercised with such care, skill, and diligence as may be necessary to prevent injury to or interference with the concurrent rights of riparian proprietors and public corporations entitled to bridge or otherwise make use of such watercourses. *Ward* v. *Township of Grenville*, 23 Occ. N. [illegible] 32 S. C. R. 510.

Electric Lamp—Injury by—Evidence—Non-direction—Liability of master for acts of servant causing injury to stranger—Findings of jury—Damages. *Sedore* v. *Toronto Electric Light Co.*, 3 O. W. R. 407.

Electric Shock—*Death Caused by—Burden of Proof—Liability of Suppliers of Electricity.*]—Appeal from a judgment condemning the defendants to pay $5,000 damages for the death of the respondent's husband, caused by taking hold of a lamp (supplied by the defendants in the ordinary course of their business) to turn on the light. It was not proved exactly what was responsible for the accident. A guy wire of another electric company's system was, at one point, within an inch or an inch and a half of the appellants' wires communicating with the house of deceased, and, although there was no evidence of actual contact between the wires, yet this was one of the various theories advanced in explanation of the accident:—Held, that the burden of proof of the fact, act, or omission constituting negligence was not upon the plaintiff. The presumption was that the fatal current came over the same system and from the same source as that by which his ordinary supply was delivered to the deceased by the appellants. The burden of proof was upon them to shew the contrary. This they had failed to do, and the judgment holding them responsible for the accident should be affirmed. *Royal Electric Co.* v. *Hevi*, 21 Occ. N. 442.

Electric Wire — *Trespasser—Evidence—Contributory Negligence — New Trial.*]—The Ahearn and Soper Co. had a contract to illuminate certain buildings for the visit of the Duke of York to Ottawa, and obtained power from the Ottawa Electric Co. For the purposes of the contract, wires were strung on a telegraph pole and fastened with tie wires, the ends of which were uninsulated. R., an employee of the Ottawa Electric Co., was sent by the latter to place a transformer on the same pole, and in doing so his hands touched the ends of the tie wire, by which he received a shock and fell to the ground, being seriously injured. To an action for damages for such injury the Ahearn and Soper Co. pleaded that R. had no right to be on the pole and was a trespasser, and on the trial their counsel urged that the work he was doing was connected with the lighting of a building in the city. The Court of Appeal held (6 O. L. R. 619, 24 Occ. N. 5, 2 O. W. R. 1022), that this defence was established and dismissed the action:—Held, reversing the judgment, that the counsel's address did not indicate that the building referred to was not one of those to be illuminated under the contract, and the evidence did not shew that R. was engaged in the ordinary business of his employers, and the case should be re-tried, the jury having failed to agree at the trial. A rule of the Ottawa Electric Co. directed every employee whose work was near apparatus carrying dangerous currents to wear rubber gloves, which would be furnished on application. R. was not wearing such gloves when he was hurt:—Held, that the mere fact of the absence of gloves was not such negligence on R.'s part as to warrant the case being withdrawn from the jury; that, as to the Ahearn and Soper Co., R. was not bound by the rules; and that, though his failure to take such precaution was evidence of negligence, he had a right to have it left to the jury and considered in connection with other facts in the case. *Randall* v. *Ottawa Electric Co.*, 24 Occ. N. 262; *Randall* v. *Ahearn and Soper Co.*, 34 S. C. R. 698.

Electric Wire—Use of pole by stranger—Liability—Findings of jury—Cause of action—Claim of wife for injury to husband. *Randall* v. *Ottawa Electric Co.*, 2 O. W. R. 146, 173, 1022, 4 O. W. R. 240, 269, 6 O. W. R. 913.

Electric Wire Left on Ground—*Injury to Passers-by—Liability of Gas Company—City Corporation—Immediate Cause of Injury—Damages—Costs.*] — Plaintiffs were injured by a wire which had been cut and allowed to hang loose by the workmen of defendant company while straightening a pole. It came in contact with a power wire and thus became a live wire injuring the plaintiffs. Defendants held liable owing to original negligence of defendants' workmen. *Labombarde* v. *Chatham Gas Co.*, 5 O. W. R. 534, 10 O. L. R. 446.

Elevator—*Injury to Person—Bad Condition of Premises—Responsibility of Owner to Stranger.*]—The plaintiff fell into the well of

an elevator at the defendant's place of business and thereby injured herself. She brought action for damages alleging negligence on the part of the defendant. At the time of the accident the plaintiff was neither an employee nor a customer, but was merely a stranger upon defendant's premises:—Held, that the proprietor had no responsibility towards third parties who might come upon his premises without invitation or without having business to transact there. *Wiggins* v. *Semi-Ready Clothing Co.*, 23 Occ. N. 117.

Ferry Boat Wharf—*Dangerous Way—Precautions for Preventing Accidents—Contributory Negligence—Findings of Jury.*]—A passenger who arrived on the pontoon wharf as a ferry boat was swinging out, and when it was a few feet away from the wharf, with the gangways withdrawn, attempted to jump aboard over the stern bulwarks, and was drowned. In an action by her representatives to recover damages from the ferry company on account of negligence in failing to provide proper means to prevent accidents at their wharf, the jury found that the drowning was caused by the fault of the company, "in not having proper gates at the gangway openings leading from the pontoon to the boat," and that deceased was herself negligent "by her imprudence in attempting to board the boat after the gangway had been raised and the boat was swinging preparatory to leaving the pontoon," but that she "was not then aware that the boat had left the wharf:"—Held, reversing the judgment appealed from (Girouard, J., dissenting, on a different appreciation of the facts), that, as there was no proof of any negligence on the part of the company which proximately and effectively contributed to the accident, but, on the contrary, it appeared that the sole, direct, proximate and effective cause of the accident was the wilful and rash act of the deceased in attempting to jump aboard the ferry boat over the bulwarks, after the gangways had been withdrawn and the boat had got under way, the company could not be held responsible in damages. Tooke v. Bergeron, 27 S. C. R. 567, and George Matthews Co. v. Bouchard, 28 S. C. R. 585, followed. *Quebec and Levis Ferry Co.* v. *Jess*, 35 S. C. R. 693.

Fire—Setting out—Damage to property—Causal connection—Findings of jury. *Fabian* v. *Smallpiece*, 4 O. W. R. 268.

Fire—*Contributory Negligence—Voluntarily Incurring Risk—Remoteness of Damages.*]—The defendant was the owner of a threshing machine and a portable steam engine, and hired from the plaintiff a team of horses with a driver for use in moving the engine about and in drawing straw and grain during the work of threshing. While threshing for a certain farmer, sparks from the engine set fire to a stack of grain, and, the separator being thereby placed in danger, the plaintiff's driver attached his horses to it for the purpose of hauling it into a place of safety; but the fire spread so rapidly and unexpectedly before the separator could be moved or the horses detached that they were severely burned and had to be killed. The County Court Judge, who tried the case without a jury, found that the fire had been caused by negligence on the part of the defendant's servants, also that the horses had been attached to the separator either in obedience to a call from the defendant's foreman or under his personal supervision, and that there was no negligence on the part of the plaintiff's driver:—Held, that the evidence fully warranted the finding of negligence, and, unless the plaintiff's driver was guilty of contributory negligence, the defendant was responsible for the loss of the horses. 2. That the driver was not guilty of contributory negligence in exposing the horses to danger, as it was not obvious, and he had acted either on the orders of the defendant's foreman or in obedience to a natural impulse to try to save the defendant's property. Connell v. Town of Prescott, 20 A. R. 49, 22 S. C. R. 147, followed. *Thorn* v. *James*, 23 Occ. N. 124, 14 Man. L. R. 373.

Highway—Horse — Presumption—Onus. *Doughty* v. *Dobbs*, 3 O. W. R. 19.

Horse at Large on Highway—*Injury to Passer-by.*]—The defendant left his horse, attached to a vehicle, upon the public highway, without tying it up or putting any person in charge. The horse ran away and struck and injured the plaintiff, who was driving a loaded sleigh:—Held, that the defendant was liable to the plaintiff in damages; and it made no difference that the plaintiff had got down from his sleigh, and when struck, was endeavouring to keep the runaway horse from running into the sleigh, as the evidence shewed that he would have been struck had he remained upon the sleigh. *Laflamme* v. *Starnes*, Q. R. 18 S. C. 105.

Horse at Large on Highway—*Injury to Passer-by—By-law.*] — 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. A municipal by-law made it unlawful for any person to allow horses to run at large:—Held, that the horse was unlawfully on 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 in 1 O. L. R. 412, 21 Occ. N. 205, affirmed. *Patterson* v. *Fanning*, 21 Occ. N. 549, 2 O. L. R. 462.

Ice—*Accumulation — Death from—Construction of Building.*]—A man hired to work about a building was killed by a mass of ice falling upon him from the roof. In an action, under Lord Campbell's Act, by the administratrix of the deceased against the owners and occupiers of the building:—Held, that the latter were not liable in the absence of evidence that they suffered the ice to remain there for an unusual and unreasonable time after they had notice of its accumulation, and might have removed it. In erecting a building the owner may adopt any style of architecture he pleases, provided he does not create a nuisance or violate any law or municipal ordinance; therefore the construction of a roof with projecting eaves, which caused an accumulation of ice and snow thereon, is not per se evidence of negligence on the part of the owner, although it may impose upon him a greater degree of watchfulness and care in order to prevent accidents. *Dugal* v. *People's Bank of Halifax*, 34 N. B. Reps. 581.

Ice—*Building—Owner — Tenant—Liability.*]—The proprietor of a building is responsible for injuries caused by snow or ice falling from the roof thereof, where the fall of the snow or ice results from a want of proper care in keeping the premises in a safe condition; and the proprietor is not relieved from this responsibility as regards the public by the fact that the building is wholly occupied by tenants, or by the fact that the municipal by-laws impose upon tenants the obligation of keeping the roof free from snow. *Jackson* v. *Vanier*, Q. R. 18 S. C. 244.

Injury to Child—Carelessness of driver of waggon — Finding of jury — Evidence — Resolution of defendant company's directors. *Cork* v. *Canada Ice Co.*, 3 O. W. R. 106.

Injury to Goods of Occupant of Building — *Trespasser or Licensee—Contractor for Alteration of Building—Liability to Occupant—Negligent Acts of Servant.*]—Where the plaintiff, a tenant of property subject to mortgage, after foreclosure of the mortgage, though his tenancy had been thereby determined, continued in occupation of the premises, pursuant to an arrangement with the mortgagor (apparently with the cognizance of the purchaser), and afterwards failed to move out as agreed with the mortgagor, because the latter had not complied with a stipulation to find him other premises, and the defendant, who had contracted to make alterations required by the purchaser, entered and commenced tearing down the walls and plaster on the upper floor, in the course of which work the waste pipe leading from a basin on the upper floor became choked with plaster, and the tap over the basin having been turned on at a time when the water was not turned off again, the water subsequently overflowed the basin, and, passing down through the floors, damaged the plaintiff's goods:—Held, that there was no duty cast upon defendant of protecting the plaintiff's property except against wilful or wanton injury, of which there was no evidence; that if any servant of the defendant had turned on the water tap, the defendant would not be liable, such not being within the scope of the employment of such servant; that to render the defendant liable the damage must have been occasioned by some negligent act of the defendant to his servants, and the onus on the plaintiff was not satisfied, there being abundant opportunity for some one else to have occasioned it after the defendant's workmen left the building; and that the plaintiff being in the position of a trespasser, and in the building at a time when the defendant was carrying on his work (the work being done with at least ordinary care), he was there subject to all risks incident to occupation at such a time, and must bear the consequences. *Sievert* v. *Brookfield*, 37 N. S. Reps. 115.

Injury to Infant in Factory—*Liability of Owner — Contributory Negligence of Infant.*]—A boy of eight years, the appellant's son, was in the habit of playing in the respondent's factory. In consequence of an accident which happened to the boy in the winter of 1899-1900, the respondent instructed his foreman to prevent all persons who had no business in the factory from entering, and particularly this boy. For a certain time these orders were obeyed, but later the boy began to frequent the factory as in the past, including a room in which was a dangerous machine, and that to the knowledge of the foreman. In August, 1900, the boy entered the factory by the office door. The bookkeeper was not there at the moment; the boy crossed the office and seeing the bookkeeper, with whom he was in the habit of playing, threw himself into his arms, and the bookkeeper began to throw the boy into the air and catch him in his arms. In playing thus the boy's foot was caught in a pulley and seriously injured:—Held, that, in these circumstances, the owner of the factory was liable, and in order to relieve himself of liability he should not have confined himself to giving orders, but should have seen that they were executed. 2. There cannot be on the part of a child of eight years liability for his own negligence, the presumption being that at such age he is incompetent to know the consequence of his conduct. *Delage* v. *Delisle*, Q. R. 10 K. B. 481.

Injury to Linesman of Electric Company—Duty of strangers—Danger—Precautions—Volunteer or licensee—Jury. *Randall* v. *Ottawa Electric Co.*, 2 O. W. R. 146, 173, 1022, 4 O. W. R. 240, 269.

Injury to Passenger in Elevator — *Contributory Negligence.*] — H. entered an elevator in a public building, after inquiring of the boy in charge if a certain tenant was in his office, and being told he was not, he remained in the elevator while it made a number of trips in response to calls, and had been in it over ten minutes when a call came from the fifth floor. The elevator went up, and the passenger who had rung entered, H. at first making no attempt to get out. The operator then shoved to the door of the elevator, and at the same time started the wheel, which had to be completely turned round to move the elevator. The turning of the wheel would also close the door. While it was being turned H., without giving warning, tried to get out through the door, and, the elevator being then descending, he was caught between it and the floor and injured, so that he died soon after. In an action by his administrator against the owner of the building:—Held, that the accident was entirely due to the conduct of H. himself, and the owner was not liable. Judgment in 34 N. S. Reps. 365, affirmed. *Hawley* v. *Wright*, 22 Occ. N. 198, 32 S. C. R. 40.

Injury to Passer-by—*Electric Company—Operations of a Dangerous Nature—Insulation of Electric Wires.*]—The defendants, a company engaged in supplying electric light to consumers in the city of Montreal, under special charter for that purpose, placed a secondary wire, by which electric light was supplied to G.'s premises, in close proximity to a guy-wire used to brace primary wires of another electric company, which, although ordinarily a dead wire, might become dangerously charged with electricity in wet weather. The defendants' secondary wire was allowed to remain in a defective condition for several months immediately preceding the time when the injury complained of was sustained, and it was at that time insufficiently insulated at a point in close proximity to the guy-wire. While attempting to turn on the light of an incandescent lamp on his premises, on a wet

and stormy day, G. was struck with insensibility and died almost immediately. In an action to recover damages against the company for negligently causing the injury:—Held, affirming the judgment in 21 Occ. N. 442, Q. R. 11 K. B. 436, that the defendants were liable for actionable negligence, as they had failed to exercise the high degree of skill, care, and foresight required of persons engaging in operations of a dangerous nature. *Hevé* v. *Royal Electric Co.*, 22 Occ. N. 358, 32 S. C. R. 462.

Injury to Passer-by — *Municipal Corporation—Dangerous Operations—Neglect of Precautions—Personal Injuries.*]—Dangerous operations, such as blasting for the purpose of excavation, should be carried on with due regard to the safety of the public; and where it appeared that a person, at a distance of about 250 yards from the works, was seriously injured by a stone hurled through the air by a blast, and that the accident occurred through the fault and negligence of the defendants' employees in not sufficiently covering the blast, the defendants were held responsible. *Larocque* v. *City of Montreal*, Q. R. 19 S. C. 527.

Injury to Pedestrian — *Street Railway — Findings of Jury — Contributory Negligence.*]—In an action founded on personal injuries caused by a street car, the jury found that the defendants' negligence was the cause of the accident, and also that the plaintiff had been negligent in not looking out for the car:—Held, reversing the judgment of the Court of Appeal, 2 O. L. R. 53, 21 Occ. N. 369, that, as the charge to the jury had properly explained the law as to contributory negligence, the latter finding must be considered to mean that the accident would not have occurred but for the plaintiff's own negligence; and he could not recover. *Brown* v. *London Street R. W. Co.*, 22 Occ. N. 78, 31 S. C. R. 642.

Injury to Person — Municipal corporation—Work on roads—Pathmaster—Relationship of master and servant—Infant. *Bock* v. *Township of Wilmot*, 1 O. W. R. 415.

Injury to Person Coming on Premises — *Dangerous Premises — Want of Screen or Guard.*]—While a teamster was delivering a load of coke on the premises of the defendants, an iron foundry company, he was struck in the eye and injured by a chip, which one of the defendants' workmen, who was cutting off the excrescences on the inside of an iron pipe for the purpose of smoothing it, had chipped off. The accident might have been avoided had there been a screen or guard; or, in the absence of a screen or guard, by the workman stopping work during the delivery of the coke:—Held, that the defendants were liable for the injuries sustained. *Fallis* v. *Gartshore-Thompson Pipe Foundry Co.*, 22 Occ. N. 283, 4 O. L. R. 176, 1 O. W. R. 348.

Injury to Volunteer—Machinery — Defects—Duty—Delegation. *Pimperton* v. *McKenzie*, 1 O. W. R. 335.

Leaving Dangerous Place Unguarded —*Contributory Negligence — Nonsuit—Undisputed Facts — Inference.*]—The power to nonsuit on the ground of contributory negligence is restricted to cases where it is indisputable that the misfortune would not have occurred but for the plaintiff's own want of proper care. Where the facts, or the proper inference from the facts, are in dispute, the case must go to the jury. And where the defendants negligently left a hole in the floor of a room unguarded, and the plaintiff, going into the room, saw the danger and at first avoided it, but, in turning to go out again, lost sight of it, stepped into the hole, and was injured:—Held, these facts being undisputed, that it was properly left to the jury to say whether she was negligent or not. *Scrivener* v. *Lowe*, 21 Occ. N. 27, 32 O. R. 280.

Master and Servant — *Injury to Servant—Volenti Non Fit Injuria — Question for Jury.*]—In an action for compensation for personal injuries caused by negligence, the defendant who invokes the doctrine of volenti non fit injuria must have a finding by the jury that the person injured voluntarily incurred the risk, unless it so plainly appears by the plaintiff's evidence as to justify the trial Judge in withdrawing it from the jury and dismissing the action. Judgment of the Court of Appeal, Mitchell v. Canada Foundry Co., 3 O. W. R. 907, in an action by the widow and children of a workman to recover damages for his death by the negligence of his employers, affirmed. *Canada Foundry Co.* v. *Mitchell*, 25 Occ. N. 27, 35 S. C. R. 452.

Municipal Buildings — *Collapse of—Injury to Workman—Liability of Employers —Contractors for Work—Liability of Municipal Corporation—Employment of Architect —Independent Contractors.*] — An employee was working on the inside of a municipal building when it collapsed by reason of insufficient truss rods placed therein owing to architect's negligence:—Held, there was no liability on the part of the municipality, no evidence having been given to shew negligence on their part in employing the architect. *Hill* v. *Taylor*, 5 O. W. R. 85, 9 O. L. R. 643.

Navigable River — Erection of bridge —County corporation—Leaving sunken piles in river—Injury to ship—Contributory negligence—Conflicting evidence—Findings of trial Judge. *McAuliffe* v. *County of Welland*, 6 O. W. R. 819.

Platform out of Repair — *Exhibition Association — Injury to Licensee—Municipality — Highway—Repair—Invitation.*]—The plaintiff purchased from an exhibition association the privilege of selling refreshments under a certain building, during the holding of the exhibition on the grounds leased from a city corporation for two months in the year for the purpose of holding the exhibition. The city corporation covenanted to repair, but the practice was for the association to repair and charge the repairs to the corporation. In walking across a platform which was constructed between the building and the public sidewalk to give access to people requiring refreshments the plaintiff put her foot into a hole in the platform, which was out of repair, and was injured:—Held, that she was not a lessee of the premises, but a mere licensee; that she was lawfully there upon the invitation of the association; that the association owed a duty

to the persons whom they induced to go there to keep the place in proper repair; that there was no liability on the city corporation, as they were not the occupiers of the grounds and did not invite the plaintiff to go where she was hurt, and there was no highway to be kept in repair by them, but that the association, who knew the place was out of repair and who had by their negligence caused the accident, were liable. *Marshall* v. *Industrial Exhibition Association of Toronto*, 21 Occ. N. 203, 368, 1 O. L. R. 319, 2 O. L. R. 62.

Playing Dangerous Game on Highway—Infant—Contributory negligence. *Coburn* v. *Hardwick*, 1 O. W. R. 733.

Promissory Note — *Agent of Bank — Neglect to Take in Proper Form — Subsequent Material Alteration—Loss of Remedy on Note—Damages.*] — The defendant, the plaintiffs' agent at a branch, accepted a promissory note, not expressed to be joint and several, as security for an advance, instead of a joint and several one, although expressly instructed to require the latter. Shortly afterwards he discovered the mistake, and, at the suggestion of one of the makers of the note, he inserted the words "jointly and severally," on the understanding that the alteration was to be initialled by all the makers. This, however, was not done, and, after consultation with the plaintiffs' solicitor, the inserted words were crossed out by the defendant. In the result the bank were held to have lost their remedy on the note on the ground of material alteration. The bank then brought this action against the defendant for damages for negligence:—Held, Osler, J.A., dissenting, that the form of the note as taken was to all intents and purposes as valid as if made jointly and severally, and therefore in this regard only nominal damages could be recoverable. The defendant, also, was not liable in damages for the consequences of his subsequent acts. What he did was done in good faith, and in ignorance of the legal consequences. The defendant exercised reasonable care and diligence, in all the circumstances of the case, and the mere fact that his judgment was mistaken, and his acts prejudicial to the plaintiffs, was not enough to render him liable. Judgment of Meredith, C.J., awarding the plaintiffs nominal damages with costs on the appropriate scale and a set-off of costs to the defendant, affirmed. *Banque Provinciale du Canada* v. *Charbonneau*, 23 Occ. N. 256, 6 O. L. R. 302, 2 O. W. R. 558.

Railways — *Injury to Licensee—License —Master and Servant — Damages — New Trial.*]—The plaintiff's son was given leave by a yardmaster of the defendants to learn in the railway yard the duties of car checker, with the expectation that if he became competent he would be taken into the employment of the defendants in that capacity, and he was free to devote as much or as little time to acquiring the necessary knowledge as he saw fit. While he was in the railway yard a few days after this permission had been given, he was killed by an engine of the defendants, which was running through the railway yard without the bell being rung, though the rules of the defendants required this to be done:—Held, that the deceased was a licensee, and not a trespasser; that the defendants were bound to exercise reasonable care for his protection; and that the omission to give the warning was negligence which made them liable in damages for his death. The Court, being of opinion, however, that damages of $3,000 allowed by the jury were excessive, ordered that there should be a new trial unless the plaintiff should consent to accept $1,500. *Collier* v. *Michigan Central R. W. Co.*, 1 Occ. N. 16, 27 A. R. 630.

Ship—*Dangerous Condition — —Cause of Death—Evidence—Onus of Proof.*] — In an action to recover damages for death caused by alleged negligence, the onus is on the plaintiff to prove not only that the defendant was guilty of actionable negligence, but also, either directly or by reasonable inference, that such negligence was the cause of the death. Where, therefore, a man employed on the defendant's tug was drowned, and it was shewn that wood had been piled upon the tug's deck in such a way as to make it dangerous to pass along the deck, but it was also shewn that there was a safe passage-way on a scow lashed to the tug, and there was no evidence whatever as to the manner of the accident, the action was dismissed. *Young* v. *Owen Sound Dredge and Construction Co.*, 21 Occ. N. 15, 27 A. R. 649.

Street Railway — Electric shock—Fall from car—Damages—Mental shock—Evidence —Improper admission—Excessive damages— New Trial—Costs. *Lewis* v. *Toronto R. W. Co.*, 6 O. W. R. 1029.

Street Railways — *Accident to Person Crossing Track—Contributory Negligence — Jury—Trial—Form of Questions.*] — When contributory negligence is set up in an action to recover damages for negligence, which is being tried before a jury, the plaintiff is entitled to a clear and distinct finding upon the point. In an action against a street railway company to recover damages, the jury, after finding in answer to questions that the defendants were guilty of negligence, in running at too high a rate of speed, not properly sounding the gong, and not having the car under proper control, and that the plaintiff's injury was caused by this negligence, said, in answer to further questions, that the plaintiff was guilty of contributory negligence in not using more caution in crossing the railway tracks:—Held, that this answer was ambiguous and unsatisfactory, and, in view of the previous distinct answers, not fairly to be treated as a finding of contributory negligence. Per Osler, J.A.—Instead of putting in such cases the question, "Was the plaintiff guilty of contributory negligence?" involving, as it does, both the fact and the law, it would be better to ask, "Could the plaintiff by the exercise of reasonable care have avoided the injury?" and to provide for the case of an affirmative answer by the further question, "If so, in what respect do you think the plaintiff omitted to take reasonable care?" *Brown* v. *London Street R. W. Co.*, 21 Occ. N. 369, 2 O. L. R. 53.

Street Railways—*Collision with Vehicle —Motorman.*]—The motorman of an electric car is not necessarily guilty of negligence because he does not at once stop the car at the first notice that a horse is being frightened either at the car or at something else. All

that can be expected is that the motorman shall proceed carefully, and it is in each case a question whether that has been done. Upon the facts of this case, the majority of the Court held that there was no evidence to justify a finding of negligence, and set aside a judgment in the plaintiff's favour. *Robinson* v. *Toronto R. W. Co.*, 21 Occ. N. 370, 2 O. L. R. 18.

Street Railways — Contributory negligence—Collision between electric car and another vehicle—Findings of jury—New trial. *Liddiard* v. *Toronto R. W. Co.*, 2 O. W. R. 145, 3 O. W. R. 852.

Trespasser — *Licensee—Master and Servant—Liability of Master for Acts of Servant—Course of Employment.*]—A trespasser or bare licensee injured through negligence may maintain an action. The workmen of a contractor for tearing down portions of a building, in order to make alterations, turned on a water tap in a room where they were working, and neglected to turn it off, whereby goods in the store below were damaged by water:—Held, Davies and Nesbitt, JJ., dissenting, that the act of the workmen was done in the course of their employment; that it was negligent; that their employer was liable; and that the owner of the goods could recover damages, though he was in possession merely as an overholding tenant who had not been ejected. *Sievert* v. *Brookfield*, 25 Occ. N. 53, 35 S. C. R. 494.

Unsafe Premises — *Accident to Visitor —Liability of Owner—Landlord and Tenant —Sub-letting without Leave—Damages—Increase on Appeal—Costs.*] — It is negligent for the owner of property to leave an unprotected excavation in an open passage leading from the street to the rear of his buildings, and used by his tenants and those having business with them, and he is responsible in damages for an accident occurring in consequence of such unprotected excavation. The fact that the person injured was visiting her son, a sub-tenant, who had leased from a tenant notwithstanding a clause in the lease of the latter prohibiting sub-letting, does not affect the responsibility of the owner for negligence in permitting the passage to be in an unsafe condition. Where the award of damages and costs by the first Court appears to be inadequate and unjust, the Court of King's Bench will, on appeal of the plaintiff, reform the judgment in this respect, and increase the award to a reasonable extent, and will, moreover, reform the judgment as to costs; e.g., where a woman had her leg broken by falling into an unprotected excavation, and was crippled and incapacitated for work, and the first Court awarded only $50 damages, without costs of plaintiff's enquête, the appellate Court increased the indemnity to $200, with costs of suit. *Vachon* v. *Durand*, Q. R. 13 K. B. 372.

Unsafe Premises — *Invitation — Unguarded Hole in Floor — Absence of Warning—Notice of Danger.*] — The plaintiff, a contractor for constructing and repairing roofs, came to the defendants' premises on their invitation to examine the roof and give an estimate of the cost of certain repairs to it. There was a cupola on the roof, from which it could be examined. This cupola was reached by a ladder going up through a hole in the roof. It had two windows and was well lighted. There was also another hole in the floor of the cupola, which was there for the purpose of furnishing light to the floor below and was unguarded. The plaintiff in broad daylight ascended to the cupola, accompanied by the defendants' foreman, for the purpose of examining the roof, and, after looking through one of the windows, he stepped backwards and fell through the last mentioned hole to the floor below and was injured:—Held, that there was no evidence of negligence on defendants' part to go to a jury, and that the plaintiff was properly nonsuited. Johnson v. Ramberg, 51 N. W. Rep. 1043, followed. Indermaur v. Davies, L. R. 1 C. P. 274, distinguished:—Held, also, that, as the danger was obvious, there was no duty on the part of the defendants' foreman, although he was present, to warn the plaintiff of it. *Fonseca* v. *Lake of the Woods Milling Co.*, 15 Man. L. R. 413, 1 W. L. R. 553.

Vehicle Driven by Policeman—*Injury to Foot-passenger—Liability of Police Commissioners.*] — A constable in charge of a patrol waggon is not a servant of a board of commissioners of police constituted under s. 481 of the Municipal Act, R. S. O. 1897 c. 223, as amended by 62 V. c. 26, s. 28, so as to make them liable for his negligence in performance of his duties, whereby a person walking in the street was knocked down and injured. *Winterbottom* v. *London Police Commissioners*, 21 Occ. N. 260, 431, 1 O. L. R. 549, 2 O. L. R. 105.

NEGOTIABLE INSTRUMENTS.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

NEW TRIAL.

Absence of Material Witness—Taking chances at trial. *McLellan* v. *Hovey*, 1 O. W. R. 215, 707.

Decree of Appellate Court—*Reasons for Judgment.*]—B., a passenger on a railway train, was thrice assaulted by a fellow-passenger during the passage. The conductor was informed of the first assault immediately after it occurred, and also of the second, but took no steps to protect B. In an action against the railway company B. recovered damages assessed generally, for the injuries complained of. The verdict was maintained by the Court of Appeal, but the Supreme Court of Canada ordered a new trial unless B. would consent to his damages being reduced (34 S. C. R. 74). In the reasons given for the last mentioned judgment it was held that damages could be recovered for the third assault only, but the judgment as entered by the Registrar stated that the Court ordered the reversal of the judgment appealed from and a new trial unless the plaintiff accepted the reduced amount of damages. Such amount having been refused, a new trial was had, on which B. again obtained a verdict, the damages being apportioned between the second and third assault. On appeal to the Supreme Court of Canada from the judgment of the Court of

Appeal maintaining this verdict:—Held, Taschereau, C.J.C., and Davies, J., dissenting, that, as the decree was in accordance with the judgment pronounced by the Court when the decision was given, and as it left the whole case open on the second trial, the jury were free to give damages for the second assault, and their verdict should not be disturbed. *Blain* v. *Canadian Pacific R. W. Co.*, 25 Occ. N. 107; *Canadian Pacific R. W. Co.*, v. *Blain*, 36 S. C. R. 159.

Discovery of Fresh Evidence] — The circumstances under which a new trial will be granted or refused on the ground of the discovery of fresh evidence, discussed. *Sexsmith* v. *Murphy*, 1 Terr. L. R. 311.

Divisional Court Setting Aside Nonsuit and Directing New Trial—Appeal—Evidence for jury—Negligent setting out fire. *Pareau* v. *Canadian Pacific R. W. Co.*, 2 O. W. R. 872.

Findings of Jury—*Contrary to Evidence—Costs.*]—On the trial of an action for the delivery up and cancellation of an order given by the plaintiff in favour of the defendant D. upon the defendant S., as a means of avoiding a threatened arrest upon a charge of having been a participant in the blowing up of the defendants' dam, the jury, in answer to several questions submitted to them, negatived the fact of plaintiff's complicity in the offence charged, and upon their finding a verdict was entered for the plaintiff. There being strong evidence to shew that the plaintiff, although not an actual participator in the offence charged, was conspiring with, and aiding and abetting, those by whom the dam was blown up; that he received sums of money from people in the neighbourhood which was used for the purchase of dynamite, to be used in blowing up the dam; and that, although not actually present at the time, he was in the vicinity, and knew all about the intentions of those by whom the act was committed:—Held, that the findings must be set aside, with costs to be paid by the plaintiff, and a new trial ordered. *Moore* v. *Dickie*, 33 N. S. Reps. 375.

Ground for—*Defence not Availed of.*]—If the defendant on the trial of a cause neglects to avail himself of a defence of which he was apprised, and which he could have then made if he had wished, it is not open to him to move for a new trial in order to make such defence. *Kennedy Island Mill Co.* v. *McInerney*, 36 N. B. Reps. 612.

Jurisdiction — *Objection not Taken at Trial.*]—Effect was given to an objection to the Judge's charge not taken at the trial, and a new trial ordered, but without costs. *Wason* v. *Douglas*, 21 Occ. N. 521, 1 O. W. R. 552.

Jury—*Verdict—Setting Aside—Powers of Court in Banc—Nonsuit.*]—Where the Court in banc set aside the verdict of the jury in favour of the plaintiffs: — Held, that the Court could not, under any of the Rules in the King's Bench Act, 58 & 59 V. c. 6, dismiss the action or enter a nonsuit or verdict for defendants in the face of the verdict of the jury. Rules 639, 640, and 642 discussed. Connecticut Mutual, &c., Co. v. Moore, 6 App. Cas. 644, and British Columbia Towing, &c., Co. v. Sewell, 9 S. C. R. 527, followed. New trial ordered without costs of former trial. Costs of the application to be costs in the cause to the defendants in any event. *Davidson* v. *Stuart*, 14 Man. L. R. 74.

Motion for—*Misconduct of Jurors—Contradictory Affidavits — Oral Examination before Court.*]—Where one of the grounds in support of a motion for a new trial was that some of the jury had been tampered with, and the charge included the defendant's attorney, an officer of the Court, and a number of affidavits very contradictory and of an entirely irreconcilable nature were read, under the special circumstances of the case an order was made that the deponents should appear before the Court to be examined viva voce touching the matters in question. *Wood* v. *Le Blanc*, 36 N. B. Reps. 47.

Motion for—*Notice of—Amendment—Appeal — Improper Admission of Evidence — Absence of Objection at Trial—Perverse Verdict.*] — An amendment was allowed to a notice of appeal so as to ask expressly for a new trial, but only on the grounds stated in the notice of appeal. An amendment so as to set up the ground, not stated in the notice, of the improper admission of evidence taken on commission was refused, as it did not appear from the Judge's notes that objection was made at the trial, though the commissioner had noted the objection. A new trial on the ground that the verdict was perverse was refused. *Edmonton* v. *Thompson*, 1 Terr. L. R. 342.

Motion for—*Practice—Service of Notice on Judge.*]—See *Lang* v. *Brown*, 34 N. B. Reps. 492.

Order Directing—Appeal from — New trial pending appeal—No application to stay — Judgment. *Webb* v. *Canadian General Electric Co.*, 2 O. W. R. 322, 865, 1113.

Restricting to Particular Issues — *Jury.*] — The jury brought in findings upon which the trial Judge was unable to enter judgment for either party. The plaintiff asked for a new trial on some of the issues not disposed of by the jury; the defendant on all the issues:—Held, that there must be a new trial on all the issues. This was not a proper case for limiting the new trial, as the jury might give answers on the issues not disposed of which might be inconsistent with the findings of the former jury. *Irvine* v. *Parker*, 24 Occ. N. 138.

Staying Proceedings — *Appeal to Supreme Court of Canada — Special Circumstances.*]—The Court has power, in its discretion, to stay the second trial of an action pending an appeal to the Supreme Court of Canada from the order directing a second trial, but the discretion should only be exercised where special circumstances are shewn by the applicant. No special circumstances being shewn, the decisions of the Master in Chambers, 7 O. L. R. 186, 24 Occ. N. 134, 3 O. W. R. 312, and of a Judge on appeal, refusing to stay the trial of these actions, were affirmed. *Hockley* v. *Grand Trunk R. W. Co.*, *Davis* v. *Grand Trunk R. W. Co.*, 24 Occ. N. 311, 7 O. L. R. 658, 3 O. W. R. 663.

Surprise — Affidavits — Loss of cattle — Bailment—Cause of disease not assigned in

pleading or preliminary examination. *McLenaghan* v. *Hood* (Man.), 1 W. L. R. 422, 25 Occ. N. 19.

NEWSPAPER.

See CONTEMPT OF COURT—DEFAMATION.

NEXT FRIEND.

See COSTS—HUSBAND AND WIFE—INFANT.

NEXT OF KIN.

See WILL.

NOLLE PROSEQUI.

See COSTS.

NONFEASANCE.

See MUNICIPAL CORPORATIONS.

NONREPAIR.

See WAY.

NONSUIT.

See COURTS—DEFAMATION — MALICIOUS PROCEDURE — MEDICINE AND SURGERY — MUNICIPAL CORPORATIONS—NEGLIGENCE —PLEADING—TRUSTS AND TRUSTEES.

NORTH-WEST MOUNTED POLICE.

Constable — *Discharge — Revocation — Authority of Superintendent — Desertion — Trial by Officers of Force — Jurisdiction — Prohibition.*]—A constable in the North-West Mounted Police, whose term of service would expire in six days, applied to the superintendent commanding the post for six days' leave of absence. The superintendent approved of the application, and appointed a board to verify and record the service of the constable, who delivered up his kit and signed a receipt in which it was stated that he had been settled with to the end of his term of service. The board made a favourable report, post-dating it six days, to the ordinary form of which were added the words, under the head of "Remarks of Board and Commissioner:" "term of service having expired he is discharged." The pass for the six days' leave of absence was issued but not delivered to the constable, and a cheque for the balance of his pay was being prepared, when the superintendent revoked the pass and ordered the constable to be notified that his pass had been revoked, the board's report cancelled, and the issue of the cheque for the balance of his pay refused; and he was ordered to continue in duty for the remaining six days of his term of service. The constable refused to obey the order to continue on duty, and absented himself from his quarters and duty, remaining absent without further leave. Proceedings for his arrest and trial under s. 18 of the Mounted Police Act, 1894, being about to be taken, a summons for a writ of prohibition was taken out:—Held, that the pass was revocable. (2) That the superintendent had authority to cancel proceedings of the board, and that such pass and proceedings having been cancelled, the constable was still a member of the force: —Held, also, that, as the officers mentioned in s. 18 of the Mounted Police Act, 1894, had jurisdiction to try a constable on a charge of desertion, and it had not been established that they were disqualified by interest or bias, the writ of prohibition should not have been granted. *In re Nettleship*, 4 Terr. L. R. 148.

NOTARY.

Affidavit — *Foreign Country.*]—Seeing that the notary public mentioned in art. 30, C. P., refers to a ntoary public in England, an affidavit sworn before a notary public in a foreign country, not in England, cannot be used in the Courts of Quebec, and will be rejected on motion. *Laurendeau* v. *Montlord*, 7 Q. P. R. 37.

Authentic Acts — *Signatures — Conventional Hypothec.*]—Notaries are appointed to take all the acts to which parties ought or wish to give authenticity, and therefore they must be present during the whole of the execution of the Act. 2. An act which is not signed in the presence of a notary, or the signature to which is not acknowledged before him, is not an authentic act, and has not the effect of creating a conventional hypothec. *Léveillé* v. *Kauntz*, 4 Q. P. R. 358.

Partnership—*Investment of Money—Misappropriation—Liability of Partner.*]—The members of a firm of notaries, practising as such in partnership, but also, by their sign, business cards, and advertisements, holding themselves out as real estate, insurance, and investment agents, are jointly and severally liable in respect of their transactions, and joint and several liability exists to account for a sum of money which was intrusted to one member of the firm for investment, and, when repaid by the debtor, was not returned to the owner thereof. *Baron* v. *Archambault*, Q. R. 19 S. C. 1.

Witness — *Production of Draft Deed — Costs.*]—A notary when called as a witness may be ordered to produce for inspection a draft of an instrument prepared by him, and cannot exact, in advance, payment of costs due him for the preparation of such draft. *Sorignet* v. *Henry*, 5 Q. P. R. 95.

See BILLS OF EXCHANGE AND PROMISSORY NOTES—CHOSE IN ACTION, ASSIGNMENT OF—COURTS—DEED—DISTRIBUTION OF ESTATES—EVIDENCE—OATHS.

NOTICE.

See ATTACHMENT OF DEBTS—BANKRUPTCY AND INSOLVENCY — COMPANY — COPYRIGHT—CROWN — EXECUTION — INDIAN LANDS—INSURANCE—LAND TITLES ACT —LIEN—LIQUOR LICENSE ACT—MALICIOUS PROSECUTION—MASTER AND SERVANT—MORTGAGE—MUNICIPAL CORPORATIONS—MUNICIPAL ELECTIONS—PAUPER — PRINCIPAL AND AGENT — REGISTRY LAWS—TRIAL—TRUSTS AND TRUSTEES.

NOTICE OF ACCIDENT.

See MASTER AND SERVANT—WAY.

NOTICE OF ACTION.

Bailiff—*Sale of Goods under Execution—Public Officer—Act of Omission.*]—A bailiff in selling goods seized under an execution, is fulfilling public functions, and if he is sued for damages for what he has done in these circumstances, he has a right to the notice mentioned in art. 88, C. P. C. 2. A public officer has a right to this notice as well when he is sued for an act of omission as for an act of commission. *Dion* v. *Richard*, Q. R. 23 S. C. 403.

Churchwarden—*Public Officer — Money Illegally Spent — Damages.*] — In this action the respondent was a churchwarden, and, therefore, a public officer within the meaning of art. 88, C. P. 2. The action, although it claimed from the respondent the repayment of certain sums which he had illegally spent in his capacity of churchwarden, was in fact an action for damages, and, therefore, the respondent had a right to the notice required by art. 88 C. P. Default of notice rendered the action premature. *Bélanger* v. *Mercier*, Q. R. 12 K. B. 428.

Defamation—*Summary Dismissal of Action.*]—There were several defendants to the action, and different causes of action were alleged. As against one defendant, a company, the allegation was that it had maliciously published and circulated a printed newspaper containing statements describing the goods manufactured by the plaintiffs as inferior, etc. A Judge in Chambers considered that the action as against the company was for libel, and dismissed it summarily because the notice of action required by s. 6 (2) of R. S. O. 1897 c. 68 was not given. A Divisional Court reversed this order, thinking it better to have the whole case disposed of at the trial, and allowed the plaintiffs to amend if they desired and the defendants to plead the want of notice. *Gurney Foundry Co.* v. *Emmett*, 7 O. L. R. 604, 3 O. W. R. 382, 554, 630.

Dominion Constable—*Provincial Government Detective—Malice—Public Officer.*]—A Government detective in the province of Quebec, appointed to that office under an order in council, who is at the same time a Dominion constable, having jurisdiction throughout the whole of Canada, is a public officer, and has a right to the month's notice mentioned in art. 88, C. P., of an action against him for damages on account of something done by him in the exercise of his public functions, unless it be alleged and proved that he has acted maliciously and in bad faith. *McDonad* v. *McCaskill*, 5 Q. P. R. 266.

False Imprisonment—*Peace Officer — Honest Belief.*]—In an action for false imprisonment the defendant, acting as a peace officer under the Criminal Code, is entitled to notice of action under s. 976, if he honestly believed the plaintiff had committed a felony. The bona fides of the defendant's belief is a question of fact, and must be submitted to the jury, if any facts exist which could give rise to an honest belief. The reasonableness of the belief is not material. *White* v. *Hamm*, 36 N. B. Reps. 237.

Malicious Arrest — *Municipal Officers.*]—An action for damages for unlawfully entering a man's house and maliciously arresting him, brought against a municipality and its constables, must be preceded by notice of action to the latter. *Milton* v. *Municipality of Coté St. Paul*, 6 Q. P. R. 407.

Police Officer—*False Arrest.*]—A police officer, sued for false arrest, is entitled to the notice of action prescribed by art. 88, C. P., where he made the arrest under instructions. *Lefebvre* v. *Village of Verdun*, 6 Q. P. R. 437.

School Commissioner—*Public Officer.*]—A school commissioner is a public officer, who has a right to notice of action under art. 88, C. P., and the absence of such notice is fatal to an action against him. *Carrière* v. *Jobin*, 5 Q. P. R. 305.

Street Railway Company — *Statute—Condition Precedent.*] — The obligation imposed upon creditors of the Montreal Street Railway Company to give notice of action, as required by the charter of the company, is not a prejudicial obligation suspending only the right of action of a plaintiff; but it is an obligation prejudicial to the right of action itself, and a creditor cannot begin an action for damages without having given such a notice. *Bourguignon* v. *Montreal Street R. W. Co.*, 6 Q. P. R. 232.

See COSTS—MALICIOUS PROSECUTION—MASTER AND SERVANT.

NOTICE OF APPEAL.

See APPEAL—PARLIAMENTARY ELECTIONS.

NOTICE OF APPEARANCE.

See APPEARANCE.

NOTICE OF ASSIGNMENT.

See CHOSE IN ACTION, ASSIGNMENT OF.

NOTICE OF COMPLAINT.

See PARLIAMENTARY ELECTIONS.

NOTICE OF CONTESTATION.

See OPPOSITION.

NOTICE OF CROSS-APPEAL.

See PRIVY COUNCIL.

NOTICE OF DEFENCE.

See PLEADING.

NOTICE OF DEPOSIT.

See PLEADING.

NOTICE OF DISHONOUR.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

NOTICE OF INJURY.

See MASTER AND SERVANT—WAY.

NOTICE OF INSCRIPTION.

Time for—*Demand of Abandonment — Contestation.*]—The time for giving notice of inscription for hearing upon the merits of a contestation of a demand for an abandonment, is regulated by art. 34, C. P. *Lemay* v. *Parizeau*, 5 Q. P. R. 427.

NOTICE OF MOTION.

Leave to Serve Short Notice.] — Where a party applies for special leave to serve short notice of motion, he must distinctly state to the Court that the notice applied for is short; and the same fact must distinctly appear on the face of the notice served on the other party. *Canadian Pacific R. W. Co.* v. *Vancouver, Westminster, and Yukon R. W. Co.*, 24 Occ. N. 161, 10 B. C. R. 228.

Statutory Requirements—*Type-written Notice.*]—The Court refused to hear a motion where the applicant had not complied with 60 V. c. 24, s. 366 (N.B.), by printing his notice of motion, which was more than 5 folios in length. A type-written notice does not comply with the statute. Time was given to print the notice. *Wilmot* v. *Macpherson*, 36 N. B. Reps. 327.

See BANKRUPTCY AND INSOLVENCY — PEREMPTION.

NOTICE OF PAYMENT INTO COURT.

See PLEADING.

NOTICE OF PROTEST.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

NOTICE OF RETURN.

See OPPOSITION.

NOTICE OF SALE.

See OPPOSITION.

NOTICE OF TRIAL.

See TRIAL.

NOTICE TO PROCEED.

See CERTIORARI.

NOTICE TO PRODUCE.

See EVIDENCE.

NOTICE TO QUIT.

See LANDLORD AND TENANT.

NOTICE TO SURETY.

See PRINCIPAL AND SURETY.

NOVATION.

See CHOSE IN ACTION, ASSIGNMENT OF — CONTRACT—SALE OF GOODS.

NUISANCE.

Construction of Artificial Ponds—Injury to neighbour's property—Evidence of damage. *Rupert* v. *Sisley*, 153, 2 O. W. R. 153.

Construction of Road—Flooding neighbouring land — Damages — Injunction — Scale of costs—Municipal corporation. *Taylor* v. *Township of Collingwood*, 3 O. W. R. 368, 553.

Damages—*Refusal to Accept Conditional Renunciation — Costs on Appeal to Court Below — Costs of Enquête—Statutory Powers —Negligence.*] — In an action for $15,000 damages occasioned by a nuisance to neighbouring property, the plaintiff recovered $3,000, assessed en bloc by the trial Court, without distinguishing between special damages suffered up to the date of action and damages claimed for permanent depreciation of the property. Before any appeal was instituted, the plaintiff filed a written offer to accept a reduction of $2,590, persisting merely in $410 for special damages to date of action, with costs, and reserving the right to claim all subsequent damages, including damages for permanent depreciation, but without admitting that the damages suffered up to the time of the action did not exceed the whole amount actually recovered. This offer was refused by the defendants, as it did not affect the costs and contained reservations, and an appeal was taken by them, on which the Court of King's Bench, in allowing the appeal, reduced the amount of the judgment to $410, reserved to the plaintiff the right of action for subsequent special damages and damages for permanent depreciation, and gave full costs against the appellants, on the ground that they should have accepted the renunciation filed:—Held, Davies, J., dissenting, that the Court of King's Bench erred in holding that the defendants had no right to reject the conditional renunciation and in giving costs against the appellants; that the action should be dismissed as to the $2,590 with costs, and the reservation as to further action for depreciation disallowed; but that the judgment for $410 with costs as in an action of that class, with the reservation as to temporary damages accruing since the action, should be affirmed. As the costs at the enquête were considerably increased on account of the large amount of damages claimed, it was deemed advisable, in the circumstances, to order that each party should pay their own costs thus incurred:—Held, also, that, although the nuisance complained of was caused by the defendants acting under rights secured to them by special statute, yet, as there was negligence found against them with evidence sufficient to support that finding, the maxim sic utere tuo ut alienum non lædas applied, and that the powers granted by their special charter did not excuse them from liability. Canadian Pacific R. W. Co. v. Roy, [1902] A. C. 220, referred to. *Montreal Water and Power Co.* v. *Davie*, 25 Occ. N. 5, 35 S. C. R. 255.

Ditch Overflowing Lands — Municipal corporation — Injunction—Damages. *Woolard* v. *Corporation of Burnaby*, (B.C.), 2 W. L. R. 402.

Drain — *Discharge of Hot Water and Steam into—Liability.*]—The defendants connected a drain leading from their premises with a private drain constructed by the plaintiff. Hot water and steam, originating on the defendants' premises and passing into their drain, flowed back through the plaintiff's drain, and overflowed his cellar, and filled his house with steam:—Held, following Fuller v. Pearson, 23 N. S. Reps. 263, 21 S. C. R. 337, that the defendants were responsible in damages. *Andrews* v. *Cape Breton Electric Co.*, 37 N. S. Reps. 105.

Electric Light Company — *Works — Vibration — Injury to Adjoining Property—Injunction—Damages — Powers of Company —Alienation of Land — Private Act of Incorporation.*]—Judgment of Street, J., 2 O. L. R. 240, 21 Occ. N. 440, affirmed. *Hopkin* v. *Hamilton Electric Light and Cataract Power Co.*, 22 Occ. N. 284, 4 O. L. R. 258, 1 O. W. R. 486.

Electric Power Company—*Authorization by Legislature—Injury to Neighbouring Properties — Vibration.*] — The fact that a company has been authorized by the legislature to carry on a certain manufacture does not render it free from the legal obligation to repair the injury which the carrying on causes to the neighbouring properties. Canadian Pacific R. W. Co. v. Roy, Q. R. 9 Q. B. 551, followed. 2. When the carrying on of a manufacture, even in a manufacturing centre, causes to the neighbouring properties an injury which goes beyond the ordinary disadvantages of the neighbourhood—for example, by the vibration caused by powerful machines and by the smoke charged with soot which escapes from the furnaces—the person carrying on such manufacture is bound to make compensation for the injury. *Montreal Street R. W. Co.* v. *Gareau*, 21 Occ. N. 128, Q. R. 10 K. B. 417.

Electric Power Company—*Erection of Power House—Injury to Land Adjoining — Vibration — Injunction—Damages.*] — An electric power company by the working of their engines caused so much vibration in the land adjoining that on which the paintiff's house was built as to render it at times almost uninhabitable, though no actual structural injury was shewn to have taken place. The company was incorporated under the Ontario Companies Act, for the purpose of manufacturing, etc., electric power, and to purchase and hold lands to be used in the business, with authority under R. S. O. c. 200, s. 3, to construct, maintain, complete, and operate works for the production, etc., of electricity. But the company had no compulsory power to take lands; and no opportunity had been afforded the plaintiff, as there would have been in such case, of objecting to the location of their works, etc. Moreover, the company were under no compulsion to exercise their powers, nor was any compensation provided, under the statutes relating to them, for any injury done by such exercise:—Held, that the company were entitled only to exercise their powers in such a way as not to create a nuisance, and the plaintiff was entitled to an injunction and a reference as to damages. 2. Although the defendants had by their private Act incorporated therein certain sections of the Ontario Railway Act, relating to expropriation, they were not entitled to protection, because no map or book of reference had been deposited. *Hopkin* v. *Hamilton Electric Light and Cataract Power Co.*, 21 Occ. N. 440, 2 O. L. R. 240.

Electric Railway — *Vibration, Smoke, and Noise—Injury to Adjoining Property — Evidence—Assessment of Damages—Reversal*

on Questions of Fact — Appeal.] — Notwithstanding the privileges conferred upon an electric street railway company for the construction and operation of an electric tramway upon the public thoroughfares of a city by its Act of incorporation, the company is responsible in damages to the owners of property adjoining its power house for any structural injuries caused by the vibrations produced by its machinery and the diminution of rentals and value thereby occasioned. Drysdale v. Dugas, 26 S. C. R. 20, followed. In an action by the owner of adjoining property for damages thus caused, the evidence was contradictory, and the Courts below gave effect to the testimony of scientific witnesses in preference to that of persons acquainted with the locality:—Held, Taschereau, J., dissenting, that, notwithstanding the concurrent findings of the Courts below, as the witnesses were equally credible, the evidence of those who spoke from personal knowledge of the facts ought to have been preferred to that of persons giving opinions based merely upon scientific observations. In reversing the judgment appealed from the Supreme Court deemed it expedient, in the interest of both parties, to assess damages, once for all, at an amount deemed sufficient to indemnify the plaintiff for all injuries, past, present, and future, resulting from the nuisance complained of, should she elect to accept the amount so estimated in full satisfaction thereof; otherwise the record to be transmitted to the trial Court to have the amount of damages determined. *Gareau* v. *Montreal Street R. W. Co.*, 22 Occ. N. 4, 31 S. C. R. 463.

Erection of Building—*Obstruction of View—Enforcement of Fire By-law — Injunction.*]—The plaintiff by injunction sought to prevent the completion of a warehouse which the defendant was erecting on ground leased by him from a railway company, being part of their right of way adjoining the lawn of a property owned and occupied by the plaintiff as a dwelling in the city of Winnipeg. On the other side of the right of way was a strip of land, owned by the defendant, sloping down to the Red river. The warehouse was situated directly between the plaintiff's house and the river and would obstruct the plaintiff's view of the river. It was being constructed of wood in contravention of the fire limit by-law of the city:—Held, that the plaintiff had no right to the unobstructed view of the river. 2. That the plaintiff had no right to enforce the fire limit by-law by injunction, as it was a by-law passed for the protection of the general public and providing for a penalty in case of its infringement, and there was no evidence to shew that the risk of fire to the plaintiff's property would be specially increased by the construction of the warehouse. Atkinson v. Newcastle, 2 Ex. D. 441, followed. The plaintiff further urged that the construction and intended use of the warehouse would create a nuisance to her, which she was entitled to have prevented by an injunction, and gave some evidence as to the use by tramps and others of the vacant ground on the side of the warehouse next her property, causing unpleasant smells, but it was not shewn that the defendant was lessee or occupant of that vacant ground:—Held, that there was not sufficient evidence to entitle the plaintiff to an injunction on the ground of nuisance. *McBean* v. *Wyllie*, 22 Occ. N. 270, 14 Man. L. R. 135.

Factory—*Neighbouring Office — Acquisition of Rights.*]—A person who rents an office in a building near an industrial establishment must bear the inconvenience which results from the normal exercise of the industry, especially when the establishment existed and carried on its industry in the same manner before the construction of the building in which such person has rented an office. *Jones* v. *McCleary Mfg. Co.*, Q. R. 18 S. C. 130.

Factory—*Noxious Odours—Municipal By-law—Extra-territorial Force—Municipal Corporation—Right to Compel Abatement.*]—A by-law of a municipal corporation imposing a penalty for sending out smoke and noxious odours, has no force outside of the limits of the municipality, and such penalty cannot be enforced against a person carrying on a manufacturing business in an adjoining municipality; but, in the present case, the plaintiffs under s. 34 of their charter, 60 V. c. 66 (Q), had a right of action to "prohibit" (faire cesser) any person from allowing emanations of smoke or unwholesome odours, even when the establishments objected to were in adjacent municipalities, if such municipalities refused or neglected to abate the nuisances. *Town of St. Paul* v. *Cook*, Q. R. 22 S. C. 498.

Factory — *Slaughter-house — Injury to Neighbours.*] — The plaintiff purchased a house in the neighbourhood of a tannery which had been carried on for many years by the defendants' predecessors and himself. The locality was also largely occupied by other manufacturing establishments. The plaintiff alleged damage by the smoke, smell, and moisture emanating from the defendants' tannery. The odour was not proved to be unsanitary. Other residents in the immediate neighbourhood testified that they did not find the smoke or smell specially objectionable. It also appeared that the plaintiff had used his own property for years as a slaughter-house:—Held, following Carpentier v. Ville de Maisonneuve, Q. R. 11 S. C. 242, that neighbours are obliged to endure the reasonable inconveniences which result from neighbourhood. These inconveniences vary in kind and in extent according to the circumstances of place, and quality of the population, and must be reduced by the care and prudence of neighbours to the lowest possible limit; but under the circumstances above stated the limit had not been exceeded in the present case, especially in view of the facts that the locality was largely occupied by manufacturing industries, that the defendants' occupancy preceded that of the plaintiff, and that the plaintiff had used his own premises as a slaughter-house. *Casson* v. *Galibert*, Q. R. 22 S. C. 493.

Factory—*Smoke, Vibration, and Noise—Rights of Neighbours—Operation of Works—Authorization by Statute—Damages.*] — The defendants operated a system of waterworks for the supply of water to several municipalities, including the town of Westmount. In this town, in a neighbourhood entirely residential, it constructed a pumping plant, operated first by steam, and later by electricity. The plaintiff, proprietor and occupant of an adjoining property for many years before the construction of the defendants' works, complained of the smoke, vibration, and noised caused thereby, more especially

of vibration and noise since the installation of an electric motor plant:—Held, that the fact that the defendants were authorized by their charter to carry on the business of supplying water and to use steam and electricity for such purpose, did not exempt them from the legal obligation of indemnifying neighbouring proprietors for the damage occasioned by the operation of their works. 2. The defendants being free to select the site for their works, the principle laid down by the Privy Council in Canadian Pacific R. W. Co. v. Roy, [1902] A. C. 220, with respect to damage caused by sparks from locomotives, did not apply, and defendants were responsible for damage caused to neighbours just as any manufacturing firm incorporated by letters patent would be responsible. 3. Permanent damage, caused by depreciation of value of property, as well as damage already suffered, may be awarded in such case. Montreal Street R. W. Co. v. Gareau, Q. R. 10 K. B. 417, followed. *Davie* v. *Montreal Water and Power Co.*, Q. R. 23 S. C. 141.

Fouling Watercourses — Ditch constructed to carry refuse from factory—Liability of municipality — Trespass — Local board of health. *Donovan* v. *Township of Lochiel*, 5 O. W. R. 222, 785.

Highway—Non-repair — Indictment — Abatement—Costs. *Rex* v. *Rural Municipality of Portage la Prairie* (Man.), 2 W. L. R. 141.

Highway — Non-repair — Remedy — Special damage to land owner—Action — Claim for damages—Mandamus—Remedy by indictment—Costs. *Noble* v. *Rural Municipality of Turtle Mountain* (Man.), 2 W. L. R. 144.

House Drains—*Damage to Neighbour's Premises.*]—The plaintiff and defendants were owners of adjoining buildings. The drains from both ran to a street, where they entered a box drain constructed by the town. The defendants allowed hot water and steam to pass into their drain. The hot water and steam did not pass away, but flowed back into the plaintiff's cellar, and the plaintiff sued for damages thereby caused. The defendants set up that the damage was caused by a stoppage in the public drain:—Held, following Fuller v. Pearson, 23 N. B. Reps. 263, 21 S. C. R. 337, and Humphreys v. Cousins, L. R. 2 C. P. 239, that the plaintiff was entitled to recover. *Andrews* v. *Cape Breton Electric Co.*, 24 Occ. N. 237.

Injury to Farm by Sewage—*Municipal Corporation—Fouling Natural Stream—Damages.*]—The defendants, a municipal corporation, were held liable to the plaintiffs for damages sustained by reason of sewage matter brought upon the plaintiffs' land by a creek which received the outflow from a sewage farm operated by the defendants, and also for anthrax germs brought upon the plaintiffs' land by reason of the defendants' sewage system. The defendants, though authorized by the Municipal Act to undertake and carry out the works, were not authorized to do so in such a way as to cause a nuisance or to injure other persons. Having given leave to the tanneries from which the anthrax germs came to connect with their system of sewers, the defendants were responsible for the result. Although they had forbidden the throwing of the refuse from which the germs were believed to come, into the sewer, they were not relieved from liability, because they had the power, and had not exercised it, of enforcing the prohibition by stopping the connection. The elements of damage in such a case were considered, and damages were assessed for the loss of an animal which died from anthrax, for the value of lands rendered worthless by anthrax, and interest thereon, for permanent impairment of the value of other lands, for the value of additional fencing to keep cattle from the infected water, for loss of pasture, and for pollution of the air in and about a dwelling-house. The acts of the defendants having had the natural effect of giving rise to an apprehension which had destroyed the value of the plaintiffs' property, the defendants were held liable to make the loss good. *Weber* v. *Town of Berlin*, 24 Occ. N. 371, 8 O. L. R. 302, 3 O. W. R. 812.

Interim Injunction—*Application before Writ of Summons Issued — Machinery — Noise and Vibration—Statutory Duty.*]—The respondents installed an electric pump, in a building belonging to them in a strictly residential neighbourhood, for the purpose of supplementing their plant for pumping water to the high level reservoir of the city. The operation of this electric pump produced noise and vibration, which affected the health and comfort of the petitioner's family and rendered his residence unfit for private occupation. It appeared that prior to the installation of the electric pump, the work of pumping water to the high level reservoir was done wholly by steam pumps without noise or vibration, whereas the operation of the electric pump caused both noise and vibration over a wide neighbourhood. It also appeared that, from motives of economy, the electric pump was to be used during the night time. An interlocutory injunction was prayed for:—Held, that the existence of a writ of summons is not essential to the procurement of an interlocutory order of injunction. Hart v. Rainville, Q. R. 15 S. C. 17, followed. 2. Whether the electric pump had been accepted by the respondents from the manufacturer or not, could not affect the petitioner's rights. 3. A nuisance, whether public or private, is, speaking generally, cause for an injunction. But with respect to a private nuisance, the petitioner for redress must suffer some special, direct, substantial, or irreparable damage, over and above the general damage sustained by the rest of the public. 4. A nuisance such as the present is ground for injunction, and for an interlocutory order as well, inasmuch as a denial of this remedy would compel the petitioner and other sufferers to resort to a multiplicity of suits, without obtaining the cessation of the grievance, or adequate compensation. 5. The statutory duty of the respondents to supply citizens with water and to provide water for fire purposes, does not affect the right to an injunction against a particular mode of pumping, not shewn to be indispensable, but which, on the contrary, may be replaced by other methods of doing the same work without damage to neighbours. *Adami* v. *City of Montreal*, Q. R. 25 S. C. 1.

Interim Injunction—*Tenants of Rooms in same Building—Noise—Reasonable use of Premises.*]—The defendant hired rooms in a building in a business part of the city for the purpose of giving music lessons, put up

his sign, and gave lessons on the mandolin to over 200 pupils between the hours of 9 a.m. and 10 p.m. On a motion for an injunction by an occupier of rooms on the opposite side of the hall in the same building, who had taken his rooms subsequently, to restrain the defendant from giving lessons, on the ground that the noise was a nuisance: —Held, on the evidence, that the noise to which objection was taken was reasonably connected with and incidental to the teaching; that the defendant's use of the premises was not an unreasonable one; and that to offend against the law, the teaching of music in such premises must be done in a manner which beyond fair controversy ought to be regarded as unreasonable; that an injunction would break up the defendant's business, and it would be better that the plaintiff should be compensated in damages if he was entitled to recover; and the injunction was refused. *Pope* v. *Peate*, 24 Occ. N. 131, 7 O. L. R. 207, 3 O. W. R. 243.

Livery Stable — Neighbouring dwelling houses—Business part of the city—Transition stage—Parties — Action by owner of houses—Addition of tenants as plaintiffs — Injunction or damages. *McKenzie* v. *Kayler* (Man.), 1 W. L. R. 290.

Machinery—*Continuing Nuisance — Permanent Injury—Damages — Prescription.*]— Where injuries caused by the operation of machinery have resulted from the unskilful or negligent exercise of powers conferred by public authorities and the nuisance thereby created gives rise to a continuous series of torts, the action accruing in consequence falls within the provisions of art. 2261, C.C., and is prescribed by the lapse of two years from the date of the occurrence of each successive tort. Wordsworth v. Harley, 1 B. & Ad. 391, Lord Oakley v. Kensington Canal Co., 5 B. & Ad. 138, and Whitehouse v. Fellowes, 10 C. B. N. S. 765, referred to. In the present case the permanent character of the damages so caused could not be assumed from the manner in which the works had been constructed, and, as the nuisance might, at any time, be abated by the improvement of the system of operation or the discontinuance of the negligent acts complained of, prospective damages ought not to be allowed, nor could the assessment in a lump sum of damages past, present, and future, in order to prevent successive litigation, be justified upon grounds of equity or public interest. Fritz v. Hobson, 15 Ch. D. 452, referred to. Gareau v. Montreal Street R. W. Co., 31 S. C. R. 463, distinguished. *Montreal Street R. W. Co.* v. *Boudreau*, 25 Occ. N. 124, 36 S. C. R. 329.

Smoke, Noise, and Vibration—*Neighbouring Proprietor—Company—Charter Authorizing Works—Right to Recover—Damages—Reduction on Appeal.*]—The appellants operated a system of waterworks for the supply of water to several municipalities, including the town of Westmount. In this town, in a section entirely residential, the appellants erected a pump station and installed a pumping plant, operated for some years wholly by steam, but later chiefly by electricity. The respondent, proprietor and occupier of a property adjacent to the pump station, for many years before the erection of the appellant's works, claimed damages by reason of the smoke, noise, and vibration caused by the operation of the works, more especially of noise and vibration since the installation of an electric motor plant:— Held, affirming the judgment of the Superior Court, Q. R. 23 S. C. 141, that the fact that the appellants were authorized by their charter to carry on the business of supplying water, and to use steam and electricity for such purpose, did not exempt them from the legal obligation of indemnifying neighbouring proprietors for the damage occasioned by the operation of their works. 2. The appellants being free to select the site for their works, the principle laid down by the Privy Council, in Canadian Pacific Railway Co. v. Roy, [1902] A. C. 220, Q. R. 12 K. B. 543, with respect to damage caused by the operation of a railway, did not apply, and the appellants were responsible for the damage caused to adjacent proprietors by their works. 3. The respondents having tendered a part renunciation of the judgment, as to permanent depreciation in the value of her property, the judgment of the first Court was reduced in appeal to the damages suffered by her prior to the institution of her action. *Montreal Water and Power Co.* v. *Davie*, Q. R. 13 K. B. 448.

Trespass—*Railway — Continuing Damage.*]—In 1888 the defendants ran their line through Britannia terrace, a street in Ottawa, in connection with which they built an embankment and raised the level of the street. In 1895 the plaintiffs became owners of land on that street, on which they had since carried on their foundry business. In 1900 they brought an action against the defendants, alleging that the embankment was built and level raised unlawfully and without authority and claiming damages for the flooding of their premises and obstruction to the egress in consequence of such work:—Held, that the trespass and nuisance (if any) complained of were committed in 1888, and the then owner of the property might have brought an action, in which the damages would have been assessed once for all. His right of action being barred by lapse of time since the plaintiffs' action was brought, the latter could not be maintained. *Chaudière Machine Co.* v. *Canada Atlantic R. W. Co.*, 23 Occ. N. 80, 33 S. C. R. 11.

Vibration, Smoke, and Soot — *Company—Authority to Carry on Enterprise — Immunity from Consequences—Damages.*]— The fact that a company are authorized by the legislature to carry on a particular enterprise, does not render them immune from the legal obligation to indemnify neighbouring property owners against the injury which the carrying on of the enterprise has occasioned them. When the carrying on of such an enterprise, even in a manufacturing district, causes inconvenience to neighbouring property owners, more than is ordinarily suffered by them, for example, by causing vibration by heavy machinery and by the discharge of smoke and soot from furnaces—he who carries on such an enterprise must make good the damage which he has occasioned. Montreal Street R. W. Co. v. Gareau, 31 S. C. R. 463, followed. When such a business is of a permanent nature, the damages may include the amount of the depreciation of neighbouring property suffered by its existence. When such damages is uninterrupted and long continued, it is not a case for the application of the limitation of two years

provided for by paragraph 2 of art. 2261, C.C. The Court may, in the interest of the parties and to prevent multiplicity of actions, fix definitely, as well as for the past as the future, the damages resulting from the carrying on of such business of a permanent character. *Boudreau* v. *Montreal Street R. W. Co.*, Q. R. 13 K. B. 531.

See CRIMINAL LAW—MUNICIPAL CORPORATIONS — RAILWAY AND RAILWAY COMPANIES.

NULLITY.

See HUSBAND AND WIFE—MARRIAGE—VENDOR AND PURCHASER — WRIT OF SUMMONS.

OATHS.

Allegiance — *Commissioner of Superior Court—Public Officer—Failure to take Oath —Effect on Proceedings.*]—A commissioner of the Superior Court is not a public officer within the meaning of arts. 599 et seq., R. S. Q. and is not obliged to take the oath of allegiance; and if he were, his failure to take the oath would not invalidate proceedings signed by him. *Lamalice* v. *Electric Printing Co.*, 4 Q. P. R. 266.

Allegiance—*Renewal of—Commissioners —Accession of Sovereign.*]—Quære, whether the commissioners of the Superior Court for the district of Quebec are obliged to take the oath of allegiance or to renew it on the accession of a new sovereign. *Lamalice* v. *La Compagnie d'Imprimerie Electrique*, 4 Q. P. R. 63.

Municipal Code — *Notary.*]—Oaths required by the Municipal Code may be taken before a notary. *Mondoux* v. *County of Yamaska*, Q. R. 22 S. C. 148.

See EVIDENCE.

OBSTRUCTING DISTRESS.

See CRIMINAL LAW.

OBSTRUCTING PEACE OFFICER.

See CRIMINAL LAW.

OBSTRUCTION OF HIGHWAY.

See CRIMINAL LAW.

OCCUPATION RENT.

See IMPROVEMENTS.

OFFICER OF CORPORATION.

See DISCOVERY—EVIDENCE.

OFFICERS OF MUNICIPALITY.

See MUNICIPAL CORPORATIONS.

OFFICIAL ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS.

OFFICIAL GUARDIAN.

See DEVOLUTION OF ESTATES ACT.

OFFICIAL REFEREE.

See REFEREES AND REFERENCES.

ONTARIO ELECTION ACT.

See LIQUOR ACT OF ONTARIO—PENALTIES AND PENAL ACTIONS.

OPPOSITION.

Affidavit—*Attorney of Opposant—Frivolous Opposition.*] — The deposition which should accompany an opposition, pursuant to art. 647, C. P., may be sworn to by the attorney of the opposant, if he has a personal knowledge of the facts alleged. 2. An opposition will not be dismissed as frivolous, upon motion under art. 651, C. P., upon the ground that the price agreed upon for the purchase of the land in question by the vendor of the opposant is not indicated in the opposition and does not appear to have been really paid. *Savard* v. *Bertrand*, 3 Q. P. R. 498.

Affidavit—*Denial of Unjust Delay.*]—An affidavit, made in support of an opposition, in which it is not stated "that the opposition is not made with the object of delaying unjustly the sale, but of obtaining justice," is insufficient and illegal. *Bourgouin* v. *Pelletier*, Q. R. 24 S. C. 473.

Amendment—*Affidavit.*]—An amendment to an opposition will not be allowed, because, the opposition being sworn to, the amendment would have the effect of introducing into the opposition a new allegation which would not be supported by affidavit. *Farand* v. *Emond*, 4 Q. P. R. 312.

Contested Cause — *Admission.*] — An opposition to a judgment cannot be maintained where the judgment was rendered in a contested cause, more especially where it appears from the opposition itself that a part at least of the plaintiff's claim was well founded. *Robertson* v. *Prossor*, 3 Q. P. R. 351.

Defence—*Time for Filing—Order of Judge—Rescission.*]—An opposition to a judgment is a defence to the action, and will be dismissed upon inscription en droit if there is nothing in the affidavit to shew that the opposant has been hindered from filing his defence within the proper time: Ross v. Dawson, Mont. L. R. 2 S. C. 361. 2. The leave of a Judge to file an opposition to a judgment is only an order of procedure, and is subject to rescission: Hamilton v. Bourassa, Q. R. 5 S. C. 467. *Martineau* v. *Lacroix*, 3 Q. P. R. 432.

Dismissal—*Frivolity—Conditional Gift.*]—An opposition stating that the effects seized were given to the opposant absolutely, but on condition that they should be returned to the donor or his heirs, should the donee predecease without descendants, is frivolous and will be dismissed on motion. *Fenoglio* v. *Ouellette*, 7 Q. P. R. 158.

Examination of Opposant — *Motion for.*]—A motion merely for the examination of the opposant, and not seeking the dismissal of the opposition after such examination, will not be granted. *Hogue* v. *McConnell*, 3 Q. P. R. 387. Cf. *Bouchard* v. *Ouellette*, 2 Q. P. R. 253.

Examination of Opposant — *Wife of Debtor—Old Code of Procedure.*]—The examination of an opposant, being the wife of the debtor separate, as to property, may be ordered if the opposition makes no distinction between the goods which her husband possessed at the time of the marriage and those which have been acquired since. 2. The examination of the opposant may be allowed upon opposition commenced under the old Code of Procedure. *Préfontaine* v. *Dorval*, 5 Q. P. R. 374.

Husband and Wife — *Amendment—Reswearing.*]—An opposition to judgment made by the husband (commun en biens) of the defendant is regular. 2. The opposant may add an allegation to his opposition, by amendment, without leave of the Judge, even after it has been sworn to and received by the Judge, provided that the amendment be also sworn to. *Dion* v. *Dionne*, 3 Q. P. R. 497.

Interpellation — *Service — Domicil.*] — The Court will not dismiss upon motion an opposition to a sale of immovables based upon the fact that the interpellation required by art. 705, C. P., has been made upon a grown-up person in the family of the debtor, without naming such person, if it appears that the interpellation was made at the domicil of the debtor. *Jetté* v. *Désaulniers*, 5 Q. P. R. 437.

Judgment for Partition—*Sale by Licitation—Time—Purchaser at Sheriff's Sale—Sheriff—Execution—Irregularity.*]—1. A proceeding by which a party opposes judgments declaring the parties to an action for partition, proprietors of a certain immovable property, and ordering the same to be sold by licitation, alleging that he is the owner of the undivided half said to belong to the defendant, and that the plaintiff's half is now under seizure at the instance of one of his judgment creditors, is a tierce-opposition, and is not subject to the delay fixed by art. 1050, C. P. 2. A purchaser of part of an immovable, at sheriff's sale, becomes proprietor thereof, by the fact of the adjudication, and may oppose judgments rendered in an action for partition of that immovable, to which he is not a party, although at the time of the institution of the action, he had not paid the purchase price, and was not registered as owner. 3. Although the writ of execution had been returned into Court by the sheriff, and was not re-issued to him, a deed given by him to the purchaser, upon payment of the price, will not be set aside as irregular, especially if the party invoking such irregularity shews no interest in doing so. 4. A tierce-opposition need not attack the legality of the proceedings which led to the judgment complained of. *Stanbridge* v. *Stanbridge*, 5 Q. P. R. 140.

Motion to Reject—*Examination of Opposant—Cross-examination.*] — Counsel for the opposant may cross-question the latter on an examination had after the launching of a motion under art. 651, C. P., to strike out the opposition. *Renaud* v. *Vaillancourt*, 7 Q. P. R. 30.

Notice of Contestation—*Filing of Copy Only.*]—A notice of contestation on opposition will not be set aside because at the time of service only a copy of the opposition was filed, the original having since been filed. *Leclaire* v. *Payette*, 7 Q. P. R. 44.

Notice of Contesting—*Neglect to File—Irregularity—Motion.*]—A party cannot by motion ask to have a proceeding in an action set aside, the proceeding in this case being a notice of contesting an opposition, served but not filed; the only proper motion would be one for dismissal. *Fortin* v. *Drouin*, 5 Q. P. R. 282.

Notice of Sale—*Guardian.*]—An opposition à fin d'annuler based upon the want of notice of sale to a guardian will not be dismissed upon motion as frivolous. *Idler* v. *Lanthier*, 5 Q. P. R. 294.

Notice to Contestants—*Time—Return—Service.*]—The opposant on the 11th August served on the plaintiff and others a notice that his opposition had been returned into Court and that if they wished to contest it they must do so within 12 days of the service of this notice. At the time of the service the opposition had not been returned, and was not until the 29th August. On motion of the plaintiff the notice was set aside. *Chaleyer* v. *Warnecke*, 6 Q. P. R. 421.

Opposition a Fin D'annuler — *Frivolous Ground—Delay.*]—An opposition à fin d'annuler, alleging that the defendant-opposant does not bear the name under which he is sued, will be dismissed upon motion as being made with the object of unjustly delaying the sale of the goods seized. *Masson* v. *Tellier*, 5 Q. P. R. 411.

Opposition a Fin de Conserver — *Affidavit—Proof—Time.*] — When an opposition à fin de conserver is filed without an affidavit and without proof, the opposant will be ordered to make proof of such opposition within a time to be fixed by the Court. *Poirier* v. *Stadacona W. L. and P. Co.*, 5 Q. P. R. 409.

Oral Agreement—*Previous Writing—No Admission of.*]—There is no ground for dismissing upon motion an opposition based upon

an oral agreement, when it is alleged in support of the motion that a writing previous to the agreement exists, and that writing is not admitted by the opposite party. *Trust and Loan Co.* v. *Bourgouin*, 6 Q. P. R. 31.

Return—*Notice—Contestation—Time.*] — The notice given by an opposant to the plaintiff that the opposition is returned and that it should be contested within 12 days from the service of the notice, will be set aside upon motion if, at the time of such notice the opposition has not in fact been returned. *Labelle* v. *Hyde*, 5 Q. P. R. 406.

Sale of Land — *Description — Error — Particulars.*]—An opposition to a sale of immovables, which alleges simply that they are erroneously described, without saying in what respect the description is erroneous, is frivolous, and will be dismissed on motion. *Phillips* v. *St. Jean*, 3 Q. P. R. 440.

Sale of Land—*Opposition to Secure Servitude—Way—Plan—Registry Laws.*] — The F. estate sold to T. two blocks of land, for $35,945, part of which T. paid in cash, and the vendor retained a bailleur de fonds claim for the balance,—the hypothec being restricted to fifty cents per foot of the land so sold. T. caused to be made and registered a plan subdividing the two blocks of land into building lots, and also indicating the proposed extension of a street, and of two lanes, through the land. These building lots he subsequently sold to various persons, granting them a servitude of right of passage over the projected street extension and over the lanes. H. purchased the bailleur de fonds claim from the F. estate, and was subrogated in all the rights of that estate. T., having become insolvent, made an abandonment of his property for the benefit of his creditors, and C. was appointed curator of the estate. The city of Montreal refused to carry out the proposed extension of the street, and the result was that the lots sold by T., and on which buildings had been erected, fronted on portions of the land covered by the hypothec of H. H. petitioned for an order upon the curator, for the sale by the sheriff in ordinary course of the land subject to his hypothec. The petition was granted, and the sheriff seized and advertised for sale four lots, being parts of the projected extension of the street, and also parts of lanes. Five oppositions to the sale were filed by persons whose rights of passage would be interfered with by the proposed sale:—Held, that the opposition, being an opposition to secure a servitude, was, under art. 725 C. C. P., unnecessary and inadmissible. *Masson* v. *Hatton* (No. 1), Q. R. 19 S. C. 218.

Sale of Land—*Ordre de Sursis—Former Judgment—Effect of—Sheriff.*] — The Court of Review confirmed a judgment of the Superior Court which dismissed several oppositions by different persons, to secure an alleged servitude of right of passage, but, as the oppositions were dismissed by the majority of the Court, on the ground that an opposition âfin de charge to secure a servitude is prohibited by the Code of Procedure, art. 725, the recourse of the opposants by opposition to annul, or such other procedure as might be advised, was reserved. The opposants now asked for an ordre de sursis:—Held, that the opposants having urged no reasons subsequent to the proceedings by which the sale was stopped in the first instance, the Court was precluded by art. 654, C. C. P., from granting the order asked for; and it was not within the jurisdiction of the Court to express an opinion for the guidance of the sheriff as to the effect of the judgment of the Court of Review. *Masson* v. *Hatton* (No. 2), Q. R. 19 S. C. 254.

Sale of Land — *Reasons for — Former Judgment—Reservation in.*]—In a judgment of the Court of Review, confirming the dispositif of the judgment of the Court below dismissing on opposition, the following clause was inserted:—"Sauf recours par telle autre opposition ou procédure qu'ils aviseront, mais qu'ils ont adopté n'est pas celle qui leur les délais, vu que l'opposition âfin de charge qu'ils ont adopté n'est pas celle qui leur compétait, et qu'ils paraissent avoir des droits à sauvegarder." The opposants then made an opposition âfin de distraire, which the petitioner-intervenant moved be rejected from the record:—Held, that the opposition, being founded upon reasons which were not subsequent to the proceeding by which the sale was stopped in the first instance, and there being no Judge's order to stop the sale, was without effect under art. 654, C. C. P., and should be rejected from the record, notwithstanding the reservation contained in the judgment of the Court of Review. *Masson* v. *Hatton* (No. 3), Q. R. 19 S. C. 256.

Sale of Land—*Unregistered Lease for a Year.*]—A lease for a year, not registered, affords no ground for an opposition âfin de charge by the lessee with respect to a sale of the demised premises. *Lantaigne* v. *Kelling*, 5 Q. P. R. 101.

Sale of Land by Hypothecary Creditor — *Opposition à Fin de Charge — Security for Realization.*] — An hypothecary creditor who puts up for sale immovable property, may demand by motion that the tenant, who makes an opposition à fin de charge based upon his lease, shall furnish security that the immovable will be sold for a sum sufficient to assure the complete payment of the debt. *Trust and Loan Co.* v. *Charlebois*, 5 Q. P. R. 365.

Solicitor—*Election of Domicil—Default—Motion—Costs—Amendment—Time.*] — By virtue of Rule 63 of the Rules of Practice of the Superior Court, an opposition signed by an attorney who has not elected a domicil pursuant to art. 86, C. P., may be set aside upon motion, but if the applicant has suffered no prejudice, the Court will grant the motion as regards costs only, and will order that an election of domicil be made, and the time fixed by art. 650 for contesting on opposition, if the notice therein mentioned has been given, will be extended until 12 days after the service of notice of such election. *Myers* v. *Mercier*, Q. R. 22 S. C. 309.

OPTION.

See EXECUTION—LANDLORD AND TENANT — MECHANICS' LIENS—PATENT FOR INVENTION.

ORDER IN COUNCIL.

See COMPANY—CROWN — MASTER AND SERVANT—MINES AND MINERALS — PARLIAMENTARY ELECTIONS.

ORDNANCE LANDS.

See MUNICIPAL CORPORATIONS.

ORIGINATING NOTICE.

See WILL.

OUSTER.

See TENANTS IN COMMON.

OVERHOLDING TENANTS.

See LANDLORD AND TENANT.

OVERSEERS OF THE POOR.

See PAUPER.

OWNER.

See MECHANICS' LIENS.

PARENT AND CHILD.

Agreement for Maintenance of Parent—Payment—Recovery back—Following into land — Lien — Costs. *Ferguson* v. *Cornelius*, 2 O. W. R. 259.

Conveyance of Land by Father to Son —Undue influence — Absence of independent advice—Improvidence—Annuity — Covenant for maintenance—Consideration—Delivery of conveyance—Charge on land—Power of distress—Re-entry for breach of covenant. *Delisle* v. *Delisle*, 5 O. W. R. 673, 6 O. W. R. 796.

Duty of Son to Support Father—*Alimentary Allowance—Offer to Receive at Home —Asylum.*]—When a father is in need of support, and his son is in a condition to furnish it to him, the latter cannot refuse to do so on the ground that his father lives with persons whom the son does not consider respectable. 2. A son who is liable to furnish support for his father has no right to offer, in place of such support, to receive him in his house and at his table, or to place him in an asylum, when he has not been declared a lunatic. *Ouimet* v. *Ouimet*, Q. R. 21 S. C. 479.

Goods Sold to Child — *Liability of Parent.*]—A father is not liable for goods sold to his daughter who is of age, without authorization by himself, unless it be proved, (a) that the goods were necessary for her proper support, (b) that she was both unable to earn her own support by her own work, and was not possessed of any property or revenue out of which she could provide for it. *Simard* v. *Baller*, Q. R. 18 S. C. 287.

Liability of Parent for Child's Tort—Infant — Knowledge — Division Courts Act. *McCann* v. *Slater*, 1 O. W. R. 131.

See BASTARD—CRIMINAL LAW — EXTRADITION—GIFT—HUSBAND AND WIFE—LIMITATION OF ACTIONS—LUNATIC.

PARISH.

See CHURCH.

PARISH COMMISSIONERS.

See MUNICIPAL CORPORATIONS.

PARKS.

See MUNICIPAL CORPORATIONS.

PARLIAMENT.

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PARLIAMENTARY ELECTIONS.

I. AGENCY, 1188.
II. BALLOT PAPERS, 1191.
III. CORRUPT PRACTICES, 1192.
IV. PETITION TO VOID ELECTION, 1201.
V. RECOUNT, 1218.
VI. TRIAL, 1222.
VII. VOTERS, 1222.
VIII. WRITS AND RETURNS, 1227.
IX. OTHER CASES, 1228.

I. AGENCY.

Delegates to Convention]—The respondent was nominated as a candidate for election as a member of the Legislative Assembly for Ontario by a party convention, and, in acknowledging and accepting the nomination, he said: "There are three things essential to success; first, a good cause; second, proper organization; third, hard work. The first we have; the second and third will largely depend on you:"—Held, that the respondent by these words constituted every delegate who was

present his agent, and became responsible for all that was afterwards done by them in organization and work for the purpose of the election. *In re East Middlesex Provincial Election, Rose* v. *Rutledge*, 23 Occ. N. 183, 5 O. L. R. 644, 2 O. W. R. 233.

Evidence of — *Canvassers — Speakers — Relatives—Scrutineers.*]—The following were held to be agents:—One who accompanied the respondent on a canvassing trip during which he spent a day canvassing for the respondent and spoke on his behalf at an election meeting at which the respondent was also present and spoke. One who accompanied the respondent on a canvassing trip, acting as interpreter (the respondent being under the impression that he was one of his supporters), and actually worked and canvassed for him with his authority. The son of the respondent, who took an active interest in the election on behalf of the respondent with his knowledge, acted as scrutineer, and was furnished with a sum of money by the respondent when leaving for the polling place at which he was to act. *Leblanc* v. *Maloney*, 5 Terr. L. R. 402.

Proof of.]—The respondent was the candidate of the Protestant Protective Association and of the Patrons of Industry. D. was president of the local Conservative Association for a town in the riding. After R., who was a candidate in the Liberal interest—though an opponent of B., the nominee of the Liberal party—had withdrawn, D. canvassed two or three votes in the interest of the respondent, to whom he transferred his support, probably in order to defeat B. There was one interview between D. and the respondent during the campaign, but it was not shewn clearly that the latter, or any accredited agent of his, knew that D. was working for him. The respondent was not called as a witness on this point, but there was no doubt that he relied on having the votes of the Conservatives. There was no Conservative committee, and D. did not attend the respondent's committee meetings. The evidence of one witness, if accepted in its entirety, would have brought agency home very closely, but it was contradicted by D. It also appeared that D. knew where to send a person to obtain a scrutineer's authority:—Held, that there was much to raise a case of suspicion, but in a question of imputed agency the facts ought to lead to a not doubtful inference; and in this case they stopped short of that, and therefore D. was not an agent for whose acts the candidate was responsible. *In re South Perth Provincial Election—Malcolm* v. *McNeill*, 2 Elec. Cas. 39.

Proof of.]—As to the agency of L., who had bribed two voters, it appeared that the respondent was brought into the field as the candidate of his party, having been nominated at a convention of the party association for the electoral district; L. was not a delegate to, nor was he present at, the convention; and he was not upon the evidence connected with the association or its officers; he was not brought into touch with the candidate, or any proved agents of his, either as regards knowledge of the fact that he was working or purporting to work on behalf of the candidate, or as regards any actual authority conferred upon him to do so. But he was present at three meetings of electors when the voters' list was gone over; he acted as chairman of a public meeting called in the respondent's interest; he canvassed some voters; and from his antecedents, the respondent hoped or believed or expected that he would be an active supporter:—Held, by the Court of Appeal, Boyd, C., dissenting, affirming the decision of the trial Judges, that L. was not an agent of the respondent. Haldimand Case, 1 Elec. Cas. 572, distinguished. *In re East Elgin Provincial Election—Easton* v. *Browcer*, 21 Occ. N. 10, 2 Elec. Cas. 100.

Proof of.]—As to the agency of T., who had been found guilty of a corrupt practice, it appeared that he was one of the local vice-presidents of the party association above referred to; he had been present at two meetings of local party men calling themselves a "Conservative Club," who were interesting themselves in the election, and had contributed towards the cost of hiring the club room; at these meetings he had gone over the voters' list with others, which was the only work done; at a meeting held by the respondent in the place where T. lived, he had presided, having been elected chairman by the audience, and had made a speech introducing and commending the respondent; before the meeting he had met the respondent in the street, had shaken hands with him, and asked him how things were going. The respondent did not know that T. was local vice-president, and had never heard of the "Conservative Club." T. was not a delegate to the nominating convention nor present thereat. The association, as such, was not charged with any definite duty in connection with the election except the selection of a candidate:—Held, reversing the decision of the trial Judges, Burton, C.J.O., and Maclennan, J.A., dissenting, that T. was an agent of the respondent. *In re East Elgin Provincial Election—Easton* v. *Browcer*, 21 Occ. N. 10, 2 Elec. Cas. 100.

What Constitutes—*Authority — Recognition—Delegates to Convention—Canvassing —Accompanying Candidate in Canvass.*] — See *In re Lisgar Dominion Election*, 22 Occ. N. 433, 14 Man. L. R. 310.

What Constitutes Agency.]—As to the nature of agency in the abstract, in election law there does not now seem to be any room for doubt. In election cases, as in other cases, there must be authority in some mode or other from the supposed principal. It may be by express appointment or direction, or employment, or request, or it may be by recognition and adoption of the services of one assuming to act without prior authority or request. It may be directly shewn or it may be inferred from circumstances. It may proceed directly from the supposed principal, or it may be created indirectly through one or more authorized agents. The fact that a person is a delegate to or member of the convention or body which selects a candidate does not of itself make such a person an agent of the chosen candidate. Canvassing or other work in the promotion of an election does not per se establish agency, although, according to degree and circumstances, it may afford cogent evidence of agency. The respondent was nominated at a meeting of delegates from different portions of the constituency. The respondent did not appear to have definitely requested the assistance of these delegates in the contest, but at a general public meeting, after the close of the

convention, he expressed hope "that all his friends would go to work with a good will;" the respondent further stated that he wished it understood that he expected the delegates to assist at the election:—Held, that these and other general remarks did not seem sufficient to constitute all supporters of the Government or all Liberals, or even all such in the constituency, agents of the candidate. Accompanying a candidate in his canvass is not sufficient in itself to constitute agency. *In re Lisgar Dominion Election*, 22 Occ. N. 433.

II. Ballot Papers.

Divisions of—*Error in Printing—Uncertainty.*]—Where a surname of a candidate had been printed so high up in the ballot paper as to appear in the division containing the name of another candidate and to lead to uncertainty as to which of the two candidates' divisions it was in:—Held, that the votes marked opposite to such surname were ambiguous, and could not be counted for either candidate; and a new election was ordered. *In re South Perth Provincial Election—Schoultz* v. *Moscrip*, 2 Elec. Cas. 52.

Initialling by Deputy Returning Officer—*Numbers—Marking by Voters.*]—A ballot paper properly marked by a voter, but not initialled by the deputy returning officer, having instead the initials C. S., which appeared to be and were assumed to be, those of the poll clerk, held good. 2. A ballot from which the official number was torn off, no explanation being given as to how it happened, held bad. 3. Ballots marked with a single horizontal or slanting line, instead of a cross, or with an imperfect cross, held good, following Jenkins v. Brecken, 7 S. C. R. 247. 4. Ballots marked for a candidate, but having: (1) the word "vote" written after his name: (2) having the word "Jos," being an abbreviation of the candidate's Christian name, written before his name; (3) having the candidate's surname written on the back of the ballot—held, bad. *In re West Huron Provincial Election—Garrow* v. *Beck*, 18 Occ. N. 247, 2 Elec. Cas. 58.

Marking of—*Division of — Portion Removed.*]—If a ballot paper is so marked that no one looking at it can have any doubt for which candidate the vote was intended, and if there has been a compliance with the provisions of the Act, according to any fair and reasonable construction of it, the vote should be allowed. 2. The dividing lines on the ballot between the names of the candidates, and not the lines between the numbers and the names, indicate the divisions within which the voter's cross should be placed, and the space containing the number is part of the division of the ballot containing the candidate's name, so that a vote marked by a cross to the left of the line between the number and the name is good. 3. A ballot from which a portion of the blank part on the right hand side has been removed, leaving all the printed matter except a portion of the lines separating the names, but properly marked by the voter, is good. 4. Ballots marked for both candidates, and a ballot marked on the back, although over a candidate's name, are bad. 5. Ballots with other marks on them besides a cross, held good or bad under the circumstances of each case set out in the report. 6. A ballot having the name of a candidate marked on its face in pencil, in addition to being properly marked for that candidate, held good. 7. A ballot with two initials on the back as well as those of the returning officer, held good. 8. A ballot with the name of a voter on the back, held bad. 9. Ballots with certain peculiar crosses marked thereon, held, good. *In re West Elgin Provincial Election*, 18 Occ. N. 249, 2 Elec. Cas. 38.

Numbering by Deputy Returning Officer—*Numbers Leading to Identification of Voters—Rejection of Ballots — Voiding Election Costs.*]—The deputy returning officer placed numbers on the ballot papers by which the voters could be identified:—Held, the prohibition contained in the Dominion Election Act, 63 & 64 V. c. 12, s. 80, s-s. 2 (D.) applied, and such ballots must be rejected. Woodward v. Sarsons, L. R. 10 C. P. 733, applied, and a new trial was ordered, there being a sufficient number of ballots rejected to have altered the result of the election. *In re Wentworth Dominion Election—Scaley* v. *Smith*, 5 O. W. R. 282, 9 O. L. R. 201.

Numbering by Deputy Returning Officers—*Marking by Voters—Divisions of Ballot Paper—Error in Printing — Uncertainty.*]—The fact that a number has been placed on the back of each ballot paper in a voting sub-division, in pencil, by the deputy returning officer, will not invalidate them. 2. The fact that the cross is marked in the division on the left hand side of the ballot paper containing the candidate's number, and not in the division containing his name, will not invalidate it. In re West Elgin Provincial Election, 2 Elec. Cas. 38, followed. 3. Where the surname of a candidate was printed too high up and in the division of the ballot paper occupied by the name of another candidate:—Held, that the ballots marked with a cross above the dividing line, but opposite the surname so placed, could not be counted for such candidate, but were either marked for the other candidate, or were void for uncertainty. *In re South Perth Provincial Election*, 18 Occ. N. 255, 2 Elec. Cas. 47.

Secrecy — *Act of Deputy Returning Officer—Numbering Ballots.*] — Under the Dominion Election Act a ballot cast at an election is avoided if there are any marks thereon by which the voter may be identified, whether made by him or not. Hence, where a deputy returning officer at a polling place placed on each ballot the number corresponding to that opposite the elector's name on the voters' list, the ballots were properly rejected. Judgment of Meredith, C. J., and Teetzel, J., 9 O. L. R. 201, 5 O. W. R. 282, affirmed. Sedgewick and Idington, J.J., dissenting. *In re Wentworth Dominion Election, Scaley* v. *Smith*, 25 Occ. N. 133, 30 S. C. R. 497.

III. Corrupt Practices.

Agents — *Prevention or Connivance of Candidate—Onus—Saving Clause—Disqualification—Evidence — Accounts—Omission — Breach of Act — Payment of Agent's Expenses—Costs.*]—Corrupt practices had been committed by five or six different agents

of the respondent; and it was found, as regards at least two of such agents, that the respondent had given no orders or cautions against the commission of corrupt practices, and that the circumstances were such as to throw upon him the suspicion of having sanctioned or connived at the corrupt practices committed by a third agent, although he denied on oath having been guilty of any such conduct:—Held, that the offences proved could not be deemed to have been of a trivial, unimportant, and limited character, and that the onus was on the respondent to shew that the offences were committed contrary to his orders and without his sanction, and, as he had failed to satisfy the Court in that regard, the election must be set aside under s. 123 of the Dominion Election Act, 1900. 2. That in seeking to disqualify the respondent the onus was on the petitioner, and the evidence was insufficient to warrant a finding that he had been personally guilty of corrupt practices. Centre Wellington Case, H. E. C. 579, Russell Case, ib. 199, and Welland Case, ib. 187, followed. 3. That the omission from the election accounts of certain payments made by the respondent personally and not through his election agent, although contrary to the Election Act, was not a corrupt practice avoiding the election. Lichfield Division Case, 5 O'M. & H. 34, and Lancaster Division Case, ib. 39, distinguished. 4. That the payment by a candidate of an agent's legitimate expenses while engaged in promoting his election, is not a corrupt practice; and quære, whether payment for the services of such an agent would be so where not colourably made to secure the agent's vote. 5. Costs awarded according to the findings. In view of s. 15, s.-s. 4, of 54 & 55 V. c. 20, the Court allowed to the respective parties the witness fees and other actual disbursements incurred in respect of the issues on which the findings had been in their favour respectively. *In re Lisgar Dominion Election*, 21 Occ. N. 487, 13 Man. L. R. 478.

Avoiding Election for—*Saving Clause—Application of.*]—Where only two acts of bribery were proved, but the perpetrators were both active, and one was an important agent of the candidate, and neither was called at the trial, and one of the bribes, though only $2, was paid out of a general election fund, to which the respondent had contributed $250, and the respondent's majority was 65 out of a total vote of about 3,000:—Held, that the election was rightly avoided, notwithstanding the saving clause, s. 172 of R. S. O. c. 9. *In re North Waterloo Provincial Election—Shoemaker* v. *Lackner*, 2 Elec. Cas. 76.

Avoiding Election for—*Saving Clause—Application of.*]—The total vote polled was over 4,500, and the majority for the respondent was 29. The trial Judges had reported one person guilty of an act of undue influence, three being concerned in acts of bribery, and T., an agent, and two others, of providing money for betting:—Held, that s. 172 of the Election Act could not be applied to save the election. *In re East Elgin Provincial Election—Easton* v. *Brower*, 21 Occ. N. 10, 2 Elec. Cas. 100.

Bribery — *Evidence.*]—In Bureau's case the evidence was that he purchased a dress and gave it to the daughter of Labossière, a hotel keeper. Bureau was working in the respondent's interest and stayed at Labossière's hotel; the daughter gave up her room to Bureau and he said he wanted to make her a nice present:—Held, that it was impossible to infer with any certainty that the present was made for the purpose of affecting the father's vote. *In re Lisgar Dominion Election*, 22 Occ. N. 433, 14 Man. L. R. 310.

Bribery—*Offer not Accepted.*]—Where a charge is made of an offer not accepted of money to influence a voter the evidence is required to be particularly clear and conclusive. *In re Lisgar Dominion Election*, 22 Occ. N. 433, 14 Man. L. R. 310.

Bribery—*Payment of Voters for Trifling Services.*]—The bribery by L. of two persons to abstain from voting against the respondent was established by the evidence, although it was not shewn that anything was said to them about voting; L. having paid them, for trifling services which he engaged them to perform upon election day, sums in excess of the value of such services, knowing them to be voters and to belong to the opposite political party. *In re East Elgin Provincial Election—Easton* v. *Brower*, 21 Occ. N. 10, 2 Elec. Cas. 100.

Conveying Voters to Poll—*Onus.*]—The taking unconditionally and gratuitously of a voter to the poll by a railway company or an individual, or the giving to a voter of a free pass or ticket by railway, boat, or other conveyance, if unaccompanied by any condition or stipulation affecting the voter's action in reference to his vote, is not a corrupt practice, and the onus is on the petitioner to prove that the railway tickets supplied had been paid for. *In re Lisgar Dominion Election*, 22 Occ. N. 433, 14 Man. L. R. 310.

Dismissal of Charges against Candidate and Agents—*Concurrent Findings of both Trial Judges—Disagreement of Trial Judges—Right of Appeal.*]—The Judges at the trial of an election petition, having reserved judgment in respect of five charges, subsequently gave judgment dismissing four of these charges, both Judges agreeing as to the result. In respect to the fifth charge—a charge of payment of money by the candidate to a voter to induce such voter to vote for him—the Judges disagreed, one Judge being in favour of the dismissal of the charge, the other being of the opinion that the charge was proved:—Held, that the existence of a right of appeal in respect of one class of charges does not draw with it the right of appeal in respect of other charges, as to which there would otherwise be no right of appeal:—Held, also, that the portions of the Ontario Controverted Elections Act relating to the right of appeal in cases of disagreement between the Judges, must be construed in connection with the other provisions of the same Act; and also with the provisions of the Ontario Election Act, which are in pari materia; that the words "or otherwise" in s.-s. (5) of s. 57 of the Controverted Elections Act extend the effect of that subsection to a difference or disagreement in every matter on which a candidate might be disqualified for a corrupt practice, and that s.-s. (6) extends it to candidates and others. That if an appeal lies in case of a disagreement between the trial Judges, a judgment in

appeal finding a candidate or other person guilty of a corrupt practice would necessarily subject him to disqualification or other disability or penalty, notwithstanding the absence of a concurrent judgment to that effect of the two trial Judges, and that this would be contrary to the statute:—Held, Maclaren, J.A., dissenting, that an appeal did not lie in respect of any of the charges. *In re Lennox Provincial Election—Perry* v. *Carscallen*, 23 Occ. N. 255, 6 O. L. R. 203, 1 O. W. R. 730, 810, 2 O. W. R. 190.

Disqualification of Candidate.]—The judgment of the trial Judges unseated and disqualified the member-elect. On appeal the members of the Supreme Court of Canada were equally divided in opinion, and the judgment stood affirmed. *In re St. James Dominion Election—Brunet* v. *Bergeron*, 34 Occ. N. 147, 33 S. C. R. 137.

Findings of Trial Judges — Concurrence—Disagreement—Dismissal of charges—Appeal. *Re Lennox Provincial Election—Perry* v. *Carscallen*, 2 O. W. R. 190. *Re South Oxford Provincial Election—Patience* v. *Sutherland*, 6 O. L. R. 203, 1 O. W. R. 795, 2 O. W. R. 196.

Jurisdiction over Foreigners — *Summary Trial of Offenders—Service of Summonses in Foreign Country—Application of Con. Rule 162 (e)—Procuring Personation of Voters—Evidence of Persons Accused — Certificate of Indemnity.*]—It is no defence to a charge, under R. S. O. 1897 c. 9, of having committed illegal and corrupt acts in connection with provincial elections, that the offenders were American citizens and that they were served properly outside the jurisdiction under Rule 162 (e); see Rule LXIV. passed 23rd Dec., 1903. Transportation by steamboat of voters does not come within s. 165 of the Ontario Election Act, R. S. O. 1897 c. 9, which makes it illegal to hire vehicles, &c., by candidates to convey electors to the polls. *In re Sault Ste. Marie Provincial Election—Galvin and Coyne Case*, 5 O. W. R. 782, 10 O. L. R. 356.

The Ontario Election Act R. S. O. 1897 c. 9, s. 189, indemnifies a defendant from any penalty resulting from his disclosures in answer to questions put to him, and he cannot be convicted on his own testimony, seeing but for this section he would have been excused from answering the questions. His testimony being the only evidence, the Evidence Act, 4 Ed. VII. c. 10, s. 21 (O.) did not apply. *In re Sault Ste. Marie Provincial Election—Lamont's Case*, 5 O. W. R. 782, 10 O. L. R. 85.

Penalties—Ontario Election Act — Bribery—Change in statute—Civil remedy — Voting without oath. *Carey* v. *Smith*, 5 O. L. R. 209, 2 O. W. R. 16.

Penalties—Ontario Election Act—Voting without right — Knowledge — "Wilfully"—Neglecting to take oath. *Smith* v. *Carey*, 5 O. L. R. 203, 2 O. W. R. 13.

Providing Money for Betting—*Loan.*]—Three persons each lent $10 to R. L., knowing that the moneys so lent were intended to be used by him, as he then told them, in betting on the result of the election. Any bet or bets which he made were to be his own bets, not theirs, and he was to return the money in a couple of days. He did not succeed in getting any one to bet with him, and he returned the money to each on the following day:—Held, that this was providing money to be used by another in betting upon the election, and was a corrupt practice within the meaning of s. 164 (2) of the Election Act. *In re East Elgin Provincial Election—Easton* v. *Brower*, 21 Occ. N. 10, 2 Elec. Cas. 100.

Summons for—*Limitation of Time for Prosecuting — Several Charges—Marshalling Evidence—Ontario Election Act.*]—The limitation of one year for bringing actions prescribed by s. 195, s-s. 3, of the Ontario Election Act, applies only to actions for penalties under that section, and not to proceedings by summons for corrupt practices under ss. 187-8, nor are the latter within the limitation of two years for actions prescribed by R. S. O. c. 72, s. 1. On such proceeding under ss. 187-8 the Judges may, if they see fit, hear the evidence on all the charges before giving judgment on any of them. *In re Halton Provincial Election—In re Cross*, 21 Occ. N. 21, 2 Elec. Cas. 158.

Treating — *Antecedent Habit — Candidate.*]—The respondent admitted that he had treated on the day of the convention, after the convention was over, several times, at at least two hotels, several persons, some of whom might have been electors. He denied, however, that the treating had any relation to the election:—Held, that under s-s. 2 of s. 162 (added by 62 V. (2) c. 5, s. 7 (O.)), treating generally or extensively or miscellaneously is only prima facie a corrupt practice. If it be shewn that the treating was not in fact done corruptly in order to be elected, or for being elected, or for the purpose of corruptly influencing votes, it is no offence any more than it was before the enactment of s-s. 2. There may still be innocent treating, though, if it be general or extensive or miscellaneous, the onus of shewing that it is innocent is upon the respondent. And an antecedent habit of treating must still help, among other things, to rebut the inference of corrupt intent:—Held, also, that, although the respondent did not become a "candidate," within the meaning of s. 2, s-s. 8, until the 27th March, yet if any corrupt acts in relation to the election were done by him before that date, they would affect the election, for the Act applies to everything done at any time before an election by a person who is afterwards elected. Youghal Election, 3 Ir. R. C. L. 53, 1 O'M. & H. 291, followed. *In re East Middlesex Provincial Election, Rose* v. *Rutledge*, 23 Occ. N. 183, 5 O. L. R. 644, 2 O. W. R. 233.

Treating — *Candidate — Corrupt Intent —Habit.*]—The undisputed evidence shewed that the respondent from the time of his nomination as the candidate of his party frequently treated the electors and others in the bar-rooms of hotels whilst engaged in his canvass. He was not a man whose ordinary habit it was to treat, nor one who in the course of his ordinary occupations frequented bar-rooms: — Held, Osler, J.A., dissenting, that the trial Judges properly drew the inference that the treating was done with corrupt intent, so as to avoid the election of the respondent. Remarks by Burton, J.A., on the amendment to the Election Act, in

respect to "the habit of treating," by 58 V. c. 4, s. 21. *In re West Wellington Provincial Election—McQueen* v. *Tucker*, 21 Occ. N. 10, 2 Elec. Cas. 16.

Treating—*Committee Meeting.*]—Upon a charge of treating a committee meeting held at an hotel, the evidence was that McC., who was found to be an agent of the respondent, brought into the room where the meeting was being held a box of cigars for the use of the members of the committee. He said he did it at the request of the landlord. It was not shewn by whom payment was made:—Held, that the charge was not proved, for it is the person at whose expense the treat is supplied, or who pays or engages to pay for it, who alone is guilty of the offence. *In re Middlesex Provincial Election—Rose* v. *Routledge*, 23 Occ. N. 183, 5 O. L. R. 644, 2 O. W. R. 233.

Treating — *Evidence.*]—In Jobin's case the treating was on polling day. He lived in a locality where there was no licensed tavern. He was accustomed, according to his own account, to keep considerable quantities of wine and spirits on hand and to supply them quite freely to others in the way of hospitality, or as a matter of business:—Held, that under the circumstances the Court would not infer the intent necessary to create an offence under either s. 110 or s. 111 of the Dominion Election Act. *In re Lisgar Dominion Election*, 22 Occ. N. 433, 14 Man. L. R. 310.

Treating — *Evidence.*]—In the cases of Ami and Foley the charges were of treating in bars. The evidence of Ami's treating was of a very general and vague character. He stayed for some time at Labossière's hotel and treated considerably, even including, at times, all in the bar-room. The circumstances of the different occasions, or who were present, were not shewn:—Held, impossible, upon such evidence, to find the corrupt intent proved. In Foley's case the charge in the particulars was of treating all of the voters—a large number present in the bar of Tremblay's hotel on a particular evening—and that Foley then announced "that although he was not the government candidate, he had their money to spend." The evidence shewed that Foley was at Labossière's, not Tremblay's hotel, and gave an invitation to all in the house to drink, and that what he said was that "if he wasn't a candidate, he had money to spend." Foley's name was one of those brought before the convention which nominated the respondent in the government interest:—Held, that the evidence of the part taken by Foley in the contest was very vague and seemed in no way to support the view that this treating was done in the respondent's interest or for the purpose of influencing electors. *In re Lisgar Dominion Election*, 22 Occ. N. 433, 14 Man. L. R. 310.

Treating — *Evidence.*]—In the case of Watson, the charge against him and others associated with him, was of furnishing food for a meal at the house of an elector, to him and other electors, on the occasion of a meeting the night before polling day. It might be inferred that the refreshments were supplied with intent to influence the electors, and that, in that sense, it was done corruptly. The suggestion, after the votes had been polled, of a further "treat" for the night of polling day was not without importance. That suggestion fell through:—Held, that the case could not be brought within s. 111 of the Dominion Election Act, for which it seems necessary that either the meat or drink, or the money or a ticket to procure them, should be actually supplied. *In re Lisgar Dominion Election*, 22 Occ. N. 433, 14 Man. L. R. 310.

Treating — *Evidence — Particulars.*]—In Fiset's case it was charged in general terms in the particulars that he travelled about in the constituency and canvassed a large number of voters in certain specified polling districts, and "corruptly treated them, to induce them to vote for the respondent." The evidence shewed that Fiset did go about canvassing and was driven by Jean Moreau. It was sought by the petitioners to shew that in so going about Fiset treated various electors, but objection was made to the allowance of such evidence on the ground that the particulars did not give the details required by the order, and the Court refused to hear evidence of treating in that way, not more definitely specified, or to allow the examination of Moreau for the purpose of obtaining information only. About a week before polling day Fiset spent an evening at Moreau's house; he had with him whisky and gin and gave a drink to one Cardinal, telling him it was "election whisky." The meeting was not arranged, but the neighbours just happened to come in. It was not shewn that Cardinal had a vote. Cardinal's evidence was given without objection, and he was cross-examined upon it:—Held, that the Court was not prevented from considering the charge on account of its not being specified in the particulars, but the way in which the evidence was brought out was to be taken into consideration. If such meetings were frequent or intentionally brought about, the inference of the corrupt intent would be almost irresistible. As it was, it could not be taken as absolutely clear. *In re Lisgar Dominion Election*, 22 Occ. N. 433, 14 Man. L. R. 310.

Treating — *Intent — Candidate.*] — It was shewn that the respondent and his chief agent had on several occasions in the course of the canvass treated in bars. The respondent was a physician, with a large country practice, and constantly on the road. He was also a horse fancier, and, although an abstainer from liquor, a great consumer of cigars. It was not disputed that while on the road he was in the constant habit of treating, and he continued to treat after his nomination by the convention on the 1st February until the writ for the election was issued, on the 22nd April:—Held, that no corrupt intent having been shewn in any of the instances of treating proved, the election was not thereby avoided. West Wellington Case, 1 E. C. 16, distinguished. *In re East Middlesex Provincial Election—Rose* v. *Rutledge*, 23 Occ. N. 183, 5 O. L. R. 644, 2 O. W. R. 233.

Treating — *Intent — Custom.*] — The treating of electors prior to and on polling day by an agent of the respondent, although done on a liberal scale, will not be assumed to have been done with the corrupt intent necessary to make it an offence, when the Court is satisfied that he was accustomed to keep at all times considerable quantities of liquors on hand and to supply them quite

freely to others in the way of hospitality or as a matter of business, and there is no other evidence to shew that the treating was done in order to influence a voter or voters. The same rule applies to treating when done in compliance with a custom prevalent in the country and without express evidence of any corrupt intent in so treating; also to the supplying of meals at a private house to electors who have come from a distance, in the absence of evidence that this was done for the purpose of influencing the election. *In re Lisgar Dominion Election*, 22 Occ. N. 433, 14 Man. L. R. 310.

Treating — *Intent — Custom.*]—Where a person who was held to be an agent gave two bottles of whisky to an elector the day before polling day, the inference of fact was drawn that they were given with the corrupt intent of influencing the voter, although there was no direct evidence to shew the object for which they were given. Where a quantity of whisky was obtained from one agent of the respondent and taken to the home of another in the vicinity of one of the polling places, where it was drunk freely on election day by the electors generally, the inference of fact was drawn that it was provided by both these agents for the purpose of influencing the electors, though there was no direct evidence to that effect, and it was held to be a corrupt practice notwithstanding that apparently it did not have that effect. The evidence also shewed that a quantity of whisky was taken to a place in the vicinity of another polling place by an agent, where it was consumed by the agents and others on polling day:—Held, that this shewed a scheme on the part of the respondent's agents to influence the voters generally, and procure the election of the respondent by providing whisky at each of the polling places. Quære, whether an agent accustomed to carry about with him a bottle of whisky to treat those whom he should happen to meet, should not, if following this custom while actually engaged in canvassing, be held to have treated with a corrupt intent. *Leblanc* v. *Maloney*, 5 Terr. L. R. 402.

Treating — *Meeting of Electors — Individuals.*] — The respondent requested M., who was found to be an agent, to go with him to a factory and introduce him to the workmen, some of whom were voters. M. did this, and the respondent addressed the workmen on behalf of his candidature. After the meeting was over and the workmen had dispersed, M. asked the foreman to have a drink at a neighbouring inn, which the foreman declined. M. also said that if the workmen who went home in that direction would go to the inn, he would "leave a drink for them there." This conversation was not in the presence of the respondent, nor heard by him. When the men were leaving their work for the day, the foreman told them what M. had said, and eight or ten of them called at the inn and got a drink of beer without paying for it:—Held, that a charge of treating a meeting assembled to promote the election, under s. 161 of the Ontario Election Act, failed upon this evidence, for the meeting had come to an end before anything was said about the treating, and the men were not told anything about it till nearly three hours afterwards. Nor did the evidence support a charge under s. 162 (1) of corrupt treating of individuals in order to be elected, M. being a customer of the factory and following a previous habit in his intercourse with the men. *In re East Middlesex Provincial Election—Rose* v. *Rutledge*, 23 Occ. N. 183, 5 O. L. R. 644, 2 O. W. R. 233.

Treating a Meeting—*Bribery.*]—Where, after a meeting of electors had broken up, an alleged agent of the respondent had treated at the bar of the hotel where it had been held, a mixed multitude comprised of some who had been at it, and others who had not:—Held, Maclennan, J.A., dissenting, that this was not treating "a meeting of electors assembled for the purpose of promoting the election," within s. 161 of the Ontario Election Act, R. S. O. c. 9:—Held, also, reversing the decision of the trial Judges, that such treating was not "bribery," within s. 159. Corrupt treating in its nature runs very close to bribery on the part of the treater, but the circumstances in which a treat can be said to be a valuable consideration within s. 159, so as to amount to bribery on the part of the person accepting it, must be unusual. *In re North Waterloo Provincial Election—Shoemaker* v. *Lackner*, 2 Elec. Cas. 76.

Treating a Meeting — *What Amounts to.*]—A number of voters met at a voter's house for the purpose of going over the voters' lists and then of having a card party. After the lists were disposed of, the card party took place, and meat and drink were supplied by the host, but the drink, a quarter cask of beer, was paid for by subscription, according to the custom of the locality, a German settlement:—Held, not a corrupt practice withing the meaning of the words "treating a meeting of electors assembled for the purpose of promoting the election," in s. 161 of the Ontario Election Act, R. S. O. 1897 c. 9. *In re South Perth Provincial Election—Ellah* v. *Montieth*, 2 Elec. Cas. 144.

Voting without Right — *Knowledge—Aliens—Non-residents.*]—Actual knowledge on the part of a voter that he has no right to vote (e.g., because an alien or non-resident) is necessary to constitute a corrupt practice under R. S. O. 1887 c. 9, s. 160. *In re South Perth Provincial Election—Malcolm* v. *McNeill*, 2 Elec. Cas. 30.

Voting without Right—*Knowledge — Mala Mens—Taking Oath.*]—It was charged that a person had voted at the election, knowing that he had no right to vote, by reason of his not being a resident of the electoral district. He knew that his name was on the voters' list, and that it had been maintained there by the County Judge, notwithstanding an appeal, and he believed that he had, and did not know that he had not, a right to vote:—Held, that a corrupt practice under s. 168 of the Election Act, R. S. O. 1897 c. 9, was not established. Under that section the existence of the mala mens on the part of the voter, "knowing that he has no right to vote," not merely his knowledge of facts upon the legal construction of which that right depends, must be proved. The offence does not depend upon his having taken the oath; it may be proved apart from that: nor does the fact that he has taken the oath, even if it be shewn in point of law to be untrue, necessarily prove that the offence has been committed. Haldimand Case, 1 Elec. Cas. 529, distinguished. *In re East Elgin Provincial Election—Easton* v. *Brower*, 21 Occ. N. 10, 2 Elec. Cas. 100.

IV. Petition to Void Election.

Affidavit — *Commissioner — Agent of Solicitor.*]—The respondent to a petition under the Ontario Controverted Elections Act moved to set aside or dismiss the petition and to set aside the service thereof, and of the affidavit of bona fides and of notice of presentation, because the commissioner before whom the affidavit was sworn was the solicitor by whom the petition and affidavit were prepared, and by whom, as agent for the petitioner's solicitors, the petition was presented:—Held, that the commissioner was not disqualified. *In re Lennox Provincial Election—Perry* v. *Carscallen*, 22 Occ. N. 407, 4 O. L. R. 647, 1 O. W. R. 730.

Appeal—*Settlement of Case.*]—No machinery has been provided by the Ontario Controverted Elections Act or by the Rules for the settlement of a case upon an appeal to the Court of Appeal from the judgment upon the trial of a petition under the Act. The trial Judges can give no direction as to the evidence to be submitted to the Court. Semble, that either party may treat the whole of the evidence taken at the trial as being before the Court of Appeal. *In re South Oxford Provincial Election—McKay* v. *Sutherland*, 23 Occ. N. 41, 5 O. L. R. 58, 2 O. W. R. 2.

Application to Fix Day for Trial—*Delay—Extending Time—Grounds — Discretion—Appeal—Form of Order.*]—The petitions were presented on the 4th February, 1903; the Legislative Assembly sat from the 10th March to the 27th June. On the 5th November applications were made by the petitioners to a Judge on the rota to fix dates for the trial of the petitions, and if necessary to extend the time for bringing them to trial. Owing to the engagements of the other Judges on the rota, and the difficulty of immediately communicating with them, the Judge was unable then to fix dates, and, the respondents not being prepared to agree to an extension of time, the applications stood over pending applications to be made to extend the time. On the 11th November the petitioners moved before the same Judge (one of the Judges of the Court of Appeal) for, and obtained, orders extending the time for the commencement of the trials, upon affidavits shewing that the petitioners believed that the Court could fix days for trial suitable to the Judges' other engagements; that bribery was extensively practised on behalf of the respondents; that the petitioners could prepare for trial in one month; that the requirements of justice rendered it necessary that the time for the commencement of the trials should be extended; that the applications were not made for delay:—Held, that the applications were in time to enable the trials to be commenced within 6 months from the date of the presentation of the petitions (excluding the time occupied by the session) within the meaning of ss. 47 and 48 of the Ontario Controverted Elections Act, and the failure to fix days could not be attributed to the petitioners; ss. 16 and 47 of the Act and Rules 26 and 27 leave the fixing of days in the hands of the rota Judges. It was not open to the respondents to complain of lack of diligence by the petitioners within the 6 months, no days for trial having been fixed. Much of what was necessary to be shewn on the applications to extend the time, transpired in the presence of the Judge, and the facts were within his own knowledge; there was no reason why he should not act thereon. The justice of the case was in favour of making the orders; the Judge rightly exercised his discretion upon sufficient grounds; and his orders should not be interfered with. The appropriate form of the orders would be to extend the time for fixing the days of trial rather than the time for the commencement. *In re North Norfolk Provincial Election, Snider* v. *Little—In re North Perth Provincial Election, Monteith* v. *Brown*, 24 Occ. N. 6, 6 O. L. R. 597, 2 O. W. R. 1079, 1104.

Change of Solicitors—*Right to Object to—Withdrawal of Petition—Order for — Evidence on—Notice of Motion—Publication —Collusion—Deposit—Security for Costs — Substitution of Petitioner —Time for.*]—The only person who can complain of an order changing the solicitor for the petitioner in an election petition is the solicitor removed. An ordinary voter has no status to attack the order, and an application by such an one to set aside an order can be considered only so far as the order is part of a scheme to get rid of the petition. 2. Assuming that an ordinary voter is a person who can move against an order giving the petitioner leave to withdraw the petition, there was no irregularity in the application to withdraw in this case, affidavits of the financial agents of the candidates not being necessary unless insisted on by the Judge who hears the application, and the notice of motion having been published in two newspapers in the electoral division. 3. It was not proved that there was collusion or that the petitioner did not in good faith authorize the application; and semble, if there had been collusion, the applicant would still have had the right to withdraw, but the Judge might have ordered that the deposit should remain as security upon a petitioner being substituted. 4. An application to substitute a petitioner is to be made at the time the motion to withdraw is made; and, if not then made, and an order for withdrawal granted, the petition is out of Court and cannot be revived. But semble, if there was power to make such an order at a later period, it should be applied for within a reasonable time and full explanation of any delay given. *In re South Leeds Dominion Election —Kelly* v. *Taylor*, 2 Elec. Cas. 1.

Charges Not Investigated at Trial—*Excessive Particulars—Witness Fees.*] — A controverted election petition contained 685 charges and at the trial application was made to 8 or 10 more charges; 225 witnesses were subpœnaed and paid $530. Two charges were proved thereupon, the respondent admitted responsibility of an agent and did not claim protection of the statute. The Court declared the seat vacant:—Held, the practice of heaping up excessive number of charges could not be encouraged. Costs were not allowed for charges which failed nor for the supplemental charges, but the Court allowed the petitioner $230, as a reasonable apportionment of the expenses for witness fees. *In re North Norfolk Provincial Election—Snider* v. *Little*, 4 O. W. R. 314, 25 Occ. N. 9, 8 O. L. R. 566.

Copy—*Service — Amendment.*]—In the printed copy of the petition served upon the respondent the concluding prayer had, by mis-

take of the clerk, a pen stroke drawn through it:—Held, that, though the copy was not strictly a "true copy" of the original, yet as the defect was a purely formal one, and could not possibly have misled the respondent, it was not fatal, and leave to amend was given. *In re Centre Bruce Provincial Election—Stewart* v. *Clarke*, 22 Occ. N. 286, 4 O. L. R. 263, 1 O. W. R. 502, 2 O. W. R. 1049.

Copy—*Neglect to Deposit—Local Registrar—Extension of Time—Terms—Costs.*]—Election petitions filed with local registrars under 62 V. (2) c. 6 (O.) are received by them as registrars of the Court of Appeal. And, although a petitioner who does not leave with the local registrar at the time of filing the petition a copy of the petition to be sent to the returning officer, is in default under Election Rule 1 (2), still the time for doing so is subject to Election Rule 58, enabling the Court or a Judge in a proper case to enlarge the time appointed. And where, through inadvertence, the solicitor for a petitioner had omitted to leave the copy, and applied without delay, the time was extended, and an order for the dismissal of the petition was discharged, upon the terms as to costs. *In re North Grey Provincial Election—Boyd* v. *Mackay*, 23 Occ. N. 303, 6 O. L. R. 273, 1 O. W. R. 474, 483, 2 O. W. R. 231, 604, 1131.

Costs — Charges which failed—Charges not investigated—Excessive particulars—Witness fees. *Re North Norfolk Provincial Election—Snider* v. *Little*, 4 O. W. R. 314, 8 O. L. R. 566.

Costs—*Conduct of Respondent.*]—The respondent, having allowed the organization of the contest to go into the hands of persons as to whom he could not or would not give any information, and having failed to shew that he had made any serious effort to prevent illegal practices, was refused any costs of his attendance or examination as a witness, the petition being in other respects dismissed with costs. *In re Lisgar Dominion Election*, 22 Occ. N. 433, 14 Man. L. R. 310.

Costs—*Counsel Fees—Disbursements.*] — The fee of an advocate or counsel upon the trial of a controverted election petition is not to exceed the amount provided by 54 & 55 V. c. 20, s. 15 (D.) 2. The fee allowed by this section does not include disbursements in the cause nor the costs of preliminary proceedings. *Bergeron* v. *Brunet*, 5 Q. P. R. 434.

Cross-petition—*Security for Costs.*] — Under s. 13 of the Controverted Elections Act, R. S. O. 1887 c. 10, security for costs is required only in the case of the original or principal petition, and not in that of a cross-petition. *In re Kingston Provincial Election—Vanalstine* v. *Harty*, 14 Occ. N. 420, 2 Elec. Cas. 10.

Deposit—*Issue of Writ—Clerk or Deputy Clerk — Bank Notes.*]—A petition under the Controverted Elections Ordinance (C. O. 1888 c. 5) was filed with the clerk of the Court at Calgary under s. 3, he being the clerk whose office was nearest to the residence of the returning officer, and afterwards forwarded to the deputy clerk at Edmonton. The deposit of $500 required by s. 5 was made with the deputy clerk, who thereupon issued the writ of summons under s. 7:—Held, that the deputy clerk was, by virtue of s. 3 of Ordinance 10 of 1891-2, the proper person to receive the deposit and issue the writ of summons. The deposit was made in notes of a chartered bank:—Held, that a payment or deposit of a sum of money required by statute need not, in the absence of express provision, be made in gold or legal tender; and that, therefore, the deposit was sufficient. *In re St. Albert Provincial Election, Prince* v. *Maloney*, 2 Terr. L. R. 173.

Deposit — Payment out—Petition abandoned before service—Grounds of abandonment—Affidavits denying collusion. *Re West Wellington Provincial Election—Patterson* v. *Tucker*, 1 O. W. R. 629.

Deposit of Copy — *Preliminary Objections.*]—Where a copy of an election petition was not left with the prothonotary when the petition was filed, and, when deposited later, the forty days within which the petition had to be filed had expired:—Held, Gwynne, J., dissenting, that the petition was properly dismissed on preliminary objections (8 R. C. R. 65, 21 Occ. N. 252). Lisgar Election Case, 20 S. C. R. 1, followed. Per Gwynne, J.: The Supreme Court is competent to overrule a judgment of the Court differently constituted, if it clearly appears to be erroneous. *In re Burrard Dominion Election*, 22 Occ. N. 10, 31 S. C. R. 459.

Deposit — Rival claimants — Issue. *Re North Waterloo Election*, 1 O. W. R. 86.

Discovery—*Examination for — Particulars.*]—Section 18 of the Controverted Elections Ordinance, C. O. 1898 c. 4, provides as follows: "The said petition and all proceedings thereunder shall be deemed to be a cause in the Court in which the said petition is filed, and all the provisions of the Judicature Ordinance, in so far as they are applicable and not inconsistent with the provisions of this Ordinance, shall be applicable to such petition and proceedings:"—Held, that the provisions of the Judicature Ordinance respecting examinations for discovery come within the above section. 2. That where particulars of the charges had been ordered the examination could not be compelled until after the delivery of the particulars. *Leblanc* v. *Maloney*, 5 Terr. L. R. 341.

Evidence — *Return.*]—In a controverted election petition it is not necessary that proof should be given that the respondent has been returned as member. *Leblanc* v. *Maloney*, 5 Terr. L. R. 402.

Examination of Respondent for Discovery — *Inquiry into Corrupt Practices Committed at Former Election—Scope of—Lengthy Examination—Discretion — Adjournment — Continuation.*]—Corrupt practices said to have been committed by the respondent to a controverted election petition at a former election on the petition against which he was declared to have been duly elected, cannot, as such and as committed with reference to that election, be inquired into for the purpose of invalidating the election in question. Therefore, the petitioner has no right, upon the examination of the respondent for discovery, to make a general inquiry

into such corrupt practices, unless it can be shewn that they are in some way connected with and are still operative upon the election in question. Where a question was asked with reference to a discussion between the respondent and another person before the previous election, coupled with a statement that the discussion alleged was allowed to have been renewed at the election in question:—Held, that the question should be answered. If an examination for discovery is not conducted with discretion or becomes oppressive, the Court is empowered to declare that it shall be closed. Where the examination was continued until late at night, when the examiner became exhausted and was unable to proceed further with it:—Held, that the respondent must attend for further examination. *In re North York Provincial Election—Kennedy* v. *Davis*, 24 Occ. N. 11, 6 O. L. R. 714, 2 O. W. R. 1169.

Extending Time for Trial — *Orders Discretion—Practice.*] — While there is nothing to prevent a petitioner from making an application to fix the time and place of trial, he cannot be said to be in default for not having done so. The obligation and initiation in that respect are cast upon the rote Judges, the only penalty (if so called) upon the petitioner being that, if three months elapse after the presentation of the petition until the day for the trial being fixed, any elector may, on application, be substituted for the petitioner, on proper terms. And where the Judges' other engagements are such as to make it difficult for them to try the petition, an application to extend the time for proceeding to trial will be granted almost as a matter of course. *In re Centre Bruce Provincial Election — Stewart* v. *Clark*, 24 Occ. N. 52, 7 O. L. R. 28, 1 O. W. R. 503, 2 O. W. R. 1094.

Extending Time for Trial—Cross-petition. *Re North Norfolk Provincial Election*, 2 O. W. R. 1106.

Misdescription of Electoral District —*Surplusage—Amendment.*] — The petition and other papers in an election case were headed in the proper Court and purported to be under the Ontario Controverted Elections Act, as to "the election of a member of the Legislative Assembly for the Province of Ontario for the electoral district of Lincoln and Niagara, holden on the 22nd and 29th days of May, 1902." No such provincial electoral district as Lincoln and Niagara existed, but there was an electoral district of Lincoln, being the district intended:—Held, that the misdescription was not fatal; that the additional words might be treated as surplusage and struck out, leave being given to the petitioner to make such amendment. *In re Lincoln Provincial Election—McKinnon* v. *Jessop*, 22 Occ. N. 362, 4 O. L. R. 456, 1 O. W. R. 594.

Particulars—*Affidavit of Verification — Service—Vagueness of Particulars — Objection on Appeal.*] — In proceedings under the Controverted Elections Act, R. S. O. c. 11, it is sufficient to attach an affidavit of verification to the particulars filed, without serving it on the respondent. 2. It is too late on appeal from the judgment on an election petition to object to the insufficiency by vagueness of the particulars. *In re North Waterloo Provincial Election—Shoemaker* v. *Lackner*, 2 Elec. Cas. 76.

Particulars—*Extension of Time—Appeal — Stay of Proceedings — Appeal Books — Costs.*]—Under the provisions of s. 18 of the Controverted Elections Ordinance and Rule 548 of the Judicature Ordinance, the Judge has jurisdiction to extend the time for applying for particulars even after the time limited by s. 11 of the former Ordinance has elapsed. Proceedings stayed pending appeal, time for applying for particulars enlarged, typewritten instead of printed appeal books allowed, and costs directed to abide result of appeal. *In re Banff Election—Brett* v. *Sifton* (No. 3), 4 Terr. L. R. 263.

Peremption—*Statute—Retroactivity.*] — The statute 1 Edw. VII. c. 7 (Q.), assented to on the 28th March, 1901, has, retroactively, the effect of perempting all election petitions in which the instruction au mérite has not been commenced within the three months which follow the publication in the Official Gazette of Quebec of the election of the respondent. *Ste. Marie* v. *Perrault*, 4 Q. P. R. 159.

Petitioner—*Status—Corrupt Practices — Right to Vote — Preliminary Objections — Dominion Election Act — Interrogatories — Failure to Answer.*]—Corrupt practices committed by a petitioner who contests a federal election do not deprive him ipso facto of his right to vote at such election, nor of his right to be petitioner, except in the cases provided for by ss. 8 and 9 of 63 & 64 V. c. 12. Consequently, the disqualification resulting from practices other than those enumerated in ss. 8 and 9 cannot be pleaded by way of preliminary objection. Aliter, in the case of a provincial election. 2. Section 113 of the Dominion Election Act of 1900 should be strictly interpreted and should not be extended by analogy. 3. In the case of a petition to set aside an election the opposite party cannot be interrogated sur faits et articles, and if the party does not obey the order to answer such interrogatories, they will not be taken as affirmatively answered upon a motion to that effect. *Poirier* v. *Loy*, 4 Q. P. R. 23.

Preliminary Objections — Affidavit of petitioners — Intituling — Receipt — Clerical error. *Re Qu'Appelle Dominion Election* (N. W.T.), 1 W. L. R. 496.

Preliminary Objections—*Answer—Quebec Controverted Elections Act.*]—The Quebec Controverted Elections Act makes no provision for the making and filing of an answer to the preliminary objections, and if an answer be filed it will be struck out on motion. *Dyer* v. *McCorkill*, 7 Q. P. R. 167.

Preliminary Objections—*Appeal—Stay of Trial.*]—Where the respondent to a Dominion election petition has appealed to the Supreme Court of Canada from a judgment overruling his preliminary objections, the Superior Court cannot, as long as the appeal has not been decided, fix a day for trial on the merits, but the Court must stay the proceedings and postpone the trial of the petition. *Bergeron* v. *Brunet*, 5 Q. P. R. 156.

Preliminary Objections—*English Rules —Copy of Petition—When to be Filed.*]—

in order to have due presentation of an election petition under the Dominion Controverted Elections Act, R. S. C. c. 9, s. 9, a petitioner must, at the same time that he files his petition, leave with the clerk of the Court a copy of the petition to be sent to the returning officer. *In re Burrard Dominion Election—Duval* v. *Maxwell*, 21 Occ. N. 252, 8 B. C. R. 65.

Preliminary Objections — Leave to supply new evidence after conclusion of hearing—Proof of status of petitioner—Production of voters' list. *Re Yukon Dominion Election—Grant* v. *Thompson* (Y.T.), 2 W. L. R. 136, 435.

Preliminary Objections — *Motion to Strike Out—Appeal—Fixing Time for Trial.*] —Preliminary objections to an election petition having, on summons to strike them out or otherwise dispose of them, been struck out, on the ground that they were not filed in time, inasmuch as they were filed after office hours on the last day limiting for filing, and an appeal from the order to the Supreme Court of Canada being pending:—Held, that, inasmuch as the preliminary objections had not been considered upon their merits, and one of the objections if sustained would finally dispose of the petition, the Court should not fix a time for the trial of the petition. *In re West Assiniboia Dominion Election—McDougall* v. *Davin*, 2 Terr. L. R. 417.

Preliminary Objections—*Order as to —Jurisdiction of Judge at Chambers—Rules of Court—Practice.*]—The words of O. 35 of the Rules of the Supreme Court made under the Dominion Controverted Elections Act, and the table of Chambers work indicating the order in which each Judge shall sit and the period of time during which he shall take the duties assigned, etc., fulfil the provisions of the Dominion Act of 1887, c. 7, s. 2, and there being both a practice as to the order of business and an arrangement of the order of business, a Judge sitting at Chambers has jurisdiction to make an order setting down preliminary objections to an election petition to be heard before one of the Judges of the Supreme Court. It is not necessary in Nova Scotia that there should be a rota before such an application can be heard, the English practice in that particular being different, and depending upon the wording of the English Act applicable in such cases. The words "order," "duties," and "arrange," as used in the Dominion Controverted Elections Act, are not used as conferring jurisdiction. *In re Cumberland Dominion Election—Ripley* v. *Logan*, 37 N. S. Reps. 349.

Preliminary Objections—*Particulars — Examination of Petitioner.*]—A respondent to a controverted election petition under the Quebec Act has no right to examine the petitioner before filing particulars of preliminary objections. 2. The respondent will be ordered to declare the names of the agents and friends of the defeated candidate who have committed in regard to the petitioner, and of those in regard to whom the petitioner has committed, acts of corruption, corrupt practices, and election frauds, mentioned in the preliminary objections, with the places and dates, and describing the acts committed, and in what they consist. *Giroux* v. *Bergevin*, 5 Q. P. R. 45.

Preliminary Objections—*Petition Intituled in the Matter of the Election of "a Member"—Return of Two Members—Affidavit—Security — Amendment.*] — A writ was issued for the return of two members to the House of Commons for the electoral district of Queens, in the province of Prince Edward Island. The returning officer returned two members as elected:—Held, that a controverted election petition against one of the members, intituled "In the matter of the election of a member," etc., was a nullity, and the affidavit and security accompanying the petition being also so intituled, there was no power to amend; and preliminary objections were sustained. *In re Queens County Dominion Election — Burke* v. *McLean*, 25 Occ. N. 46.

Preliminary Objections—*Prejudice.*] — In preliminary objections, and a fortiori in those made to a petition against an election, there is no necessity to specifically allege prejudice. *Sweeney* v. *Lovell*, 3 Q. P. R. 422.

Preliminary Objections — *Several Causes of Complaint—No Return — Undue Return—Corrupt Practices.*] — An election petition was divided into two parts: the first being based upon the alleged invalidity of T.'s nomination, and the relief prayed with regard to that was that B., the other candidate, should be returned as elected, or that there should be a new election; and the second part being in the alternative, in case the Court should think T. should have been returned, that he should be declared to be disqualified by reason of corrupt practices. T. received a majority of the votes, but the returning officer made a special return of the facts and the facts and the return of "no member elected," on account of the supposed invalidity of T.'s nomination. The returning officer was made a respondent to the petition:—Held, upon preliminary objection to the petition, that, as a petition must, by statute, be filed within a certain number of days after the election, and not after the return, that the two distinct sets of allegations and prayers for relief were properly included in the one petition. *In re West Durham Dominion Election—Burnham* v. *Thornton and Bingham*, 21 Occ. N. 169.

Preliminary Objections — *Several Causes of Complaint—No Return—Illegal Deposit—Parties to Petition.*]—A petition under the Dominion Controverted Elections Act, R. S. C. c. 9, alleged that T., a respondent who had obtained a majority of the votes at the election, was not properly nominated, and claimed the seat for his opponent; and that, if it should be held that T. was duly elected, his election should be set aside for corrupt acts by himself and agents:—Held, that T. was properly made a respondent to such petition, which was properly framed under s. 5 of the Dominion Controverted Elections Act. Judgment of Street, J., 21 Occ. N. 169, affirmed. *In re West Durham Dominion Election—Burnham* v. *Thornton and Bingham*, 21 Occ. N. 365, 31 S. C. R. 314.

Preliminary Objections — *Status of Petitioner — Corrupt Acts—Evidence—Dominion Elections Act, 1900, s. 113.*]—Section 113 of the Dominion Elections Act, 1900, provides that any person hiring a conveyance for a candidate at an election, or his agent, for

the purpose of conveying any voter to or from a polling place shall, ipso facto, be disqualified from voting at such election:—Held, that the right of an elector to present a petition against the return of a candidate at an election may be questioned, by a preliminary objection, on the ground that he is disqualified under s. 113, and that on the hearing of the preliminary objection evidence may be given of the corrupt acts which caused such disqualification. Beauharnois Election Case, 31 S. C. R. 447, distinguished. Held, also, that though, unless the commission of the corrupt acts charged is admitted, it must be judicially established, such admission or judicial determination does not take effect merely from the time at which it is made, but relates back to the commission of the acts. *In re Cumberland Dominion Election, Logan* v. *Ripley; In re Pictou Dominion Election, McDonald* v. *Bell; In re North Cape Breton and Victoria Election, McKenzie* v. *Cannon*, 25 Occ. N. 134, 36 S. C. R. 542.

Preliminary Objections — *Status of Petitioner—Corrupt Practices by — Voter — Discovery—Faits et Articles.*]—In contesting a Dominion election, the fact that the petitioner has been guilty of electoral corruption, other than that mentioned in art. 113 of the Dominion Elections Act, does not make him incapable of contesting the election, such corruption not taking away from him ipso facto his right to vote at the election. 2. The Controverted Elections Act not having authorized the administration to the parties of interrogatories sur faits et articles, the default of the petitioner to answer such interrogatories is no evidence against him. *Poirier* v. *Loy*, Q. R. 19 S. C. 489, 4 Q. P. R. 412.

Preliminary Objections—Status of petitioner—Evidence—Voters' list—Certified copy —Notice under Canada Evidence Act—Oral testimony of petitioners —Notice of presentation of petition and of security—Clerical error —Copy of certificate of registrar—Receipt—Service—Deposit—Bank notes — Payment of cost of publication of petition—Credit—Affidavit verifying petition—Proof that election held—Illegal acts of enumerators and deputy returning officers. *Re Alberta Dominion Election* (N.W.T.), 1 W. L. R. 486.

Preliminary Objections — *Status of Petitioner — Particulars—Corrupt Practices.*]—A respondent to an election petition must, if he alleges that the petitioner's name is not lawfully upon the list of electors, point out the nature of the illegality charged. 2. The respondent will be orderd to give particulars of the corrupt practices of which he alleges that the petitioner has been guilty and the expenses which he has incurred and the electors whom he has treated. 3. He will also be ordered to give particulars of the conspiracies of which he accuses the petitioner, the payments and promises of money or rewards which he alleges the latter has made, and the particular circumstances of each offence. *Ste. Marie* v. *Perrault*, 5 Q. P. R. 430.

Preliminary Objections—Status of petitioner—Proof of—Copy of voters' list certified by Clerk of the Crown in Chancery—Notice —Canada Evidence Act—Petition filed before return — Form of petition — Affidavit. *Re Yukon Dominion Election—Grant* v. *Thompson* (Y.T.), 2 W. L. R. 136, 435.

Preliminary Objections — *Status of Petitioner—Proof of—Notice of Hearing of Preliminary Exceptions—Procedure on Hearing—Particulars—Quebec Controverted Elections Act.*]—The allegation that the deposit required by law had not been made by the petitioner, and that the latter was only a prête-nom, are not good grounds of preliminary exception. If the respondent denies that the petitioner is a British subject and entitled to vote, it is for the petitioner to prove his qualification as a voter and his status to contest the election. The production of the original voters' list which was used at the poll or of a copy duly certified by the officer who has charge of the original, is the best proof of the status of the petitioner; and if the latter has voted at the election without objection on the part of any one, his status as an elector cannot be questioned. The production of a certificate of baptism setting out the date of the birth of the petitioner and the domicil of his father and mother in the province of Quebec at that time, although the baptism took place more than 24 years after such birth, is sufficient proof that the petitioner is a British subject; and the burden of proof is on the respondent to prove that the petitioner, although baptized in the province, was born in a foreign country. The law being silent as to the form of proceedings to be followed on a hearing of preliminary exceptions, the notes of evidence may be taken by a stenographer appointed by the Judges, and the witnesses may be sworn by the clerk of the Court (député protonotaire of the Superior Court) in the presence of the Judge; this procedure is conformable to the spirit of the law as set forth in ss. 473 and 500 of the Controverted Elections Act of the province of Quebec. To prove that an election has been held, it is not necessary to produce the writ nor the proclamation and commission of the returning officer, but these facts may be established by oral testimony: s. 515, Quebec Controverted Elections Act. This Act and the Rules of practice under it do not contain any direction as to the length of the notice to be given of the hearing, leaving it to the Judge to give at, at his discretion, on the application of one of the parties, as he may deem convenient in the common interest of the parties and the public; and the rules followed in England in similar cases are not consistent with the rules of practice governing election petitions in the province of Quebec. The Judge may, without prejudice to the parties, fix a day for the hearing at the same time that he grants an application of the respondent for particulars, providing he limit such hearing to facts for which particulars are not demanded and of which proof can be made by the production of public and official documents, and adjourn the hearing on the other facts until after such particulars are furnished. It is not necessary to give public notice of the day fixed for the hearing, the only public notice required by the law being that of the discontinuance of the petition on abandonment of the contestation. *In re Brome Provincial Election—Dyer* v. *McCorkill*, Q. R. 26 S. C. 392.

Preliminary Objections — *Status of Petitioner—Proof of—Voters' List—Franchise Act, 1898.*]—On the trial of the preliminary objection to an election petition, filed under the Dominion Controverted Elections Act, that the petitioners were not persons entitled to vote at the election in question, it is not necessary

since the passing of the Franchise Act, 1898, and the Dominion Elections Act, 1900, to prove that the names of the petitioners were on the list of voters which was actually used by the deputy returning officer at the particular polling division; but it will be sufficient to shew that their names were on the original list transmitted under s. 16 of the Franchise Act, 1898, by the custodian thereof, after final revision, to the Clerk of the Crown in Chancery, as this is declared by s.-s. 2 of s. 16 to be "the original and legal list of voters for the polling division for which the list of which it is a copy was prepared:" and under s. 10 of the same Act this list may be proved by the production of a copy authenticated by the ordinary imprint of the Queen's Printer. The Richelieu Case, 21 S. C. R. 168, and The Winnipeg and Macdonald Cases, 27 S. C. R. 201, distinguished on the ground of changes in legislation. *In re Provencher Dominion Election*, 21 Occ. N. 315, 13 Man. L. R. 444.

Preliminary Objections—*Sufficiency of — Service of Petition — Naming Attorney— Affidavit in Support of Petition.*] — The Dominion Controverted Elections Act, defining, as it does, what are grounds on which an election petition may be deemed insufficient, the Courts can only entertain preliminary objections based on substantial error and want of formalities essential to a valid petition, especially when the want of form is not such as is calculated to prejudice, surprise, or mislead the party who urges it. After an election petition has been presented, the petitioner may get it from the registrar of the Court and deliver it to a bailiff for service in the same manner as in the case of writs of summons in civil matters. A petitioner is not bound to name an attorney, and, if he does, he need not state the residence of the attorney chosen. The affidavit filed by the petitioner in support of the petition, sworn before an officer qualified to take oaths and within the limits of his jurisdiction, is lawful although the place where it is sworn is not accurately stated in the jurat. *Bailey* v. *Hunt*, Q. R. 27 S. C. 84.

Presentation of—*Time—Return to Clerk of Crown in Chancery, when Made—Notice of Presentation.*]—The return of a member by the returning officer is made only when it has been actually received by the Clerk of the Crown in Chancery, and not when the returning officer has placed it in the express or post office for transmission to such Clerk; and a petition may be presented within 21 days after such receipt. R. S. O. 1897 c. 9, s. 135, and R. S. O. 1897 c. 11, s. 9, considered. 2. The omission to serve a separate notice of "presentation" of the petition is not fatal to the proceedings, where a copy of the petition itself is duly served, on which is indorsed: "This petition is filed," etc. Williams v. Mayor of Tenby, 5 C. P. D. 135, distinguished. *In re Ottawa Provincial Election —Randall* v. *Powell*, 2 Elec. Cas. 64.

Presentation of—*Time — Computation.*] —An election petition under R. S. B. C. 1897 c. 67, s. 214, must be filed within 21 days of the exact time of the return. Decision in 22 Occ. N. 43, 8 B. C. R. 273, affirmed; Irving, J., dissenting. *In re New Westminster Provincial Election—Rae* v. *Gifford*, 9 B. C. R. 192.

Publication of Notice of Trial — *Sheriff's Costs of—Payment Out of Deposit.*] Where an election petition is dismissed at the trial without costs, the petitioner must pay to the sheriff the costs incurred in the publication of the notice of trial thereof; and, although the sum deposited as security is not security for such expenditure, payment out of Court will be ordered only on the condition of its being made good to the sheriff. No charge can be made by the sheriff for attending to the publication, no allowance therefor being authorized by the tariff. *In re East Middlesex Provincial Election*, 2 Elec. Cas. 150.

Qualification of Petitioner—"*Reside*" *—Ontario Controverted Elections Act.*]—The word "reside" in s. 3 of the Ontario Controverted Elections Act, R. S. O. 1897 c. 11, as amended by 62 V. (2) c. 6, s. 1, is intended to denote the place where the petitioner "eats, drinks, and sleeps," And therefore a petitioner who owned a farm assessed in all for more than $1,000, and all in one electoral district, but the house and part of the land, assessed for less than that sum, being in one township, and the main part of the land in another township, was held to be unqualified, the assessment of the part with the house being alone regarded. Leave was given to substitute a petitioner:—Held, on the evidence, that the signatures of the petitioners to the petition and accompanying affidavit had not been obtained by fraud. *In re North Renfrew Provincial Election—Wright* v. *Dunlop*, 24 Occ. N. 125, 7 O. L. R. 204, 3 O. W. R. 300.

Qualification of Petitioners — *Signatures—Fraud—Question of Fact—Corroboration — Insufficiency — Residence — Leave to Substitute Petitioner.*]—Within a few days after the presentation of an election petition, signed in a solicitor's presence, the affidavits accompanying it, sworn to before another solicitor, deposing to the presentation of the petition being in good faith, and with reason to believe that the statements contained in it were true in substance and in fact, and after a retainer of the first named solicitor to conduct the proceedings, two of the petitioners made affidavits virtually contradicting their former affidavits, one of them deposing to being intoxicated at the time and unable properly to realize what he was doing, while the petition had only been partly read over to him, some of the statements in which he had since found were wholly untrue, while as to others he knew nothing; the other petitioner stating that he was an old man, unable to read or write, and that without the petition being read over or explained to him, and without his having any independent advice and without his appreciating his position, he was induced by the first named solicitor and a hotel keeper to sign the petition and swear to the affidavits:—Held, that, in the absence, not only of any corroboration of the statements made in the subsequent affidavits, but in the face of their denial by the parties interested, as well as by another person then present, they were not sufficient to support an application made by the respondent to set aside the petition. Order of Moss, C.J.O., 24 Occ. N. 125, 7 O. L. R. 204, 3 O. W. R. 300, dismissing application to set aside petition and allowing a new petitioner to be substituted for one whose qualification was insufficient, affirmed. *In re North Renfrew*

Provincial Election — Wright v. *Dunlop*, 24 Occ. N. 364, 8 O. L. R. 359, 3 O. W. R. 894.

Rules of Court—*Validity of — Payment into Court—Appointment of Master — Status of Petitioners—Evidence on Appeal.*] — Payment into Court in the usual way is a good payment in, within the meaning of Rule 16 of the Parliamentary Election Petition Rules, 1868 (Imperial). A Rule made by the Judges empowering the Senior Puisne Judge, or any other Judge of the Court, to perform the duties devolving by the Rules on the Chief Justice whenever the office of Chief Justice is vacant, or he is absent from the Province, is valid. Appointment of a new Master under said Rules operates ipso facto as a rescission of any former appointment, it being unnecessary to rescind any former appointment by express writing. The full Court on appeal allowed evidence to be adduced to prove the status of the petitioners, although the matter was not gone into in the Court below. *In re Esquimalt Provincial Election—Jardine* v. *Bullen*, 7 B. C. R. 471.

Security—*Notice—Affidavit of Service — Rules of Court.*]—In s. 216 of the British Columbia Elections Act "proposed security" means "intended security," and a notice by the petitioner informing the respondent that security would be given by depositing $2,000 with the Registrar was held a good notice pursuant to the section. The additional Rules made on the 27th January, 1875 (i.e., in addition to the Parliamentary Election Petition Rules, Michaelmas Term, 1868), are in force in British Columbia. The petitioner after serving notice of the presentation of the petition and of the proposed security omitted to file an affidavit of the time and manner of such service thereof:—Held, that the petition should not be struck off the files of the Court on that ground. *In re Lillooet Provincial Election—Stoddart* v. *Prentice*, 7 B. C. R. 498.

Service—*Extension of Time—Special Circumstances.*]—Under substituted s. 10 (s. 8 of c. 20, 1891), of the Dominion Controverted Elections Act, a Judge of the Election Court has jurisdiction to extend the time for personal service of the petition on the ground of special circumstances of difficulty in effecting service, if it appears that there was a bona fide attempt to serve, and ordinary diligence is used in trying to effect a service, even though it is shewn that the petition was not delivered to the officer for service for four days after it was filed, and during the whole period allowed by the section for service the respondent was at or in the vicinity of his residence, and made no attempt and colluded with no person to avoid service, and might have been served if more than ordinary diligence had been used. *In re Sunbury and Queen's Dominion Election—Nason* v. *Wilmot*, 35 N. B. Reps. 457.

Service—*Irregularity — Extending Time —Re-service—Preliminary Objections.*]—The petitioner in a controverted election petition under the Dominion Act, after the appearance of the respondent, and the filing by him of preliminary exceptions in which he complains of the irregularity of the service effected upon him, may obtain ex parte an order of a Judge extending the time for service, and that before having desisted from the first service. *Labelle* v. *Leonard*, 5 Q. P. R. 77.

Service — *Order Extending Time for — Grounds for.*]—An election petition filed in the clerk's office on the 17th December was sent to the petitioner at C. by registered letter on the 20th, and was received at the post office at C. on the evening of that day, but, for some reason that was not explained, the letter was not delivered, and the petitioner had no knowledge of its receipt until the 27th, the last day for service:—Held, that an order extending the time for service was properly made. *Re Restigouche Dominion Election—McAllister* v. *Reid*, 35 N. B. Reps. 390.

Service — *Personal—At Domicil—Abandonment—Time — Extension of — Motion to Dismiss Petition.*]—An election petition under the provisions of s. 10 of c. 9, R. S. C., as amended by s. 8 of c. 20 of the statutes of 1891, should, unless otherwise ordered by a Judge, be personally served. 2. Service made on the respondent of a copy of the election petition by leaving such copy for him at his domicil with his wife, without having previously stated the impossibility of making a personal service within the time described, and without the order of a Judge, is not good service according to the provisions of s. 8 of c. 20. 3. As in ordinary actions, a petitioner may abandon at his own expense the service of an election petition made as above, without the authorization of the Court or a Judge, which is necessary under s. 56 of c. 9. 4. Within the time allowed by law for the service of an election petition, a Judge of the Superior Court may, under s. 10 of c. 9, extend the time for such service, and a personal service, such as is required by s. 8 of c. 20, is a good and valid service of such petition. 5. A motion for the dismissal of an election petition, made before the time allowed by law or by a Judge has expired, is premature and will be dismissed with costs. *Labelle* v. *Leonard*, 4 Q. P. R. 420.

Service — *Substituted Service — Order after Time Expired.*]—Under s. 8 of c. 20 of 54 & 55 V., substituted for s. 10 of the Dominion Controverted Elections Act, R. S. C. c. 9, the Court has jurisdiction to make an order for substituted personal service, where the application for the order is not made until after the time allowed for personal service has expired. The order is not bad because it omits to fix a time within which the substituted service must be made. Where the petitioner, by reason of a deception practised upon him, erroneously believed a personal service had been effected and allowed five days after the extended time to elapse before taking out the order for substituted service:—Held, that it was not too late. *Re York Dominion Election—McLeod* v. *Gibson*, 35 N. B. Reps. 376.

Service of Notice of Presentation — *Security for Costs—Deposit—Moneys of Solicitor.*]—The statute of Canada 54 & 55 V. c. 20, s. 8, allows three modes of service of the notice of presentation of an election petition:—(a) If service is made within ten days of the presentation, it may be made in the same way as in the case of a writ of summons in a civil cause. (b) If, by reason of special circumstances of difficulty in service, the petition has not been served within the ten days, the Court or Judge may allow further time, and in such case the service must be personal. (c) If it has not been

possible to serve the defendant personally within the time allowed by the Court or Judge, then the Court or Judge may order another mode of service. 2. Rule 12 of the Rules of Practice of the Superior Court does not apply to a deposit, made in the matter of a contested Dominion election, of the moneys of the solicitor for the petitioner. *Belanger* v. *Carbonneau*, 5 Q. P. R. 8.

Service of Petition — *Exhibition of Original—Indorsement of Service — Allegations of Petition—Holding of Election.*]— There is nothing in the law requiring that the original of a petition contesting a federal election be exhibited to the respondent at the time of the service. The omission by the bailiff to mention on the copy of the writ of summons or contestation of election the date of such service, is no ground for exception to the form, unless prejudice is shewn. It is sufficient in the contestation of an election held in one of the divisions of Montreal, to state that the same took place within the judicial district of Montreal. *Darlington* v. *Gallery*, 7 Q. P. R. 40.

Service of Petition—*Second Service.*]— An election petition cannot be served outside of Canada. Where the petition was served on the respondent abroad, and, subsequently, service was made on him in Ottawa:—Held, that the first irregular service did not invalidate that properly made afterwards. *In re Shelburne and Queen's Dominion Election—Cowie* v. *Fielding*, 25 Occ. N. 133, 36 S. C. R. 537.

Service of Petition out of Canada— *Second Service on Agent.*] — Under the Dominion Elections Act, service of an election petition cannot be made outside of Canada: Idington, J., dissenting. By rule 10 of the Nova Scotia Rules under the Elections Act, a candidate returned at an election may, by written notice deposited with the clerk of the Court, appoint an attorney to act as his agent in case there should be a petition against him:—Held, that an agent so appointed is authorized only to act in proceedings subsequent to the service of the petition, and service of the petition itself on him is a nullity. *In re King's Dominion Election—Parker* v. *Borden*, 25 Occ. N. 135, 36 S. C. R. 520.

Service out of Jurisdiction.]—A petition against the return of a member may be served personally on the respondent out of the jurisdiction; and it is not essential that an application should be made for leave to effect such service, or for allowing the service so made. *In re West Algoma Provincial Election — Whitacre* v. *Savage*, 14 Occ. N. 390, 2 Elec. Cas. 13.

Setting aside—*Summary Application — Grounds.*]—Held, that a petition may be set aside upon summary application upon grounds other than those contained in s. 10 of the Controverted Elections Ordinance, N. W. T. *In re Banff Election—Brett* v. *Sifton* (*No. 2*), 4 Terr L. R. 253.

Status of Petitioner—*Fees—Credit for —Copy — Affidavit — Deposit — Service— Bailiff.*] — A party who contests a federal election has only to shew that he had a right to vote at the election in question, and the fact that he is on the voters' list as a tenant instead of as an occupant does not affect his status. 2. No court house tax is payable upon an election petition. 3. The respondent has no interest in urging that the prothonotary gave credit to the petitioner's attorney, instead of claiming his fee on the election petition at once. 4. A copy of an election petition which is followed by an affidavit is not invalid by the mere fact that a copy of the petition itself is not certified with the words "true copy" when the signature appears at the end of the last document, the affidavit. 5. A deposit of bank bills accepted by the prothonotary, is regular. 6. It is regular to serve a copy of the election petition and affidavit, not a duplicate thereof. 7. A bailiff will not be declared unqualified by the mere fact that no proof has been shewn that his guarantee policy has been renewed. *In re Missisquoi Dominion Election, Morin* v. *Mergs*, 6 Q. P. R. 372.

Status of Petitioner—*Franchise Acts.*] —The principal contention raised on preliminary objections to an election petition was that the petitioner had been guilty of corrupt practices before, during, and after the election, and that, by the effect of 61 V. c. 14 and 63 & 64 V. c. 12, the Dominion Franchise Act was repealed and the provisions of the Quebec Elections Act regulating the franchise in the province of Quebec substituted therefor, so as thereby to deprive the petitioner of a right to vote under s. 272 of the Quebec Elections Act, 59 V. c. 9, and being so deprived of a vote, that he had no status as petitioner. In the Election Court, evidence was taken on issues joined, and the Judge, holding that no corrupt practice upon the part of the petitioner had been proved, dismissed the preliminary objections. On appeal to the Supreme Court of Canada:—Held, that, as corrupt practices had not been proved, the question as to the effect of the statutes did not arise. Per Gwynne, J.:—A person properly on the list of voters for an election to the House of Commons cannot be deprived of his right to vote at such election by provincial legislation. *In re Beauharnois Dominion Election*, 22 Occ. N. 6, 31 S. C. R. 447.

Status of Petitioner — *Voters' List— Affidavit — Preliminary Objection.*]—A list appearing on its face to be an imprint emanating from the Queen's printer, certified by the clerk of the Crown in Chancery to be a copy of the voters' list used at an election, and upon which the name of the petitioner against the return at such election appeared as a person having a right to vote thereat, is sufficient proof of his status. The jurat of the affidavit accompanying the petition was subscribed "Grignon & Fortier, Protonotaire de la Cour Supérieure dans et pour le District de Terrebonne:"—Held, per Gwynne, J., that an objection to the irregularity of the subscription to the jurat did not constitute proper matter to be inquired into by way of preliminary objection to the petition. *In re Two Mountains Dominion Election—Ethier* v. *Legault*, 22 Occ. N. 5, 31 S. C. R. 437.

Status of Petitioner—Statement—Sufficiency—Defeated candidate. *Re Stormont Provincial Election—McLaughlin* v. *McCart*, 1 O. W. R. 504.

Stay of Proceedings Pending Appeal on Preliminary Objections — *Trial* —

Time—Extension.] — Preliminary objections to an election petition filed on the 22nd February, 1902, were dismissed by a Judge on the 24th April, and an appeal was taken to the Supreme Court of Canada. On the 31st May the Judge ordered that the trial of the petition be adjourned to the thirtieth juridical day after the judgment of the Supreme Court should be given, and the same was given, dismissing the appeal, on the 10th October, making the 17th November the day fixed for the trial under the order of the 31st May. On the 14th November a motion was made before a Judge, on behalf of the member elect, to have the petition declared lapsed for non-commencement of the trial within six months from the time it was filed. This was refused on the 14th November, but the Judge held that the trial could not proceed on that day, as the order for adjournment had not fixed a certain time and place, and, on motion by the petitioner, ordered that it be commenced on the 4th December. The trial was begun on that day:—Held, that the effect of the order of the 31st May was to fix the 17th November as the date of commencement of the trial; that the time between the 31st May and the 10th October, when the judgment of the Supreme Court on the preliminary objections was given, should not be counted as part of the six months within which the trial was to be begun; and that the 4th December, on which it was begun, was therefore within the six months:—Held, also, that, if the order of the 31st May could not be considered as fixing a day for the trial, it operated as a stay of proceedings, and the order of the 17th November was proper. *In re St. James Dominion Election, Brunet* v. *Bergeron*, 23 Occ. N. 147, 33 S. C. R. 137.

Substituting Petitioner — *Grounds for —Jurisdiction of Court—Time—Collusion.*] —The Court has no power in a proceeding under the Dominion Controverted Elections Act to substitute a new petitioner unless either no day for trial has been fixed within the time prescribed by statute or notice of withdrawal has been given by the petitioner. And where a petition came regularly down for trial and the petitioner stated that he had no evidence to offer, an application of a third party to be substituted as petitioner, upon vague charges, made on information and belief, of collusion in the dropping of the petition, which were contradicted, and of corrupt practices, was refused; and the petition was dismissed with costs. *In re South Essex Dominion Election—Tofflemire* v. *Allan*, 2 Elec. Cas. 6.

Time for Hearing—*Legislature in Session — Quebec Controverted Elections Act.*] —An election petition under the Controverted Elections Act of the province of Quebec, must be brought on for hearing on the merits by the petitioner within four months following the publication of the notice provided for in s. 213 of the Election Act of Quebec, 1895, even if the legislature is or has been in session. After the trial is commenced the Court should adjourn it over the session on the request simply of the sitting member. *Rochon* v. *Gendron*, Q. R. 27 S. C. 163.

Trial — Charges and expenses of stenographers. *Re Ontario Controverted Elections Act*, 2 O. W. R. 495.

Trial — *Expenses of—Sheriff's Fees—Crier's Fees.*]—A sheriff has a right to a fee for attendance at the trial of a controverted election petition only if his presence at the trial has been required. 2. The fees of criers at the trial of election petitions will be taxed. *Bergeron* v. *Brunet*, 5 Q. P. R. 435.

Trial—*Extension of Time—Appeal—Jurisdiction.*]—On the 25th May, 1901, an order was made by Belanger, J., for the trial of the petition against the appellant's return as a member of the House of Commons for Beauharnois, thirty days after judgment should be given on an appeal then pending from the decision on preliminary objections to the petition. Such judgment was given on the 29th October, and on the 19th November, on application of the petitioner for instructions, another order was made by the same Judge which directed that judicial days only should be counted in computing the thirty days, and stating that such was the meaning of the order of the 25th May, and that the 6th December would be the date of trial. On the petition coming on for trial on the 6th December, the appellant moved for peremption on the ground that the six months' limitation for hearing had expired. The motion was refused, and on the merits the election was declared void. On appeal to the Supreme Court:—Held, Davies, J., dissenting, that an appeal would not lie from the order of the 19th November; that the Judge had power to make such order, and its effect was to extend the time for trial to the 6th December; and that the order for peremption was, therefore, rightly refused. *In re Beauharnois Dominion Election — Loy* v. *Poirier*, 22 Occ. N. 193, 32 S. C. R. 111.

Trial—*Production of Voters' Lists—Certified Copies—Costs.*]—Since the Franchise Act, 1898, provides that the voters' lists used at an election of a member of the House of Commons may be proved by the production of certified copies, it is unnecessary to procure the attendance of the clerk of the Crown in Chancery from Ottawa to produce the lists at the trial of an election petition, and the costs occasioned by procuring his attendance will not be allowed to the successful petitioner as against the respondent, but instead thereof only what the certified copies of the necessary parts of the lists, if procured, would have cost. *In re Lisgar Dominion Election*, 14 Man. L. R. 268.

Verification — *Sufficiency of Affidavit.*] —An affidavit which alleges that the allegations contained in an election petition are true "to the best of my knowledge," is not sufficient to satisfy the requirements of a statute which provides that the deponent shall swear "that he has reason to believe and does verily believe," etc. *Lemieux* v. *Paquet*, Q. R. 27 S. C. 159.

V. Recount.

Appeal — *Notice of—Signature—Result of Appeal—Majority.*]—The notice of appeal from the decision of the County Court Judge upon a recount of votes under s. 129 (1) of the Election Act, R. S. O. 1897 c. 9, need not be signed by the appellant candidate personally, but may be signed by his solicitor or

agent on his behalf. Where both candidates appeal from the decision of the County Court Judge, and the result of the appeal of one, first heard and determined, is to give his opponent a majority, the appeal of the other will be heard and determined, although it cannot change the result except by increasing the majority. Neither appeal having been limited to particular ballots, it was open to the candidate whose appeal was first determined to object, when his opponent's appeal was being heard, to certain ballots not previously objected to. *In re North Grey Provincial Election—McKay* v. *Boyd*, 22 Occ. N. 287, 4 O. L. R. 286, 1 O. W. R. 474, 483, 2 O. W. R. 231, 604, 1131.

Ballots — *Absence of Candidates' Numbers.*]—Recount of votes cast at a provincial election:—Held, that the candidate's number, mentioned in s. 69 (3) of the Ontario Election Act, R. S. O. 1897 c. 9, is not an essential part of the ballot paper; and where a deputy returning officer, in detaching the ballot papers from the counterfoils, did so in such a manner that the candidate's numbers were left on the counterfoils, instead of appearing on and as part of the ballot papers, such ballot papers, when marked by voters, were not rejected. *In re Prince Edward Provincial Election—Williams* v. *Currie*, 22 Occ. N. 285, 4 O. L. R. 255, 1 O. W. R. 468.

Ballots — *Irregular Marking.*]—Upon the recount of ballots cast at the election of a member of the Ontario Legislature, there being two candidates, ballots were allowed which were marked (1) with a cross below and to the right of the lower compartment; (2) with a cross in one compartment and a line in the other; (3) with a cross in one compartment and a faint and probably unintentional mark in the other; (4) with a mark in the form somewhat of an inverted V, as being probably intended for a cross; (5) with three crosses in one compartment; and (6) with a mark which might fairly be taken to be a clumsy and ill-made cross; and ballots were disallowed which were marked (1) with a single stroke; the error in the head-note in In re West Huron, 2 Ont. Elec. Cas. 58, in which it is stated that ballots so marked were in that case allowed, being pointed out; (2) with a plain cross in one compartment and a fainter, partly smudged or rubbed out cross in the other; (3) with the name of the candidate written in the compartment; and (4) with a circle in both compartments. Ballots marked in due form but with an indelible coloured pencil, were objected to on the ground that there was possibly a design to identify the voters, but these were allowed, there being no evidence, and evidence not being admissible, to shew whether a pencil of this kind had or had not been supplied by the deputy returning officer. *In re Halton Provincial Election,—Nixon* v. *Barber*, 22 Occ. N. 362, 4 O. L. R. 345, 1 O. W. R. 501.

Ballots — *Irregular Marking.*] — Four ballots counted for one of the candidates by a deputy returning officer were held to have been properly rejected by the County Court Judge on a recount, in consequence of each being marked with a cross in the division of both candidates. There was nothing to shew that, as was alleged, one of the crosses had been placed on each ballot after the counting by the deputy returning officer. A ballot having a distinct cross in the division of one candidate, and an obliterated cross in that of the other, was allowed for the first. But where there was a distinct cross in one division, and a very faint one in the other, the ballot was rejected. The following ballots were rejected:—Marked for one candidate and having the name of that candidate written on the back. Having, instead of a cross, a perpendicular, horizontal, or straight slanting line. Having a cross on the back only. The following were allowed:—Properly marked, but having on the back words written by the deputy returning officer. Having several connected tremulous marks in one division. Having a strongly marked cross in one division, and a thin, faint upright pencil mark on the upper edge of the ballot in the other division, not indicative of any intention to make a cross. Having a distinct cross, and in the same division a slight irregular pencil marking, or a series of slight, cloudy, formless pencil markings. Having a mark consisting of two lines lying very close to each other, both distinctly visible, in one division, shewing an intention to make a cross. *In re North Grey Provincial Election, Boyd* v. *McKay*, 22 Occ. N. 286, 4 O. L. R. 286, 1 O. W. R. 474, 483, 2 O. W. R. 231, 604, 1131.

Ballots — *Irregular Marking—Ballot not Objected to Before Deputy Returning Officer.*]—A County Court Judge is not confined, on a recount, to the consideration of cases in which an objection was made before the deputy returning officer when counting the votes at the close of the poll. Where a ballot was marked with a cross outside, but near the upper line of, the top division:—Held, that it should be allowed. It is not essential to have a line on a ballot paper at all. Similarly all votes below the lower division must be counted for the candidate whose name is in it. Where a ballot was marked with a circle, not a cross, nor any apparent attempt to make a cross:—Held, bad. Where a ballot was well marked for one candidate, but in the other candidate's division there was an irregular, shapeless pencil mark, which was not, however, a cross or any attempt to make a cross, nor a mark by which the voter could be identified:—Held, a good vote for the candidate for whom the paper was well marked. Where a ballot, though well marked, had, in the same division, the initials S. A. in small but legible capitals:—Held, bad. Any written word or name upon a ballot presumably written by the voter, ought to vitiate the vote as being a means by which he may be identified. Where ballot papers had a cross or crosses in the division of both candidates:—Held, bad. *In re Lennox Provincial Election—Carscallen* v. *Madole* 22 Occ. N. 363, 4 O. L. R. 378, 1 O. W. R. 472.

Ballots—*Irregular Marking—Initialling.*] —Ballots marked with a straight line only are improperly marked and cannot be counted, while ballots marked with a cross upon or above the upper division line, or marked with a cross made by three or four pencil strokes, or marked with what might be taken for a "c," are properly marked and should be counted. In initialling the ballots a deputy returning officer at one sub-division put as his initials H. C. instead of his full initials H. C. G., and a deputy returning officer at another polling sub-division put McN., instead of his full initials, W. D. McN.:—Held, that such ballots were sufficiently initialled within the

meaning of the Act, the object of such initialling being merely the identification of the voter, which was effected, there being no suggestion that the number of ballots cast at the polling sub-division was not correct; and semble, that under these circumstances the ballots should not be rejected, even if not initialled at all. *In re Muskoka Provincial Election—Mahaffy* v. *Bridgland*, 22 Occ. N. 322, 4 O. L. R. 253, 1 O. W. R. 487.

Interference with by Superior Court Judge—*Method of Counting Votes.*]—A County Court Judge holding a recount of the votes cast at an election for the House of Commons, pursuant to s. 90 of the Dominion Elections Act, 1900, rules that a ballot could not be objected to before him because the same objection had not been raised when the ballot was counted by the deputy returning officer:—Held, that a motion to a Superior Court Judge for an order requiring the County Court Judge to entertain the objection was not warranted by s. 91; under that the County Court Judge could be directed to proceed, but not as to the mode by which he should proceed. *In re King's County Dominion Election*, 21 Occ. N. 57.

Irregularities.]—Upon a recount of the votes cast at the London election for the House of Commons objection was taken to three ballots without the official stamp of the returning officer and to five ballots from which the deputy returning officer had omitted to remove the counterfoils. The ballots were in other respects regular, and were counted and allowed by the deputy returning officer. The Judge refused to disallow them. *In re London Dominion Election*, 24 Occ. N. 401, 4 O. W. R. 402.

Jurisdiction of Deputy County Court Judge—*Absence of Statement by Returning Officer as to Result of Poll—Substituted Statement—Two Crosses on Ballot—Erasure of One—Irregular Cross.*]—The County Judge was ill and a deputy took his place:—Held, the deputy had jurisdiction to hold recount of ballots in an election for the Provincial Legislature. A ballot had a cross in a division for one candidate and the ballot also shewed an erasure of another cross after the the other candidate's name:—Held, properly counted for the candidate in whose division the cross was left unerased. Held, also, that there was nothing in the Ontario Election Act to void the ballots cast at any particular poll where the deputy returning officer failed to make a statement of the votes cast in his returns; if the returning officer has no difficulty in ascertaining the number of votes cast the vote must be counted. *Re Prince Edward Provincial Election*, 5 O. W. R. 376, 9 O. L. R. 463.

Jurisdiction of Junior County Court Judge.]—A junior Judge of a County Court has jurisdiction under the Ontario Election Act, R. S. O. 1897 c. 9, ss. 124-131, to recount votes. *In re North Grey Provincial Election—Boyd* v. *McKay*, 22 Occ. N. 286, 4 O. L. R. 286, 1 O. W. R. 474, 483, 2 O. W. R. 231, 604, 1131.

Mistake in Initials of Deputy Returning Officer — *Torn Ballot — Ballot without Initials—Mistake of Officer—Ballots Wrongfully Numbered by officer—Disclosing Identity of Voters.*]—Held, ballot marked but not initialled properly rejected. 2. Ballots marked on back with the number in the poll book opposite to the name of each voter properly counted; 3. Ballots with letters "R. S." on their back placed there by mistake for D. R. officer's initials "R. S.," were good by R. S. O. 1897 c. 9, s. 112, ss. 3; 4. Ballot torn in two and pinned together, good ballot. *Re West Huron Provincial Election*, 5 O. W. 378, 9 O. L. R. 602.

Production of Ballots—*Jurisdiction to Order.*]—The Court or a Judge thereof has no jurisdiction, under s. 154 of the Provincial Elections Act, to order the deputy provincial secretary to produce ballots for the purpose of a recount before a County Court Judge under s. 43 of the amending Act of 1899. *Re Fernie Provincial Election*, 10 B. C. R. 151.

Recount — *Ministerial Proceeding—Place of Holding—Right of Appeal.*]—1. The proceedings on an application for a recount, by a Judge, of the votes given at a Dominion election, are executive and ministerial and not judicial, and do not pertain to the Superior Court. 2. Such recount need not necessarily take place at the chef-lieu of the district; the Judge may appoint another place. 3. There is no appeal to the Court of Queen's Bench, appeal side, from the proceedings on the recount. *Meigs* v. *Corneau*, 21 Occ. N. 50, Q. R. 10 Q. B. 56.

VI. Trial.

Judgment—*Voiding Election—Effect on Pending Appeal by Dissolution of Legislature —Costs.*]—The trial Judges declared an election void. The case was appealed and while waiting for judgment the legislature was dissolved:—Held, the Court of Appeal could make no order as to costs or otherwise. *Re North York Provincial Election—Kennedy* v. *Davis*, 5 O. W. R. 478, 10 O. L. R. 93.

Judgment—*Session of Parliament.* — Notwithstanding R. S. O. c. 11, s. 48, providing against trial of a petition during a session or within 15 days from the close thereof, when judgment has been reserved after examination of witnesses and hearing and the arguments of counsel, the trial Judges may give it and issue their certificate and report at any time, whether during or after a session. *In re North Waterloo Provincial Election—Shoemaker* v. *Lackner*, 2 Elec. Cas. 76.

Persons Reported by Rota Judges—Evidence—Doubt as to guilt—Discharge of summons. *Re Lennox Provincial Election—Re Miles and Smith*, 3 O. W. R. 142.

VII. Voters.

British Columbia Elections Act—*Application for Registration—Affidavits—Official to Take—Statutes.*]—Under the Provincial Elections Act and amendments an affidavit or application to be placed on the register of voters for an electoral district may be sworn outside the province of British

Columbia; and the venue and jurat of the affidavit, form A., Provincial Elections Act Amendment Act, 1902, may be varied to conform to that fact. The affidavit may be sworn before a commissioner for taking affidavits in and for the Courts of the province, or before any of the officers named in s. 4 of the amending Act of 1902, provided they derive their power from provincial authority, or ordinarily reside and perform their duties within the province. The Lieutenant-Governor in council has power under the Elections Act and s. 11 of the Redistribution Act to make regulations providing that affidavits sworn outside the province may be received by collectors of votes, and the applicants' names be placed upon the register. Per Walkem and Drake, JJ.: Acts affecting the franchise should be construed liberally so as not to disfranchise persons having the necessary qualifications of voters. *In re Provincial Elections Act*, 24 Occ. N. 33, 10 B. C. R. 114.

Collector of Vote —*Jurisdiction—Time—Prohibition.*]—After the collector of votes under the British Columbia Elections Act, 1897, as amended in 1899, has placed on the register of voters the names of persons objected to, an application for prohibition on the ground that the collector proceeded without jurisdiction is too late. Semble, in any event prohibition is not the proper remedy. Quære, whether the Crown Office Rules have any application in civil matters. *In re O'Driscoll and Wright*, 8 B. C. R. 424.

Court of Revision—*Appeal—Jurisdiction—Voter's Qualification—Territories Election Ordinance — Residence—Controverted Elections Ordinance.*]—In the case of an election under the Territories Election Ordinance, a Judge sitting in appeal from the Court of Revision is limited in the exercise of his jurisdiction to the same extent as the Court of Revision. The jurisdiction of the Court of Revision is limited to inquiring whether any of the formal statements, subscription to which the Ordinance provides, may be required from a person tendering a vote, is "false in whole or in part;" if false in whole or in part, the vote is to be disallowed; if altogether true, the vote is to be allowed. New polls were held in two polling divisions; votes were challenged on the following grounds: (a) voter was deputy returning officer in another polling division on the day of the general election, (b) voter was resident in another polling division on the day of the general election and entitled to vote there, and (c) voter was absent from electoral district on day of general election; and in each case the voter could not possibly have voted on that day at either of the two polling divisions in question; the Court of Revision disallowed these votes; the Judge in appeal held that he had no jurisdiction sitting in appeal (but only in proceedings under the Controverted Elections Ordinance) to consider the validity of these votes, though he doubted their validity. "Residence" means a man's habitual physical presence in a place or country which may or may not be his home; the word "habitual" does not mean presence in a place for either a long or short time, but the presence there for the greater part of that period. *In re Banff Election —Brett* v. *Sifton* (No. 1), 19 Occ. N. 119, 4 Terr. L. R. 140.

Lists—*Appeal — Notice of Complaint—Loss of—Parol Evidence.*]—A list of appeals, containing names sought to be added to the voters' list, was prepared, and a voter's notice of complaint in Form 6 to the Ontario Voters' Lists Act, R. S. O. c. 7, was signed, by the complainant, attached to the list of names to be added, and handed to the clerk in his office within the thirty days required by the statute. When the list was produced by the clerk in Court the notice of complaint was missing:—Held, that it was competent for the Judge to hear and receive parol evidence as to the form and effect of the notice in question and of its loss; and that, upon his being satisfied by such evidence that a sufficient notice of complaint was duly left with the clerk, the complaint might be dealt with. *In re Marmora and Lake Voters' Lists*, 21 Occ. N. 114, 2 Elec. Cas. 162.

Lists—*Assessment Made in Previous Year—Qualification Arising after Final Revision of Roll—Freeholders—Tenants.*]—Where the assessment for a city, on which the rate for the year 1898 was levied and the voters' list based, was made in the previous year, the roll having been finally revised on the 2nd December, 1897, freeholders who were such between that date and the last day for the revision of the voters' list were, under s. 86 of the Municipal Act, R. S. O. 1897 c. 223, and s. 14 (7) of the Ontario Voters' Lists Act, R. S. O. 1897 c. 7, held, entitled to be placed on the list; and freeholders also who had parted with property for which they were assessed, but had acquired other sufficient property, were held entitled to remain on the list; otherwise as regards tenants, under similar circumstances, the form of oath required to be made by them precluding them. *In re St. Thomas Voters' Lists*' 2 Elec. Cas. 154.

Lists—*Finality—Scrutiny.*]—No inquiry can be made upon a scrutiny under s. 76 of the Controverted Elections Act, R. S. O. 1897 c. 11, as to voters being under the age of twenty-one years, as the voters' lists are final and conclusive on that point. *In re South Perth Provincial Election—Ellah* v. *Monteith*, 2 Elec. Cas. 144.

Lists—*Notice of complaint—Service on Clerk—Registered Letter.*]—A notice of complaint, with list of names, was received by the clerk through the mail by registered letter, in due time:—Held, that s. 17 (1) of the Voters' Lists Act, R. S. O. c. 7, had been complied with. *In re Madoc Voters' Lists*, 21 Occ. N. 115, 2 Elec. Cas. 165.

Lists—*"Resided Continuously"—Temporary Absence.*]—The provision of s. 8 of the Ontario Voters' Lists Act, R. S. O. 1897 c. 7, that persons to be qualified to vote at an election for the Legislative Assembly must have resided continuously in the electoral district for the period specified, does not require a residence de die in diem, but that there should be no break in the residence; that they should not have acquired a new residence; and where the absence is merely temporary, the qualification is not affected. Where, therefore, persons resident within an electoral district, and otherwise qualified, went to another province merely to take part in harvesting work there, and with the intention of returning, which they did, their

absence was held to have been of a temporary character, and their qualification not thereby affected. *In re Seymour Voters' Lists*, 2 Elec. Cas. 69.

Notice of Appeal—*Leaving at Clerk's Residence.*]—The language of R. S. O. 1897 c. 7, s. 17, s.-s. 1, "give to the clerk or leave for him at his residence or place of business" notice in writing, etc., means, when the notice is not personally given to the clerk, that it is to be left for him at his residence or place of business in such a place or under such circumstances as to raise a reasonable presumption that it reached his hands within the time allowed by the statute. And where, between 9 and 10 o'clock of the evening of the last day for serving notices of appeal, certain notices were left on the outside knob of one of two doors of the clerk's dwelling-house by a person who first knocked but received no response, and such notices did not come to the knowledge of the clerk till about noon the next day, the service was held insufficient. *In re Voters' Lists of Hungerford*, 23 Occ. N. 43, 5 O. L. R. 63, 2 O. W. R. 1.

Notice of Complaint — *Form of — Grounds of Objection—Subjoined Lists—Amendment of Notice.*]—In a list of complaints contained in a notice of complaint under the Ontario Voters' Lists Act, R. S. O. 1897 c. 7, the names of persons wrongfully omitted from the voters' list were given, and in the column headed "grounds on which they are entitled to be on the voters' list," "M. F. and" appeared:—Held, having regard to the provisions of s. 6 (1) and (7), and Form 6 (list 1) of the Voters' Lists Act, and of ss. 1 (12), 13, and 56 of the Assessment Act, and of s. 4 of the Manhood Suffrage Registration Act, that the letters "M F." could be properly read as meaning "Manhood Franchise," and those words were sufficient for the purposes of the notice, while the word "and" should be treated as surplusage. 2. The notice of complaint consisted of fifteen sheets, each in itself in the form given in the schedule to the Voters' Lists Act as No. 6, the lists Nos. 1, 2, 3, and 4 being printed on the backs of forms of notices of complaint; only the notice of complaint on the last sheet was filled out and signed by the complainant; but evidence was given that the whole fifteen sheets were attached together when the complainant signed the notice, and handed the whole to the clerk; and they so appeared before the Court. The notice referred to the "subjoined lists:"—Held, that the lists were part of the complaint, and it was sufficient in that regard. 3. Held, that, if it were necessary, in order to make the notice of complaint a good one, to amend it so that it should refer explicitly to the annexed sheets, the amendment should not be allowed under s. 32. *In re Voters' Lists of Carleton Place*, 22 Occ. N. 108, 3 O. L. R. 223, 1 O. W. R. 105.

Ontario Elections Act—*Notice of Complaint—Non-compliance with Form—Amendment.*]—It is not essential that the form given in the schedule to the Ontario Voters' Lists Act, R. S. O. 1897 c. 7, for objections to names wrongfully inserted in the voters' lists, should be followed with exactness; all that is required is that the nature of the objections to the names should be stated with reasonable clearness. Where, therefore, in giving notice of the wrongful insertion of names in the voters' list, the complainant used list No. 2 of form 6 in the schedule, being the list for persons wrongfully named, instead of list No. 3, being the list for those wrongfully inserted in the voters' list, but it was quite apparent what the grounds of the objections were, the notice was held sufficient. An amendment in such case might be made, if such was necessary. *In re Rawdon Voters' Lists*, 24 Occ. N. 12, 6 O. L. R. 631, 2 O. W. R. 1058.

Ontario Elections Act—*Preparation of Lists—Dominion Franchise Act, 1898, s. 9—Appointment of Persons to Prepare Lists—Order in Council—Prohibition—Powers of High Court.*]—The High Court of Justice for Ontario has power to prohibit persons assuming to exercise judicial functions in the preparation of voters' lists for an election to the House of Commons for Canada, if these persons have no authority in law for the exercise of any judicial functions in respect of such lists. Re North Perth, Hessin v. Lloyd, 21 O. R. 538, distinguished. The Dominion Franchise Act of 1898 changed completely the whole law in regard to the preparation of voters' lists, adopting the provincial lists, instead of having parliamentary lists prepared; but, to provide against the possibility of there being no sufficiently recent provincial lists in some of the electoral districts, s. 9 was passed. This section means that when provincial lists exist—"are prepared"—they shall be used, but when they do not exist the mode of preparing them provided in the section may be adopted. On the facts of this case, it was within the power of the Governor-General in council to appoint all necessary officers for the preparation of the lists, thus making them officers of a federal Court constituted by the section. These officers are to follow, as far as possible, the provisions of the laws of the province regulating the preparation and revision and bringing into force of the provincial lists. If the order in council appointing the officers gives directions to them in conflict with the statute, the order, to that extent, has no effect. If the officers do not proceed in accordance with the statute, they are answerable to Parliament, not to the Court, upon an application for prohibition. *In re West Algoma Voters' Lists*, 24 Occ. N. 397, 8 O. L. R. 533, 4 O. W. R. 229.

Ontario Elections Act — *Revision of Lists—Correction of Lists—Complainant—Posting up Lists—Time for Objecting—Deputy Registrar of Deeds.*]—A person resident in, and entitled to be placed upon the manhood suffrage register for a town forming part of an electoral district, is entitled to require the revision under s. 13 of the Ontario Voters' Lists Act, R. S. O. 1897 c. 7, of the voters' lists for another municipality forming part of the same electoral district, and is also entitled to require the subsequent revision of such lists provided for by ss. 22 and 23 of the Ontario Voters' List Act, R. S. O. 1897 c. 7. A reputy registrar of deeds is not entitled to vote at an election of a member of the Legislative Assembly for Ontario for the electoral district in which he is acting as such deputy registrar, and is not entitled to be placed on the voters' lists in such district. The date mentioned by the clerk of the municipality, in the advertisement published by him pursuant to s. 12 of the Ontario

Voters' Lists Act, R. S. O. 1897 c. 7, as that upon which the voters' lists have been posted up in his office, is the date from which the time for taking proceedings, limited by s. 17, runs, even though the clerk has in fact posted up the lists some days before the date named in the advertisement. *In re Huron Voters' Lists*, 24 Occ. N. 83, 7 O. L. R. 44, 3 O. W. R. 139.

Quebec Election Act—*Income Voter—Domicil—Residence.*]—A person must have his domicil in the electoral district, in order to have his name put on the list of electors, on qualification of income. Semble, that having such a domicil in one municipality, an elector can be put on the voters' list of the place of his actual residence, in another municipality, in the same electoral district. *Barker* v. *Village of Cowansville*, Q. R. 24 S. C. 333.

Right to Vote—*Refusal of Ballot—Action—Damages.*]—The plaintiff resided in St. John, New Brunswick, and his name was on the voters' list in St. John, and also in Dalhousie, Annapolis county, Nova Scotia, at which latter place the defendant acted as deputy returning officer in the last Dominion election. The plaintiff presented himself at the Dalhousie booth, and demanded a ballot. Under the Nova Scotia statute, which was passed with a view to provincial elections only, it is provided, in effect, that an elector can only vote once in the province at any election; that he must vote in the county in which he resides at the teste of the election writ, if qualified, and not elsewhere; and that a non-resident elector, having a right to vote in two or more polling districts, may vote in either. The plaintiff was required to swear before receiving a ballot that "at the teste of the writ for this election I resided in the city of St. John, New Brunswick; that I am not qualified to vote in the said city . . . ." He declined to take the oath and was refused a ballot and brought this action to recover damages:—Held, that the plaintiff had a right to vote in Dalhousie; and damages were assessed at $350. *Anderson* v. *Hicks*, 21 Occ. N. 507.

VIII. Writs and Returns.

Bye-election—*Issue of Writ for—Session.*]—The Legislative Assembly of Ontario has power while in session to order the issue of a writ to hold a bye-election, s. 33 of R. S. 1897 c. 12 applying only to vacancies occurring while the assembly is not in session. *In re South Perth Provincial Election—Ellah* v. *Monteith*, 2 Elec. Cas. 144.

Special Return—*Election not Held—New Writ—Petition—Costs.*]—The returning officer decided that, owing to the absence of proper voters' lists, the election could not be held on the days fixed by the writ, and publicly so declared, and notified the two prospective candidates that there would be no meeting for nomination on the day appointed. He made a special return to the writ, setting forth why it had not been duly executed, and the executive government accepted such return, and issued a new writ, under which due proceedings were had and one M., a former candidate, was nominated and declared elected by acclamation. The petitioner, who was to have opposed M., refused to recognize the authority of the returning officer to decline to hold a meeting for nomination, and on the day originally appointed left with a clerk of the returning officer a nomination paper and deposit, and he filed a petition under the Dominion Controverted Elections Act to have it declared that he had been duly elected for the district. M. was not made a party:—Held, that, apart from the question of the jurisdiction to entertain such a petition, no practical result could follow from an attack upon the returning officer as sole defendant. If the special return was illegal, the Court would go no further than to declare that it was an invalid return, upon which Parliament might direct the issue of a new writ; but that was what executive government had done, and was not what the petitioner had sought. It was not the duty of the Court under its statutory jurisdiction to pronounce upon the constitutional right of the executive to direct the issue of a new writ; that was a matter for the House of Commons. *In re Nipissing Dominion Election—Klock* v. *Varin*, 21 Occ. N. 258.

IX. Other Cases.

Dominion Elections Act—*Deputy Returning Officer—Conditional Refusal to Vote—Non-resident's Oath—Damages—Malice.*]—Plaintiff, who resided at St. John in the province of New Brunswick, was a property owner and entitled to vote at Dalhousie, in the county of Annapolis and province of Nova Scotia, where his name appeared on the list of voters as a non-resident. Plaintiff presented himself before the deputy returning officer at Dalhousie at an election and demanded a ballot paper, but the officer refused to deliver a ballot paper or to permit plaintiff to vote unless he took the non-resident's oath:—Held, that the oath proposed was not applicable to the case of a property owner residing in another province, and that the officer was wrong in his refusal to permit plaintiff to vote. Per MacDonald, C.J., and Ritchie, J., that plaintiff's right to vote being clear, defendant was responsible in damages for his refusal to permit him to do so; that defendant, in undertaking to determine plaintiff's right to vote, was not acting in a judicial capacity, but was merely a ministerial officer to carry out the provisions of the Act; and that, even assuming that defendant was acting in any respect in a judicial capacity, his action in refusing the ballot paper not being bona fide, but being wilful and corrupt, the action was maintainable even on the theory that proof of malice was necessary. Per Weatherbe, J., and Graham, E.J., that defendant was a public officer having a quasi judicial duty to perform, and that he could not be made liable for an error of judgment; that, in order to make defendant liable, malice must be shewn; that the burden of shewing malice was on plaintiff, and that the evidence adduced was not sufficient for that purpose. *Anderson* v. *Hicks*, 35 N. S. Reps. 161.

Telegrams—*Action for Price—Illegality—Pleading.*]—To an action begun by a telegraph company to recover the price of a certain number of telegrams, the defendant will not be allowed to plead simply that such telegrams were sent in the course of a parliamentary election; in order to defeat the

action in such a case, it is necessary to allege that such telegrams were sent for the purpose of illegally influencing the election. *Great North-Western Telegraph Co.* v. *Dalby*, 5 Q. P. R. 92.

PAROCHIAL ELECTIONS.

Churchwardens—*Voters—"Tenant feu et Lieu"—"Householder" — Custom.*]—The words "paroissiens tenant feu et lieu" used in art. 3438, R. S. Q., and the word "householder" in the English version of the same, comprehend and designate all heads of families, even married sons living with their fathers, working with them and dwelling on the paternal lands, lodging and having a common table with their fathers and mothers; and such married sons have, pursuant to the text of that Act, the right to vote at elections of churchwardens. 2. Unmarried sons living under the same circumstances, with their fathers and mothers, are not "paroissiens tenant feu et lieu," and cannot vote at elections of churchwardens. 3. The usage followed in the parish in question, or in neighbouring parishes, cannot be invoked to interpret art. 3438, the law overriding the custom, and the latter being no authority except in the absence of a positive law. *Plante* v. *Guévremont*, Q. R. 18 S. C. 401.

PAROL EVIDENCE.

See EVIDENCE.

PART PAYMENT.

See BILLS OF EXCHANGE AND PROMISSORY NOTES—VENDOR AND PURCHASER.

PART PERFORMANCE.

See SPECIFIC PERFORMANCE—VENDOR AND PURCHASER.

PARTICULARS.

Account—*Amendment at Trial—Refusal of Postponement—Surprise—New Trial.*]—Declaration for work and labour and on an account stated. Pleas, payment and set-off, the particulars of which shewed a considerable sum due the defendants over and above what was claimed by the plaintiff's particulars which were confined to the count for work and labour. At the trial, where a verdict passed for the plaintiff, the set-off being entirely rejected, an application was made to amend the plaintiff's particulars by making a large addition to the time of the alleged work and labour and by giving particulars of the account stated. The amendment was allowed without terms, although the defendants produced affidavits of one of themselves and their attorney and counsel, stating that they were unprepared to make their defence at the then circuit to the claim of work and labour as set out in the amended particulars; that had the original particulars been served as amended they might have offered to suffer judgment and would have done so had they found the plaintiff's claim was correct; that, as no particulars had been served applicable to the count for an account stated, that count had not been regarded as bona fide, and in preparing for trial no consideration had been given to it; that if the amendment was allowed the defendants would be taken by surprise and were not prepared to make their defence, and great injustice would be done to them:—Held, that the defendants' affidavit shewed that the amendment was of a character to materially prejudice the defendants, and should not have been allowed without such terms as would, as nearly as might be, place the defendants in the position they occupied when the original particulars were served; and a new trial was ordered. *Hicks* v. *Ogden*, 35 N. B. Reps. 361.

Account — *Partnership — Interests of Partners.*]—It is not necessary for a defendant, sued in assumpsit, to know the respective interests of each one of the plaintiffs in their partnership, nor to know the minor details of an account already for the most part paid. *Callaghan* v. *Rutherford*, 5 Q. P. R. 303.

Action by Advocate for Bill of Costs—*Fees and Disbursements — Procuration—Copies of Proceedings—Demand of Particulars—Default of Plea — Opening Pleadings Closed—Terms.*]—The defendant in default for a plea will be relieved from his foreclosure and be allowed to demand particulars of the plaintiff's account, upon payment of the costs, occasioned by his default. 2. The advocate in an action for fees and disbursements in a former suit in which he acted for the present defendant's opponent, must state when the proceedings for which he claims fees were taken by him. 3. He must also indicate the object of his disbursements made in Court or at the sheriff's office. 4. He should also file the procuration of his client authorizing him to sue when he alleges such procuration. 5. Semble, that he is not obliged to file copies of the proceedings which he has taken nor of the acts which he has had made by a notary on behalf of his client. *Desjardins* v. *Lamoureux*, 4 Q. P. R. 338.

Action for Account—Postponement till after discovery. *Canadian Bank of Commerce* v. *McDonald* (Y.T.), 1 W. L. R. 271, 506.

Action for Goods Sold—*Exception to Form.*]—A plaintiff suing for a balance of an account for goods sold and delivered, without giving at the time of service of process details of the quantity, quality, nature, and kind of the goods sold, as required by Rule of Practice 56, will, on an exception to the form, be required to furnish such details on pain of his action being dismissed. *Savaria* v. *Rosenfeld*, 7 Q. P. R. 15.

Action of Ejectment—*Defence of Encroachment.*] — A general allegation of encroachment in the defence to an action for possession of land may be the object of a motion for particulars shewing when, how, and to what extent the plaintiff has encroached upon the land of the defendant. *Vallée* v. *Prescott*, 4 Q. P. R. 279.

Breach of Contract—*Statement of Damage.*]—In an action for damages resulting from a breach of contract, an allegation that the plaintiff has, through the breach, lost his custom and a large sum of money, by the ruin of his business, is sufficiently particularized. *Gratton* v. *Dagenais*, 5 Q. P. R. 261.

Commission on Sale of Goods—Information in possession of defendants. *Blackley* v. *Rougier*, 4 O. W. R. 153.

Contestation of Opposition—*Illegality of Debentures of Railway Company.*]—Particulars will be ordered to be given of a paragraph in a contestation, alleging generally the illegality of an issue of debentures of the execution debtors, a railway company, without averring in what the illegality in question consists of an opposition to a seizure. *Connolly Baie des Chaleurs R. W. Co.*, 4 Q. P. R. 178.

Damages — *Plea that Damage Caused by Plaintiff's Own Acts.*]—When, in pleading to an action for damages, the defendant alleges that if the plaintiff has suffered any damage, which is denied, such damage is due to his own acts, the defendant will be ordered to give particulars of these acts of the plaintiff, and will not be allowed to prove other acts than those which he enumerates. *Montreal and St. Lawrence Light and Power Co.* v. *Stillwell*, 5 Q. P. R. 148.

Declaration — *Acknowledgment of Debt Sued for—Promise to Pay.*]—The Court will not order particulars of an oral acknowledgment of the debt sued for, alleged by the declaration to have been made by the secretary of the defendant company in the name of the company, nor of a promise to pay made in the same way. *Montreal Watch Case Co.* v. *Imperial Button Works, Limited*, 7 Q. P. R. 279.

Declaration — *Amendment.*] — Particulars furnished by the plaintiff pursuant to an order therefor, will not be set aside upon motion because they amount to an amendment of the declaration. *Fournier* v. *Martin*, 6 Q. P. R. 288.

Dedication of Town Site — *Public User.*]—In an action by the provincial Attorney-General for a declaration that the public had a right of access to the sea over the embankment of the Canadian Pacific Railway via certain streets in Vancouver, it was alleged that, in 1870, Her Majesty, by the officers of her colony of British Columbia, laid out and planned a town-site on Burrard Inlet and dedicated certain parts of the town-site to public uses:—Held, that the plaintiff must give particulars: (1) of the authority under which the town-site was laid out; (2) of the nature and dates of dedication and by whom made; and (3) of what portions of the town-site were dedicated. *Attorney-General for British Columbia* v. *Canadian Pacific R. W. Co.*, 10 B. C. R. 184.

Defamation — *Justification—Damages—Costs—Grounds for Ordering—Surprise—Exception to Form.*]—A motion for particulars assumes that the cause of action is sufficiently set forth; the defendant accepts and desires only to have additional or more precise information in order to prepare his defence. Such a motion is not subject to the formalities of an exception to the form, from which it is different. It is a motion according to English law, and has always been admitted in Quebec jurisprudence; it is a matter of discipline in the conduct of causes in order that there may be no surprise. 2. Where the plaintiff in an action for libel has anticipated the defence and undertaken to justify the act of which the defendant has accused him, he will be ordered to give particulars of his grounds of justification, if his allegations are vague. 3. A defendant, on motion for particulars, may obtain an order that the plaintiff shall make more precise all the definite or vague allegations which he has made. 4. If the plaintiff alleges special damage he must give particulars of it. 5. The plaintiff in an action for libel claimed a lump sum of $25,000 damages to his reputation, his honour and his property:—Held, that he should give particulars of the special damage intended to be covered by these words. 6. The plaintiff claimed also $25,000 damages as "effectivement" caused by the libel. He was ordered to declare whether he intended to claim some special damage, and if so to give the particulars of it; but if general damages only, particulars would not be necessary. 7. In an action for defamation the plaintiff stated that the defendant had defamed him before several persons. He was ordered to give the names of these persons, if he knew them, and also the dates. The defendant has a right to all the information which the plaintiff possesses. 8. The costs of a motion for particulars should be in the cause. *Chicoutimi Pulp Co.* v. *Price*, Q. R. 25 S. C. 351.

Default — *Dismissal of Action.*]—If a plaintiff neglects to give the particulars which he has been ordered to give, and if the allegations which he has thus neglected to supplement constitute the whole action, the other allegations being general and simply introductory, his action will be dismissed upon motion. *Gravel* v. *Lafontaine*, 5 Q. P. R. 82.

Demand — *Time — Deposit.*] — A demand of particulars is in the nature of a preliminary exception, and therefore must be made within the time fixed for the filing of such exceptions and be accompanied by a deposit. (But see 1 Edw. VII. c. 34). *Alliance Nationale* v. *Union Franco-Canadienne*, Q. R. 10 Q. B. 116.

Filing — *Service — Time.*] — Particulars served within the time fixed by an order requiring them to be delivered will not be set aside because not filed in Court until the day after the last day fixed by the order. *Vallée* v. *Vallée*, 6 Q. P. R. 306.

Fire Insurance Policy—Falsification of stock lists — Amount of over-statements — Motion for particulars—Affidavit in support. *Quebec Bank* v. *Phœnix Ins. Co.*, 3 O. W. R. 603.

Further Particulars — Interpleader issue—Credits—Settled account. *Tasse* v. *Seguin*, 1 O. W. R. 14, 56.

Gift — *Opposition.*] — An opposant who declares that he is the owner of an article seized, having received it as a gift from a person other than the execution debtor, and who has no writing evidencing the gift, will

not be ordered to give further particulars of the gift. *Turner* v. *Bradshaw*, 6 Q. P. R. 277.

Issue—Attack on conveyance. *McKinnon* v. *Richardson*, 2 O. W. R. 244, 275.

Laches — Crown—Defence to petition of right. *Cartwright* v. *The King* (B.C.), 1 W. L. R. 82.

Mechanics' Lien Action — Defects in work—Examination for discovery. *King* v. *Georgetown Floral Co.*, 3 O. W. R. 587.

Motion for — Affidavit — Notice of reading—Date of filing—Contract—Interest—Offers. *Martin* v. *Moody*, 2 O. W. R. 153.

Motion for—*Damages for Injury to Property.*]—In an action for damages for injury caused to his property, the plaintiff will be ordered, upon motion, to furnish a statement indicating separately each item of damages making up the whole sum claimed. *Hertel* v. *Foley*, 4 Q. P. R. 334.

Motion for — *Diligence.*]—A motion for particulars is in the nature of a preliminary plea, and must be made with diligence. *Raymond* v. *Whithall*, 6 Q. P. R. 209.

Motion for — *Exception to the Form—Notice — Deposit — Certificate.*]—Every motion for particulars, whether urged against a declaration, a pleading or a paragraph of a pleading, is necessarily founded on the insufficiency of the allegation attacked, and is therefore in its nature an exception à la forme, and falls under the rule of art. 164, C. P. C., requiring notice thereof to be served within three days, and presentment to be made as soon as possible after the delay to which the opposite party is entitled. Such motion must be accompanied with a certificate of deposit. *Loomis* v. *Sun Life Assurance Co. of Canada*, Q. R. 18 S. C. 329.

Motion for—*Time.*]—A motion for particulars, not being in its nature a preliminary plea, may be made after the lapse of the time prescribed for the filing of such a plea. *Neven* v. *People's Telephone Co.*, Q. R. 20 S. C. 538.

Municipal Corporations — *Highway—Injury to Persons—Precautions — Contributory Negligence — Climatic Causes—Costs.*]—In an action against the corporation of the city of Montreal to recover damages for injuries received in an accident the defendants are not obliged to particularize the precautions which they say they took, such precautions being defined by the city by-laws. 2. But the defendants are obliged to explain in what the default of the plaintiff consists and the uncontrollable climatic causes to which they attribute the accident. 3. No costs will be given upon a motion for particulars granted in part only. *Matthews* v. *City of Montreal*, 3 Q. P. R. 349.

Negligence — *Knowledge.*]—Particulars are ordered for the purpose of forwarding the applicant's case, and not to hamper the party ordered to give them. When a plaintiff is ordered to give particulars of negligence which are essentially within the defendant's knowledge, the order may provide that the plaintiff shall not be confined at the trial to the particulars given. *Alaska Packers' Association* v. *Spencer*, 9 B. C. R. 473.

Negligence—*Personal Injuries—Heads of Damage—Admission of Liability.*]—A plaintiff who claims damages for injuries caused by an accident, must give particulars of the amounts which he claims: (1) for medical services, nursing, and medicines; (2) for injury to his clothing; (3) for other injuries alleged in his declaration. 2. A plaintiff will be ordered to furnish particulars of the time and place at which the defendant admitted owing him or promised to pay him the amount claimed, or at the least to indicate the circumstances in which such promise was made. *Poole* v. *Hogan*, 5 Q. P. R. 424.

Negligence—*Pleading.*]—In an action for damages for personal injuries, paragraph 5 of the statement of claim contained allegations of negligence which might not have been particulars of the negligence alleged in paragraphs 3 and 4:—Held, that the plaintiff must give particulars or else state that they were to be found in paragraph 5. *Kingswell* v. *Crow's Nest Pass Coal Co.*, 9 B. C. R. 518.

Order for—*Affidavit—Action for Tort.*]—On an application for an order for particulars of the plaintiff's claim in an action of tort, special grounds must be shewn by affidavit setting forth at least such facts as would satisfy a Judge that the defendants would be embarrassed in their defence without such particulars and that justice requires their delivery. An affidavit by the defendants' solicitor that he belives the defendants cannot frame their defence without any statement of particulars is not sufficient to warrant the making of such an order. Brown v. Great Western R. W. Co., 26 L. T. N. S. 398, followed. *Miller* v. *Rural Municipality of Westbourne*, 20 Occ. N. 394, 13 Man. L. R. 197.

Order for—*Appeal.*]—There is no appeal from an interlocutory judgment ordering a party to furnish certain details and documents in support of his declaration. *Village of De Lorimier* v. *Community of Sisters of the Holy Names of Jesus and Mary*, 7 Q. P. R. 64.

Order for, before Trial—Limiting evidence—Non-delivery—Striking out evidence. *Bell* v. *Morrison*, 5 O. W. R. 266.

Patent Action—Demand—Time for — Scope of—Costs. *Moffat* v. *Leonard*, 3 O. W. R. 633.

Patent for Invention—*Action for Infringement—Defence—Want of Novelty — Specifications.*]—Action for infringement of a patent giving the exclusive rights within Canada of making and selling a certain improved machine. Paragraph 3 of the defence: That the applicances making up the machine are all well known mechanical appliances in use for many years prior to the date of the plaintiff's patent. 4. That there is no specification in the plaintiffs' patent covering a graduated series of fixed chisels or cutters, and that such a series was not, at the date of the patent, either novel or the subject of a patent under the Patent Act of Canada. 5. That the mechanical devices in the plaintiffs' machine alleged to have been infringed, are

not covered by the specifications set out in the plaintiffs' patent:—Held, that greater degree of particularity was required in respect of the defences set up in paragraphs 3 and 4 than in the plaintiffs' particulars of breaches, the object being to limit the expense to the parties, and to prevent patents being upset by some unexpected turn of the evidence. 2. Particulars of the allegation of want of novelty must be given, as they might not be within the knowledge of the patentee. 3. If the defendants knew a particular defect in the specification as to the nature of the invention, and the specification did not sufficiently describe the invention in that regard, they should point it out in order that the plaintiffs might not be taken by surprise. *Jones* v. *Galbraith*, 22 Occ. N. 76.

Replevin for Books and Papers — Master and servant — Common knowledge. *Morang* v. *Hopkins*, 2 O. W. R. 285, 703.

Residence of Husband of Defendant—*Motion—Costs*.]—A woman sued as a widow who pleads that her husband is still living, must indicate the domicil or actual residence of her husband, and if she swears that she does not know it, she will be ordered to pay the costs of a motion for particulars. *Merrill* v. *Laprade*, 6 Q. P. R. 271.

Seduction — *Special Damage—Stage of Action—Cross-examination on Affidavit.*]—In an action for seduction, where the defendant denied upon affidavit the plaintiff's allegations, an order for particulars to be given by the plaintiff was made before the defence was filed. Knight v. Engle, 61 L. T. R. 780, followed. Such affidavit being filed as an evidence of good faith only, and it not being the duty of the Court to determine on the motion the truth of the facts deposed to, an enlargement of the motion for cross-examination was refused. *Gambell* v. *Heggie*, 24 Occ. N. 91, 2 O. W. R. 1174, 3 O. W. R. 49, 412. *A.* v. *B.*, 7 O. L. R. 73.

Statement of Claim—Action for negligence — Defects in electrical appliances — Examination for discovery. *Stone* v. *Ottawa Electric Co.*, 2 O. W. R. 984.

Statement of Claim — Action to set aside resolution of shareholders of company —Allegation of non-compliance with Companies Acts — Submission to Court. *Maclean* v. *Wood*, 1 O. W. R. 763.

Statement of Claim — Conversion of logs—Pleading over—Trial—Examination for discovery—Damages. *Cleveland Sarnia Co.* v. *Miers*, 6 O. W. R. 780.

Statement of Claim — Facts within knowledge of defendants—Evidence in arbitration. *Kathbun Co.* v. *Standard Chemical Co.*, 2 O. W. R. 36, 385.

Statement of Claim — Information for purpose of pleading — Trial — Discovery. *Becker* v. *Dedrick*, 2 O. W. R. 786.

Statement of Claim—Trade mark—Infringement. *Morrison* v. *Mitchell*, 709, 1 O. W. R. 709, 838.

Statement of Defence — Action on foreign judgment. *Molsons Bank* v. *Hall*, 5 O. W. R. 625.

Statement of Defence — *Assault — Wrongful Dismissal — Justification.*]—Where in an action by a clerk against his former employer, an hotel keeper, for an alleged assault and for arrears of wages, the defence was that the plaintiff, contrary to his duty, was disrespectful and uncivil to several of the guests, whereby they left and refused to further patronize the hotel, the plaintiff was held entitled to particulars of the names of such guests. *Scott* v. *Membery*, 22 Occ. N. 122, 3 O. L. R. 252.

Statement of Defence—Application before examination for discovery—Particulars for pleading or trial—Affidavit. *Dunston* v. *Niagara Falls Concentrating Co.*, 4 O. W. R. 218, 239.

Statement of Defence — Material on application for—Issue joined. *Uda* v. *Algoma Central R. W. Co.*, 1 O. W. R. 246.

Street Railway—Negligence of servants —Defective appliances. *Brittain* v. *Toronto R. W. Co.*, 3 O. W. R. 823.

Striking out or Amending—*Farmers' L. and S. Co.* v. *Scott*, 2 O. W. R. 23.

Test Action — *Substitution — Order.*]—Where particulars of the statement of claim in a test action are struck out on an appeal to the full Court, and full and true particulars ordered to be given, the plaintiffs may deliver their particulars in another action which has since been settled on as the test action; and an order obtained in Chambers which has the effect of nullifying in part the full Court order will be set aside. *Leadbetter* v. *Crow's Nest Pass Coal Co.*, 10 B. C. R. 404.

Time for Service—*Dies Non—Filing.*]—Particulars ordered to be furnished within a certain delay, may, if such delay expires on a dies non, be furnished on the next judicial day. 2. It is sufficient that particulars be served upon the opposite party within the delay fixed without being filed in Court, and such particulars will not be struck out of record because they were only filed in Court on the day following that of their service upon the opposite party. *Germain* v. *Hurteau*, 5 Q. P. R. 380.

Undue Influence.]—A party alleging undue influence will be required to give particulars of the acts thereof. Lord Salisbury v. Nugent, 9 P. D. 23, considered. *Hopper* v. *Dunsmuir (No. 3)*, 10 B. C. R. 159.

Vendor and Purchaser — *Action en Garantie — Concealed Defects.*]—An allegation of concealed defects in an action en garantie by a purchaser against his vendor, is sufficient without other particulars, when a copy of the declaration in the principal action is annexed to the demand en garantie. *Goltman* v. *Hoare*, 5 Q. P. R. 321.

Vendor and Purchaser — *Action for Price of Land—Plea—Fraud of Vendor — Quantity of Land.*]—A defendant, sued for the price of land sold, must indicate, if he complains of having been induced to sign the agreement for purchase by reason of fraud of the vendor, the particulars of that fraud. 2. A defendant who complains that the extent

of the lands bought by him was not mentioned in the agreement for sale, must indicate their true extent. *Prefontaine* v. *Bergeron*, 5 Q. P. R. 133.

PARTIES.

I. Addition of, 1237.

II. Joinder, Misjoinder, and Non-joinder, 1238.

III. Third Parties, 1247.

IV. Other Cases, 1250.

I. Addition of.

Consent—Verification by Affidavit—Identity of names. *Webling* v. *Fick*, 1 O. W. R. 203.

Distinct Causes of Action—Election to proceed with one. *Plummer* v. *Sholdice*, 1 O. W. R. 789.

Fraud — *Partners — Company Name — Affidavit—Information and Belief — Pleadings.*]—The plaintiff, having recovered judgment against an incorporated company for an amount claimed for services rendered, under a contract, but not having been able to realize anything upon the judgment, brought this action against the person who had signed the contract as president, for damages for fraud, and alleged that at the time the contract was made, the company had ceased to do business as such, but that the defendant had formed a partnership with L. and C. and the partnership had acquired the property of the company, and was doing business under the company's name, and had obtained the benefit of the plaintiff's services by fraudulent concealment:—Held, that the plaintiff was entitled to add L. and C. as defendants, but not the company. Semble, that affidavits must state the source on which belief is founded, but here the statement of claim shewed the facts, and it was not necessary to look at the affidavit. *Chong* v. *McMorran*, 8 B. C. R. 261.

Litigation between Agents — *Principals Added.*]—T. sued McM. as the drawer of a bill of exchange payable to T.'s order, with an alternative claim against McM. on a guaranty that the bill would be paid. T. was the manager of the P. C. line, of Seattle, which owned the steamer Mexico, and the defendant was the agent of the D. and W. H. N. Co., and these two principals had through T. and McM. entered into a charter-party providing that the steamer Mexico should carry certain freight, for which the D. and W. H. N. Co. agreed to pay. McM. alleged that he gave the bill of exchange sued on along with the guaranty to T. as the balance of the freight moneys due under the charterparty, and the company set up a claim for demurrage, and advised McM. to pay. On an application made by McM. and the company, an order was made adding the company as a defendant, and giving leave to counterclaim against P. C. line:—Held, on appeal, that the order was properly made, as the real parties in interest should be brought before the Court. *Trowbridge* v. *McMillan*, 22 Occ. N. 421, 9 B. C. R. 171.

Separate Causes of Action—*Joinder—Rules 185, 186, 187, 192—Third Party Notice —Indemnity.*]—The plaintiff sued to recover the amount of a book debt assigned to him. The defendant admitted nothing, and pleaded payment and set-off:—Held, that the plaintiff was properly allowed to add as a party defendant the assignor of the alleged debt, and to make a claim against him, in the event of the original defendants succeeding in their defence, basing such claim upon an alleged warranty or a total failure of consideration. Rules 185, 186, 187, 192 discussed. Tate v. Natural Gas and Oil Co., 18 P. R. 82, and Evans v. Jaffray, 1 O. L. R. 614, followed. Smurthwaite v. Hannay, [1894] A. C. 494, Thompson v. London County Council, [1899] 1 Q. B. 840, and Quigley v. Waterloo Manufacturing Co., 1 O. L. R. 606, distinguished. Held, also, that the added defendant was properly allowed to give a third party notice to a bank, upon his allegation that he acted only as the bank's agent in assigning the debt. Confederation Life Association v. Labatt, 18 P. R. 266, followed. *Langley* v. *Law Society of Upper Canada*, 22 Occ. N. 99, 3 O. L. R. 245, 1 O. W. R. 143, 718.

Separate Causes of Action—*Joinder—Rules 186, 192.*]—Where the plaintiff sought to join in one action the original and added defendants, in order that he might recover against the original defendants damages for breach of an alleged warranty of title and quiet enjoyment of the property in question, if it should appear that the added defendants rightfully dispossessed him of it, or, if it should appear that the latter were wrong-doers, that he might recover from them damages for the conversion of the property, his motion for an order to add them was refused:—Held, that the causes of action were entirely separate, and there was no right to join them even as alternative causes. Thompson v. London County Council, [1899] 1 Q. B. 840, and Frankenburg v. Great Horseless Carriage Co., [1900] 1 Q. B. 504, followed. Child v. Stenning, 5 Ch. D. 695, commented on and distinguished. *Quigley* v. *Waterloo Manufacturing Co.*, 21 Occ. N. 240, 336, 1 O. L. R. 606.

Specific Performance — *Several Purchasers.*]—Where the owner of property authorized two agents to make a sale for him, and each of them entered into a contract for sale:—Held, that in a suit by one purchaser for specific performance, the other had a right, on his own application, to be added as a party defendant. *Bryce* v. *Jenkins—Ex p. Levy*, 8 B. C. R. 32.

II. Joinder, Mis-joinder, and Non-joinder.

Adding New Plaintiff—New cause of action—Rule 26. *Hogan* v. *Bactz*, *Hogan* v. *Bactz and Taylor* (Y.T.), 1 W. L. R. 393.

Adding New Plaintiff without his Consent—Aiding original cause of action—New cause of action—Bona fide mistake — Account—Bank — Excessive interest—Voluntary payment—Action by receiver and judgment creditors—Addition of judgment debtor. *Ritchie* v. *Canadian Bank of Commerce* (Y. T.), 1 W. L. R. 499.

Addition of Party — Alternative relief. *Castle* v. *Chaput*, 2 O. W. R. 499.

Alternative Claims—*Rule 186.*] — A machine sold by the plaintiffs was burnt while in the premises of the defendant railway company at the place for its delivery to the purchaser. The plaintiffs brought this action against the railway company as carriers for the value of the machine and in the alternative against the purchaser for the price:—Held, that this could not be done, the relief claimed against the railway company being based on the assumption that the title to the machine was in the plaintiffs, and that against the purchaser on the assumption that title had passed to him. Quigley v. Waterloo Manufacturing Co., 1 O. L. R. 606, and Evans v. Jaffray, 1 O. L. R. 614, applied. *Chandler and Massey, Limited,* v. *Grand Trunk R. W. Co.,* 23 Occ. N. 172, 194, 5 O. L. R. 589.

Application to Strike Out—*Matter of Substance.*]—An objection that one joined as plaintiff in an action has no title to maintain the action, is matter of substance which should be raised on the pleadings as provided by Rule 259, and is not a proper subject for an application to strike out parties under Rule 185. *Morang* v. *Rose,* 22 Occ. N. 168, 3 O. L. R. 354.

Assignee of Chose in Action—*Transfer before Service of Process in Action by Assignor — Dilatory Exception.*]—A party sued upon a claim which was, before process in action served, transferred to another, may ask, by dilatory exception, that the assignee be added as plaintiff to the action. *Honan* v. *Anderson,* 7 Q. P. R. 170.

Assignee of Claim—*Intervention.*] — A judgment ordering a plaintiff to add the assignee of the claim as co-plaintiff, is not satisfied if the said assignee merely intervenes to protect his rights, and declares that he acquiesces in the plaintiff's conclusions, and that his only interest in the case is to have any sum in which the defendant may be condemned, paid to him, intervenant. *Honan* v. *Anderson,* 7 Q. P. R. 288.

Cause of Action—*Exception to Form.*]—Where two plaintiffs complain of the same grievances, and each one invokes a right of action proceeding from the same source, and their conclusions are to the same effect, the claims may be joined together by the plaintiffs, who can institute them only as a single suit, and in such a case the suit will not be dismissed upon exception to form. *Slater Shoe Co.* v. *Trudeau,* 5 Q. P. R. 314.

Cause of Action—*Injuries Received in Same Collision—Adding Plaintiff.*]—Rule 206 is to be read in connection with Rule 185, and parties to an action who might have been joined under the latter may be added by way of amendment under the former. In an action against a street railway company for damages for running an electric car into the plaintiff and his horse and waggon in which his son was seated with him, who was also injured, the son was added as a party plaintiff in an action already commenced by the father alone. *Liddiard* v. *Toronto R. W. Co.,* 23 Occ. N. 156, 5 O. L. R. 371, 2 O. W. R. 145.

Causes of Action—*Partnership Account —Conspiracy.*]—The relief sought against the defendant J. was an account and damages for breach of a partnership agreement between him and the plaintiff; and that sought against the other defendants was damages for the malicious procuring of the breach by the defendant J. and for conspiracy:—Held, that, despite the form of pleading, there was such unity in the matters complained of as between all parties as justified the retention of the co-defendants. Kent Coal Exploration Co. v. Martin, 16 Times L. R. 486, specially referred to. *Evans* v. *Jaffray,* 21 Occ. N. 336, 1 O. L. R. 614.

Causes of Action—*Pleading — Lease — Action to Set Aside—Fraud on Creditors—Right of Assignee for Creditors—Termination of.*]—One of the defendants mortgaged land to the plaintiff bank, and then made an assignment under R. S. O. 1897 c. 147, to the other plaintiff for the benefit of creditors. The assignee conveyed to the bank the equity of redemption in the land. This action was then brought to have a lease of the land made by the mortgagor to his co-defendant declared void. The bank alleged that the lease, though dated before the mortgage, was not made until after it; and both plaintiffs alleged that the lease was made voluntarily when the lessor was, to the knowledge of the lessee, in insolvent circumstances, and with intent to defraud creditors:—Held, that the right to relief upon the latter ground could be claimed only by the assignee under s. 9 of the Act, and his right terminated when he so dealt with the estate as to render the relief useless to it; and therefore the assignee was improperly joined as a plaintiff. Semble, that the proper order would be to strike out the name of the assignee as plaintiff and the claim to set aside the lease as fraudulent against creditors. The order made below, 7 O. L. R. 613, putting the plaintiffs to their election as to which claim they would proceed upon, was, however, affirmed. *Bank of Hamilton* v. *Anderson,* 24 Occ. N. 347, 8 O. L. R. 153, 3 O. W. R. 301, 380, 709.

Company — Action by shareholder of, against directors—Account of profits—Addition of company—Amendment. *Meyers* v. *Cain,* 6 O. W. R. 834.

Company—Action to enforce contract and for breach — Addition of company as co-plaintiff—Company not in existence when contract made—Principal of cestui que trust — Pleading—Amendment. *Cass* v. *McCutcheon* (Man.), 1 W. L. R. 435.

Contract — *Undivided Share in Mining Right—Rescission—Parties to Contract.*]—A person who has acquired an undivided share in a mining right, has no right of action to set aside the contract by virtue of which his share has been transferred to him, without bringing before the Court all the parties to the contract. *Jeannotte* v. *Caron,* Q. R. 23 S. C. 540.

Contract for Sale of Land—Specific performance—Principal and agent—Damages. *Lee* v. *Britton,* 4 O. W. R. 311.

Counterclaim—Action of ejectment — Counterclaim for declaration of title—Heir-at-law of deceased owner—Administrator — Pleading — Defences—Striking out. *O'Connor* v. *O'Connor,* 5 O. W. R. 701, 751.

Deed — *Rectification—Cancellation — Independent Claims—Election.*]—In considering the propriety of the joinder of defendants, the nature of the action and of the relief asked must be considered. If that relief is of an equitable nature, all parties must be before the Court whose presence is necessary to give the plaintiff if successful the full measure of his rights, assuming that the action is not multifarious. On the other hand, the plaintiff cannot join two independent claims merely because they happen to relate to the same subject matter, there being no connection otherwise between the parties. In an action claiming as against one defendant rectification of a deed and as against the other defendant cancellation as a cloud on the plaintiff's title of a deed from a third person to that defendant of part of the land which, as the plaintiff alleged, should have been included in the deed of which rectification was sought, an order was made as in Chandler and Massey v. Grand Trunk R. W. Co., 5 O. L. R. 589, requiring the plaintiff to elect as against which defendant he would proceed. *Andrews* v. *Forsythe*, 24 Occ. N. 134, 7 O. L. R. 188, 3 O. W. R. 307.

Different Causes of Action—Sale of goods—Claim for price — Claim for loss. *Chandler and Massey (Limited)* v. *Grand Trunk R. W. Co.*, 5 O. L. R. 589, 2 O. W. R. 286, 407, 427, 1044.

Distinct Causes of Action—Husband and wife—Wages of wife—Money expended by husband. *Pask* v. *Kinsella*, 2 O. W. R. 824.

Distinct Causes of Action—Personal injuries—Collision. *Liddiard* v. *Toronto R. W. Co.*, 5 O. L. R. 371, 2 O. W. R. 145.

Exception for want of—*Time for Presentation.*]—A dilatory exception, based upon the fact that all the parties interested and whose presence is necessary are not before the Court, must be presented within three days after a judgment maintaining an exception to the form, and dismissing the action as to one of the defendants, saving recourse. *Soucy* v. *Industrial Printing Co.*, 5 Q. P. R. 121.

Foreign Unincorporated Association —*Money of Union—Judgment Against Members of Unincorporated Association in Representative Action—Trust.*]—Action against an association. Certain members were authorized by the Court to defend the action on behalf of themselves and all other members:—Held, 1. That the association was not a corporation, individual, partnership, nor a quasi-corporate body. 2. That its members could not be sued by their adopted name. Certain costs were ordered to be paid by defendant members. The plaintiffs sought to garnishee a certain account at the Dominion Bank, headed "Amalgamated Sheet Metal Workers' Union, No. 30":—Held, could not be garnished, as order that the defendants shall pay money, without more, cannot be enforced against the property of any one except the defendants themselves. *Metallic Roofing Co. of Canada* v. *Local Union, No. 30, Amalgamated Sheet Metal Workers' International Association*, 1 O. W. R. 573, 644, 2 O. W. R. 183, 266, 819, 844, 5 O. W. R. 95, 709, 6 O. W. R. 41, 283, 5 O. L. R. 424, 9 O. L. R. 171, 10 O. L. R. 108.

Former Owners—*Action to Fix Boundaries—Motion to Add Defendants.*] — The defendants, before pleading, applied for an order that the plaintiff join several owners farther back, alleging that the boundaries of the lands adjoining could not be laid out unless that be done, and asked for a stay of proceedings meanwhile:—Held, that the motion could not now be granted; that the Court could not now compel the plaintiff to go to the expense of joining these owners. The defendants themselves could, at their own risk, summon them, if they thought proper. *Desrivières* v. *Richardson*, Q. R. 26 S. C. 128.

Fraudulent Conveyance—Action to set aside — Grantor — Partnership—Motion to strike out name of defendant—Claim of some plaintiffs, but not of all—Costs. *Turner* v. *Van Meter* (N.W.T.), 2 W. L. R. 257.

Grantor and Grantee—*Declaration of Ownership of Property—Claim for Value.*]—A plaintiff who asks to be declared owner of part of a certain property cannot, in the same action, ask as a subsidiary remedy, that the defendant's auteur be ordered to pay him the value of that property. *Poirier* v. *City of Montreal*, 7 Q. P. R. 246.

Indorsers of Promissory Notes Sued on—Allegation of payment—Third party procedure. *Canadian Bank of Commerce* v. *Butler* (Y.T.), 1 W. L. R. 173.

Joint or Several Liability—Causes of action—Separate torts—Election. *Grandin* v. *New Ontario S. S. Co. and Canadian Northern R. W. Co.*, 6 O. W. R. 521, 553.

Municipal Corporation—Causes of action — Municipal Act, s. 609 — Rule 186. *Baines* v. *City of Woodstock*, 6 O. W. R. 601, 10 O. L. R. 694.

Mutual Aid Societies—*Action by Local Court of Foreign Society—Exception to the Form.*]—A local Court of a foreign mutual aid society, cannot, at least if it has not complied with the requirements of the provincial Act governing such societies, bring an action in its own name, and such an action will be dismissed on exception to the form, but without costs against the plaintiff society, considered as non-existent. *Court St. Charles No. 167 of the Order of Catholic Foresters* v. *Gibeault*, 7 Q. P. R. 95.

Negligence—Personal injuries—Separate causes of action — Breach of contract to carry safely—Railway company—Breach of statutory duty. *Geiger* v. *Grand Trunk R. W. Co.*, 4 O. W. R. 152.

Negligence — *Death of Plaintiff's Husband—Children of Deceased—Stay of Proceedings.*]—In an action by a widow for damages caused by the death of her husband through the negligence of the defendants, the defendants cannot ask that the proceedings be suspended until the children of the deceased have been made parties to the suit. *Thomson* v. *Singer Manufacturing Co.*, 6 Q. P. R. 358.

Nullity of Action—*Dilatory Exception.*] —The default of a plaintiff to bring before the Court a person who is a necessary party to the action does not render the action void as a matter of law, and such default should

be invoked by a dilatory exception, and not by way of exception to the form. *McNally* v. *Préfontaine*, Q. .R 11 K. B. 370.

Overflow of Water — *Damage by — Separate Causes of Action — "Combined" Acts of Defendants — Election or Amendment.*] — Different defendants cannot be brought before the Court in the same action where the real causes of action that exist against them are separate. In this case the plaintiff sued for the obstruction of a watercourse which passed through her property, causing it to be overflowed. The town corporation were charged by the plaintiff with having increased the volume of water, while also obstructing the watercourse. The defendant Webb was charged with having obstructed the watercourse where it passed through his land. And it was charged that the natural effect of the combined acts of the defendants was to cause the watercourse to become obstructed and to overflow the plaintiff's land. But it was not alleged that these acts were done in concert, or that the defendants were jointly concerned in their commission:—Held, that the plaintiff must elect against which of the two defendants she would continue the action, or amend by setting up a joint cause of action. *Hinds* v. *Town of Barrie*, 24 Occ. N. 4, 6 O. L. R. 656, 2 O. W. R. 995.

Partnership—Persons interested—Mining ventures—Cautioner. *McLeod* v. *Dawson*, 6 O. W. R. 487.

Principal and Agent — *Action for Breach of Contract — Alternative Claim — Pleading.*]—In an action for breach of contract the plaintiff may join as defendants both the agent through whom the contract was made and his undisclosed principal, claiming alternatively against one or the other; the statement of claim in such case should read "the claims alternatively against one or other of the defendants," rather than "the plaintiff claims damages;" and, when the contract is in writing, the plea of a defendant, that, if any agreement was entered into between the plaintiff and defendant, it was entered into by such defendant as agent of the other defendant, and not on his own account, and that, at the time, the plaintiff knew he was so acting, is sufficiently pleaded, there being nothing to prevent the inference that the fact set forth in such allegation appeared on the face of the correspondence forming the contract. *Hart* v. *Bissett*, 37 N. S .Reps. 320.

Principal and Agent—*Bailiff—Conversion—Counterclaim — Judicature Ordinance.*] —In an action of conversion against a bailiff, an application under s. 45, J. O. 1893, by the bailiff's principal to be added as a defendant, on the grounds that the bailiff was entitled to be indemnified, and the principal was entitled to set up, by way of counterclaims, certain claims against the plaintiff not arising out of the conversion complained of, was refused. The plaintiff brought an action against the defendant for conversion of certain household furniture. The defendant applied to add or substitute, as a defendant, one O., on whose behalf he had, as bailiff, seized and sold the goods in question, alleging, (1) that O. had agreed to indemnify him against the seizure, and (2) that O. desired to be added or substituted as defendant for the purpose of counterclaiming against the plaintiff certain claims, none of which appeared to arise out of the subject matter of the action: — Held, that the Court had no jurisdiction to substitute or add O. as a defendant, as it was not necessary for the determination of the question in dispute, he being only indirectly interested in the result, and could be brought in by the defendant as a third party; and that he could not be added for the purpose of setting up a counterclaim which did not arise out of, and was not involved in, the subject matter of the action. *Randall* v. *Robertson*, 2 Terr. L. R. 332.

Principal and Agent—*Order 16, Rules 4, 6.*]—Action against an agent and his undisclosed principal for damages for breach of contract. In the defences a point of law was raised that it was not competent to the plaintiff to join both in the same action:—Held, that under the old practice it was competent to the plaintiff to sue the agent in one action and the principal in another, but his remedy was limited to a judgment in one action. Having regard to these principles, Order 16, Rules 4 and 6, are wide enough to admit of the action being brought against both. The claim is not in the alternative. The plaintiff cannot recover against both, and must make his election before judgment. Honduras R. W. Co. v. Tucker, L. R. 2 Ex. 305, and Thompson v. London County Council, [1899] 1 Q. B. 845, referred to. *Hart* v. *Bissett*, 23 Occ. N. 335.

Recovery of Moneys Paid by Mistake.] — M. brought three separate actions against three insurance companies on three policies of insurance, two on the hull of defendant's vessel, and the third on freight. The three actions were tried together before a jury, but were not consolidated. Upon the findings of the jury judgment was entered for the plaintiff in each action separately with costs. The defendants moved in each action for a new trial, and these motions were dismissed, separate orders being issued. The defendants appealed in each action to the Supreme Court of Canada; and the three appeals were all heard together, but not consolidated. The appeals were allowed on payment by the defendants of the costs of the former trial within thirty days after taxation. There being some uncertainty as to the exact terms of this judgment, the defendants paid the plaintiff's solicitors, under protest, the amount which the latter considered was payable to them as costs under such judgment, the defendants reserving the right to require repayment of any part of the amount paid. In an action on behalf of the three companies jointly to recover part of the money paid as having been paid by mistake:—Held, that the claims made against the three companies and their supposed liability being several, and the money to pay the costs having been contributed severally, the implied promise to pay back was several, and the title to the moneys was several, and therefore the companies could not be joined as plaintiffs in one action; but they should have leave, on terms, to amend by striking out two of the companies and leave to tax the costs of the trial severally against each company. *Insurance Company of North America* v. *Borden*, 34 N. S. Reps. 47.

Replevin—*Equitable Title—Striking Out Name of Joint Plaintiff.*]—In an action of replevin, the property replevied consisted of

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two land scrips which had been issued to the defendant B., and which it was alleged she had sold to McM. and allowed him to get possession of, having given him a written contract assigning them to him, but which scrips, it was alleged, she or her husband and a co-defendant afterwards wrongfully seized and kept. It was alleged that McM. sold the scrips to one H., but did not assign to him the contract with B., and that H. sold the scrips to the plaintiff W. The action was brought by W. and McM. On his examination for discovery McM. stated that his sole interest in the scrips when the action was brought was to see that W. got them and to protect himself against claims by H. or W. if the scrips should not be located. The defendants moved to strike out McM.'s name on the ground that the above shewed that he had no interest in the subject matter of the action, and claimed no property in the scrips:—Held, that as between McM. and B., McM. had probably the legal title to the scrips. If so, he was properly joined as a plaintiff. If, however, his interest was equitable only, then Carter v. Long, 26 S. C. R. 430, seemed to be an authority that replevin can be brought on an equitable title. *Wright* v. *Rattley*, 24 Occ. N. 278.

Representatives of Insured — *Action against Assignee of Life Insurance Policy—Cancellation.*]—The cessionnaire of an insurance policy, sued for cancellation thereof, cannot ask, by dilatory exception, that the heirs and representatives of the party on whose life and in whose favour the policy issued, should be called in to defend the action. *North American Life Assurance Co.* v. *Lamothe*, 7 Q. P. R. 159.

Separate Causes of Action — Damage by overflow of watercourse — "Combined" acts of defendants—Election or amendment. *Hinds* v. *Town of Barrie*, 1 O. W. R. 775, 2 O. W. R. 995.

"Series of Transactions" — *Common Notice.*]—The allegation that the defendants have been actuated by the same motive in each of a number of similar transactions between them and distinct plaintiffs is not sufficient to constitute the transactions a "series" within the meaning of Con. Rule 185, so as to enable the plaintiffs to join in one action. Order of Master in Chambers, 3 O. W. R. 621, affirmed. *Mason* v. *Grand Trunk R. W. Co.*, 24 Occ. N. 325, 8 O. L. R. 28, 3 O. W. R. 621, 810.

Several Plaintiffs — Distinct causes of action—Joinder — Election — Life insurance policies. *Honsinger* v. *Mutual Reserve Life Ins. Co.*, 5 O. W. R. 528.

Several Torts—*Penalties—Company and Agent—Election.*] — Claims against two or more defendants in respect of their liability for several torts cannot be joined in the same action. Where, therefore, an action was brought against an extra-provincial company for penalties for carrying on business in Ontario without a license, and against an individual for penalties for carrying on the company's business in Ontario during the same period as its agent, the plaintiffs were ordered to elect as against which defendant they would proceed and the action was dismissed with costs as against the other. *Appleton* v. *Fuller*, 24 Occ. N. 25, 6 O. L. R. 683, 2 O. W. R. 1083.

Shareholder in Company — Action against company — Estoppel — Conduct as director—Refusal to add another shareholder. *Stickney* v. *Buckel*, 6 O. W. R. 469, 522.

Slander—Several causes of action. *McEvoy* v. *Wright*, 3 O. W. R. 428.

Tax Sale — *Joint Wrong-doers.*] — In an action to set aside a tax sale deed obtained by the defendant T. and for an account and damages against the defendant municipality, the tax sale was impeached on the grounds, amongst others, that there were no taxes due, that there was no proper assessor's roll or collector's roll, and that the provisions of the Municipal Clauses Act respecting tax sales had not been observed:—Held, that the municipality were not improperly joined as parties defendant. *Lasher* v. *Tretheway*, 24 Occ. N. 260, 10 B. C. R. 438.

Trustee and Cestui que Trust — *Amendment—Fraudulent Conveyance—Estoppel.*]—In an action brought against a husband alone for the sale of land vested in his wife by an unregistered deed, and which the plaintiff contended was bound by a registered certificate of judgment against the defendant, the plaintiff applied, after the case had been set down for trial, for leave to amend his statement of claim by adding the wife as a party defendant, and by alleging that the land in question was the defendant's property, and had been mortgaged by him with other lands to a bank; that, after the bank had commenced an action for foreclosure of the mortgage, it was agreed between it and the defendant that the bank should take a final order apparently foreclosing the defendant's title to all of the mortgaged lands, but should accept in actual satisfaction of its claim the mortgaged lands other than the parcel in question, and should hold the latter for the defendant; that such agreement was carried out; and that, after getting such final order, the bank, at the defendant's request, conveyed the parcel in question to the defendant's wife, who gave no consideration for it, but received and had always since held it solely as a trustee for the defendant. When he began the action the plaintiff had knowledge of the facts thus sought to be set up by amendment:—Held, that leave to amend as asked should be granted, on payment of costs, and that both husband and wife would be proper parties to such an action, notwithstanding that the defendant in his statement of defence had denied that he had any interest in the land. Such denial could not afterwards be set up as an estoppel against him in favour of his wife, or even in favour of the plaintiff, but would only be evidence that at one time, and for certain purposes, he had repudiated having any such interest. Bank of Montreal v. Black, 9 Man. L. R. 439, distinguished. *Shiels* v. *Adamson*, 24 Occ. N. 158.

Will—*Action to Set Aside—Heirs—Executor—Pleading—Exception.*] — A plaintiff alleging nullity of a will is not obliged to make all the heirs parties, but, when indivisible debts or rights are in question, the party served may, by a declinatory exception, stay the suit until all the heirs have been brought before the Court. 2. An executor sued for retaining the property of the estate after his functions have ceased, cannot, by exception to the form, demand a dismissal of an action

which has been brought against him personally. *Coleman* v. *Stevens*, Q. R. 25 S. C. 44.

Will — Setting aside — Establishment of earlier will—Beneficiaries—Inconvenience — Jurisdiction. *McDonald* v. *Park*, 2 O. W. R. 455, 808, 812, 972.

III. THIRD PARTIES.

Action to Set Aside—Tax sale—Claim by purchaser to relief over against municipality. *Farmers' Loan and Savings Co.* v. *Hickey*, 1 O. W. R. 695.

Cancellation of Lease—*Premises Uninhabitable — Action against Tenant — Making Landlord Party en Garantie.*] — Where the lessee is sued by his sub-tenant for cancellation of the lease, on the ground that the premises have become uninhabitable through fire, and the lessor is bound to repair and reconstruct the premises, the lessee has the right to call in the lessor in warranty. *Imperial Button Works Limited* v. *Montreal Watch Case Co.*, 7 Q. P. R. 217.

Company — *Directors — Partnership* — Illegal payment — Setting aside third party notice. *Wade* v. *Pakenham*, 2 O. W. R. 1183.

Company — *Officer of.*] — In an action against a company for a declaration that the plaintiff was the owner of certain shares in the company, the company applied to have its president added as a third party, on the ground that he was the real defendant and was responsible for the action:—Held, that the defendant's remedy was by third party notice. *Henley* v. *Reco Mining and Milling Co.*, 7 B. C. R. 449.

Cross-demand—*Principal Demand—Contract.*]—When a cross-demand arises from the same cause as the principal demand, the cross-plaintiff may have the proceedings stayed for sufficient time to bring before the Court a third person who was a party to the contract upon which the principal demand is based. *Larue* v. *Gerth*, 5 Q. P. R. 322.

Defective Construction of Building—*Builders—Privity.*] — A defendant sued for damages for injury to the plaintiff by reason of the defective construction of a roof, may bring in as third parties en garantie the persons whom he has employed to construct the roof and who have done it badly. 2. An inscription in law by the third parties brought in, alleging want of privity, will, in these circumstances, be dismissed with costs. *Dagenais* v. *Caron*, 5 Q. P. R. 42.

Defendant en Garantie—*Right to Appeal from Principal Judgment.*]—A defendant en garantie, in the case of a formal guaranty, may appeal from the judgment in the principal action, although he has refused, in the first instance, to make common cause with the principal defendant. Desjardins v. Robert, Q. R. 1 Q. B. 286, followed. *Banque Jacques-Cartier* v. *Gauthier*, Q. R. 10 K. B. 243.

Delay—Discharge of order—Costs. *Louth* v. *Riley*, 6 O. W. R. 769.

Garantie—*Right of Defendant en Garantie to Intervene—Judgment by Default against Him—Right of Plaintiff to Enforce—Right of Principal Defendant.*]—Although ordered to intervene and take up the defence of the action in the place of the defendant in the principal action, a defendant "en garantie" is not obliged to do so. There is no privity between the plaintiff and the defendant en garantie ordered to take up the defence of the principal defendant, and who has neither appeared nor pleaded in the principal action, and therefore the principal plaintiff cannot proceed against him. The principal defendant may require that the defendant "en garantie," ordered to take up his defence in the principal action, and who has not intervened, indemnify him from the judgment rendered against him in favour of the principal plaintiff. *Andrews* v. *Larocque*, Q. R. 27 S. C. 107.

Garantie—*Pleading—Defence.*] — A third party brought in by the defendant en garantie may take part in the principal action and do what is necessary for the preservation of his rights, but he cannot, after the defendant has appeared and pleaded in the action, file a defence absolutely identical with that filed by the defendant. *Dryden* v. *Yuile*, Q. R. 24 S. C. 315, 6 Q. P. R. 58.

Indemnity — *Directions — Order allowing Notice—Appeal.*]—In an action to recover damages for the death of an employé of the defendants, who was killed at a crossing of the defendants' railway with another railway, the defendants obtained an ex parte order allowing them to serve a third party notice upon the other railway company, claiming indemnity under an agreement whereby the latter company were allowed to put in the crossing at the point where the accident happened, upon their indemnifying the defendants against any claim for damages arising during the progress of the work. The defendants asserted and the other company denied that the accident in question happened during the progress of the work: — Held, that it was desirable that the question as to the defendants' liability to the plaintiff should be established in such a way as to be binding upon the third parties, although all the matters in dispute between the defendants and the third parties could not be determined in the action. Baxter v. France (No. 2), [1895] 1 Q. B. 591, distinguished. Form of order giving directions as to the trial and questions of costs in such a case settled. Semble, referring to Baxter v. France, [1895] 1 Q. B. 455, 458, that it was the duty of the third parties, if they objected to being added, to appeal within due time against the order allowing the notice to be served upon them. *Holden* v. *Grand Trunk R. W. Co.*, 21 Occ. N. 533, 2 O. L. R. 421.

Indemnity or Relief Over — Sale of goods—Warranty. *Oshawa Canning Co.* v. *Dominion Syndicate*, 2 O. W. R. 221, 315.

Indemnity—*Trespassers — Tort-feasors.*] —The defendant entered into a contract with one Prince to cut timber on the property of the latter within certain defined boundaries. The defendant cut the timber, but it appeared that the title to the locus was in the plaintiff, who brought an action of trespass against the defendant. The defendant obtained leave to serve Prince with a third party notice, and upon application for directions, which was opposed by Prince:—Held, that the application must prevail; the rule that wrong-doers

cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an illegal act. *Weir* v. *Blois*, 21 Occ. N. 481.

Indemnity—Trial of issues—Discovery — Directions. *Deseronto Iron Co.* v. *Rathbun Co.*, 2 O. W. R. 414, 418.

Notice — *Service Out of Jurisdiction — Partners—Amendment — Irregular Affidavit.*] —After service of the writ the defendant applied for and obtained under Rule 60 (J. O. 1898), leave to issue and serve ex juris a third party notice on a partnership carrying on business without and not within the Territories. The notice was directed to them under the partnership name, and not to the several partners as individuals, and was served upon an officer of the partnership, and not upon any of the partners individually:—Held, that the order giving leave to issue the third party notice to a firm not carrying on business within the jurisdiction, in the firm's name, was not authorized under Rule 60; (2) that such a notice must be personally served upon the members of the firm, where the firm does not carry on business within the jurisdiction. Amendment of the proceedings was allowed. An affidavit incorrectly intituled was, under the authority of Rule 306 (1898), J. O., received and filed. *Imperial Bank of Canada* v. *Hull*, 20 Occ. N. 291, 4 Terr. L. R. 331.

Notice — *Time — Enlarging — Rules 209, 353.*]—In an action for damages for trespasses to land and cutting down and removing timber and wood, the defendants in their statements of defence justified the acts complained of under agreements which they alleged authorized those acts, and to which the plaintiff's rights in the land were subject. The defendants served notice upon third parties claiming indemnity or relief over in respect of all liability which the defendants might be under to the plaintiff by reason of acts done by them on the faith of representations made by the third parties, who had sold to the defendants the standing timber on the land and the right to remove it, representing that they had acquired title from the owners under whom the plaintiff derived his title:—Held, that the third party notice was served too late (Rule 209), having been served not only after the time for the delivery of the defence, but after the pleadings were closed and the action entered for trial; and, under the circumstances, the time should not be enlarged by virtue of the provisions of Rule 353. Semble, that it was not a proper case for contribution, indemnity, or relief over, under Rule 209. *Parent* v. *Cook*, 22 Occ. N. 31, 110, 2 O. L. R. 709, 3 O. L. R. 350, 1 O. W. R. 366.

Notice—Time for service—Directions for trial—Motion—Costs. *Ontario Sugar Co.* v. *McKinnon*, 3 O. W. R. 64.

Order Allowing Service of Third Party Notice—Time for moving to discharge —Waiver by appearance—Objection taken on motion for directions as to trial. *Donn* v. *Toronto Ferry Co.*, 6 O. W. R. 920, 973, 11 O. L. R. 16.

Relief Over—*Identity of Claims.*]—The owner and occupant of a house in a town sued a gas company for damages alleged to have been sustained by reason of an escape of gas from the defendants' pipes upon the highway into the plaintiff's premises. The defendant served a third party notice upon the town corporation, alleging that the break in the pipes was caused by the negligence of the corporation in the course of construction of a sewer in the same highway:—Held, that there was no right to indemnity or relief over, within the meaning of Rule 209, as the damages which might be recovered by the plaintiff against the defendants were not the measure of the damages which might be recovered by the defendants against the third parties. *Miller* v. *Sarnia Gas and Electric Co.*, 21 Occ. N. 397, 2 O. L. R. 546.

Right to Contribution or Indemnity —*Application for Directions as to Trial— Warranty of Title.*] — The plaintiff brought action against the defendants for breach of warranty of title to a horse sold by the defendants to the plaintiff. The defendants, in pursuance of leave given, served a third party notice on G., from whom they had bought the horse, claiming to be indemnified by him to the extent of any damages recovered against them by the plaintiff, on the ground of breach of warranty of title by G.:—Held, that upon the application for directions as to trial, the Court should consider the defendants' right to contribution or indemnity, and if satisfied that they were not so entitled should refuse to give directions, which refusal will be tantamount to a dismissal of the third party from the action. Held, also, that in the circumstances the defendants' claim against G. was not properly one for contribution or indemnity, and that no direction as to trial should be given. *Bolduc* v. *Larose*, 5 Terr. L. R. 6.

Settlement of Action.]—After a third party had been brought in and the usual directions as to trial given, the action was settled as between the plaintiff and the defendants:—Held, that the defendants could not proceed to trial as against the third party, and the action was dismissed as against the third party with costs, without prejudice to the right of the defendants to bring an action against the third party. *Wheeler* v. *Town of Cornwall*, 22 Occ. N. 260, 4 O. L. R. 120.

IV. Other Cases.

Action Brought in Name of "C. & Co."—Sole plaintiff—Rules of Court. *Cummings* v. *Ryan*, 1 O. W. R. 149.

Action en Faux—*Person Profiting.*] — In a principal action to declare null a false document, just as in the case of an incidental inscription for the same purpose, it is not necessary to bring before the Court all the parties to the document alleged to be false, but it is sufficient to make a demand against the one who profits or is in a position to profit by such document. *Awde* v. *Chaurest*, 5 Q. P. R. 6.

Action to Cancel Registration of Document — *Registrar—Person Procuring Registration.*]—In a suit to set aside the registration of a document affecting real property, it is proper to make the registrar a party, especially when it is alleged that he has

treated as a right to real property that which was not in fact one. The neglect to make the one who has procured the registration a party is no ground for a defence in law. *Rochez* v. *Champagne*, 5 Q. P. R. 19.

Defendants by Counterclaim — *Addition of—Pleading.*]—The practice of the Supreme Court of the Territories permits a defendant to set up a counterclaim which raises questions between himself and the plaintiff, along with other persons, and to add such other persons as parties by counterclaim; the English practice respecting counterclaims contained in Order 21, rr. 11, 12, 13, 14, and 15, being in force in the Territories. *Robertson* v. *White*, 5 Terr. L. R. 311.

Defendants by Counterclaim—*Service Out of Jurisdiction—Cause of Action.*]—T., the British Columbia agent for the P. C. Line of Seattle, sued McM., the agent of the D. and W. H. N. Co., on a bill of exchange drawn by McM. on the company in favour of T. This bill was for the balance of freight moneys due under a charterparty entered into between the principals, and the company, having a claim against the P. C. Line for demurrage, obtained an order adding the company as party defendants, and giving them and McM. leave to deliver a counterclaim and serve it upon the P. C. Line (9 B. C. R. 171, 22 Occ. N. 421). An order was then made giving leave to McM. and the company to serve notice on the P. C. Line of the defence and counterclaim:—Held, that, as no cause of action or counterclaim against T. was shewn, there was no "action properly brought against some other person duly served within the jurisdiction," and hence there was no jurisdiction to take the order. *Trowbridge* v. *McMillan*, 9 B. C. R. 443.

Fraudulent Preference—*Action to Set Aside—Insolvent Debtor—Costs of Examination of, for Discovery.*]—A fiat will not be granted under Rule 932 of the King's Bench Act to tax to a plaintiff the costs of the examination of a defendant who was not a necessary or proper party to the action, although no objection on that ground was taken prior to the application for the fiat. An insolvent debtor who has made an assignment for the benefit of his creditors is neither a necessary nor a proper party to an action by the assignee to set aside a fraudulent preference given by him. Weise v. Wardell, L. R. 19 Eq. 171, and Bank of Montreal v. Black, 9 Man. L. R. 439, followed. Gibbons v. Darvill, 12 P. R. 478, distinguished. *Schwartz* v. *Winkler*, 22 Occ. N. 401, 14 Man. L. R. 197.

Interpleader Issue—Plaintiff in issue—Insurance moneys—Security for costs. *Bruce* v. *Ancient Order of United Workmen*, 4 O. W. R. 241.

Judgment for Costs—*Saisie-arrêt Issued by Solicitors—Distraction—Subsequent Proceeding by Original Party.*]—Where a saisie-arrêt is made in the name of the solicitors for the defendant in respect of costs for which there is distraction in their favour, a contestation of the declaration of the garnishee cannot be made in the name of the defendant himself. *Tapley* v. *Irving*, 6 Q. P. R. 223.

Mortgage Action—Death of plaintiff—Assignment of portion of interest—Revivor—Executors—Assignee—Costs—Reference—Rules 659, 753. *Sexton* v. *Peer*, 2 O. W. R. 845, 1144.

Motion to Add—*Examination of Solicitors — Order for—Summons—Affidavit—Subpœna.*] — Several actions for damages were brought against colliery owners by relatives of miners killed in an explosion, and the defendants applied to add the plaintiffs' solicitors as parties, and while the summons was pending they obtained under Rule 383 an order on summons, in support of which no affidavit was filed, for the examination of the solicitors as to what interest they had in the subject matter of the action:—Held, that the summons should have been supported by an affidavit shewing that it was probable that the solicitors had some interest in the subject matter of the litigation, and the order should not have been made as of course. A subpœna under Rule 383 cannot be issued without an order therefor. *Leadbeater* v. *Crow's Nest Pass Coal Co.*, 24 Occ. N. 103, 10 B. C. R. 206.

Municipal Corporation—*Authority to Use Name — By-law — Retainer — Ratification—Application to Dismiss.*]—Under s. 362 of the Municipal Act, R. S. M. 1902 c. 116, which provides that "the powers of the council shall be exercised by by-law when not otherwise authorized or provided for," a by-law is not necessary to authorize the commencement of an action, but a municipal corporation may give such authority by resolution under the corporate seal. Town of Barrie v. Weaymouth, 15 P. R. 95, Barrie Public School Board v. Town of Barrie, 19 P. R. 33, and Brooks v. Torquay, [1902] 1 K. B. 601, followed. Where an action has been commenced without authority, a subsequent ratification of the proceedings by a properly executed retainer will be a sufficient answer to an application by the defendant to dismiss the action, subject to the question of costs. Quære, whether a defendant has any locus standi under the present practice, to ask for the dismissal of an action on the sole ground that it has been brought without the authority of the plaintiff. *Town of Emerson* v. *Wright*, 24 Occ. N. 190, 14 Man. L. R. 636.

Numerous Defendants in the same Interest—*Appointment of Solicitor to Defend.*]—The object of Rule 200, which provides that, where there are numerous parties having the same interest, one or more of such parties may sue or be sued, or may be authorized by the Court to defend, on behalf of, or for the benefit of, all so interested, is to avoid the expense and inconvenience of bringing before the Court a numerous body of persons, all having the same interest; but does not authorize the making of an order by the Court, on the plaintiff's application, for the appointment of a solicitor to defend for a number of persons in the same interest who are already defendants to the action. *Ward* v. *Benson*, 22 Occ. N. 117, 3 O. L. R. 199, 1 O. W. R. 24.

Obligation to Provide Maintenance—*Joint or Several—Action for Aliments.*]—The obligation to provide maintenance is neither joint nor indivisible, and a party sued for aliments, cannot, by dilatory exception, stay the suit until another person equally

bound to furnish maintenance has been made a party. *Larocheile* v. *Lafleur*, 3 Q. P. R. 527.

Partnership—*Individual Partners—Multiplicity of Actions—Writ of Summons—Election—Appeal — Costs.*]—S., G., and H. P. were residents of England and members of the firm of S. & Co., which carried on business in England only. The plaintiffs issued two writs of summons (neither of which was for service out of the jurisdiction) in respect of the same cause of action, the defendants named in one being the firm and S., G., and H. P. individually, and in the other the three individuals only. The writs were served on H. P. while on a visit to British Columbia, and he entered conditional appearances, and applied to have both writs set aside, and (in the alternative) as to the second action, to have it dismissed as vexatious:—Held, that the name of the firm was wrongly inserted and should be struck out of the first writ, and that the plaintiffs should elect as to which action they would proceed with. Before the hearing of the appeal, the plaintiffs gave notice that they were content that the name of S. & Co. should be struck out of the writ:—Held, that the defendant appellant was entitled to the costs of the appeal up to the time of the service of the notice, and the plaintiffs to the costs subsequent. *Oppenheimer* v. *Sperling*, 22 Occ. N. 376, 9 B. C. R. 166.

Representation — *Members of Trade Union.*]—The plaintiff sought an injunction against an unincorporated musical protective association restraining them from making a member of that body break a contract which he had entered into with the plaintiff to supply an orchestra to the latter's theatre, and made the president and six other officers or leading members of the association defendants as representing the association:—Held, that under Rule 200 the plaintiff was entitled to an order that the defendants might be sued and authorized to defend on behalf of all the members of the association. *Small* v. *Hyttenrauch*, 2 O. W. R. 447, 656, 658, *Cresswell* v. *Hyttenrauch*, 23 Occ. N. 261, 6 O. L. R. 388, 2 O. W. R. 447, 655, 662.

Specific Performance—Action by purchaser—Sale of third person before action—Addition to party after trial—Amendment—Terms. *Clergue* v. *Preston*, 2 O. W. R. 50.

Stated Case — *Lieutenant-Governor.*] — Quære, whether the Lieutenant-Governor in Council can be a proper party to a cause or matter, and therefore whether the Court should entertain a stated case to which the Lieutenant-Governor is a party. *In re Edmonton By-law*, 21 Occ. N. 100, 4 Terr. L. R. 450.

Summary Application to Quash Municipal By-law—Countermand — Motion to add or substitute new applicant. *Re Ritz and Village of New Hamburg*, 4 O. L. R. 639, 1 O. W. R. 574, 690.

Unincorporated Association — *Salvation Army — Estoppel — Interlocutory Order — Amendment.*] — Held, affirming the judgment of Falconbridge, C.J., 6 O. L. R. 406, 23 Occ. N. 329, that the Salvation Army is not a legal entity, which can be sued for wrongs done by its officers:—Held, also, that the defendants were not estopped by the interlocutory decision of a Judge in Chambers, 5 O. L. R. 585, 23 Occ. N. 229. The plaintiff was given leave to amend, upon payment of costs, by adding the chief officer of the Army as a defendant. *Kingston* v. *Salvation Army*, 24 Occ. N. 309, 7 O. L. R. 681, 3 O. W. R. 556, 2 O. W. R. 314, 406, 859.

PARTITION.

Acquisition of Entirety by Licitation — *Effect of Incumbrances upon Undivided Shares—Preference on Shares of Price.*]—Art. 746, C. C., which declares that the co-partitioner who acquires the entirety of an undivided immovable by licitation, is deemed to have always been the owner of such entirety, establishes a fiction of law in favour of such co-partitioner, which must be restricted to the party in whose interest alone it was created. One of the effects of this fiction is, that he acquires the entirety free from all incumbrances; but when the price of the property licitated is deposited in the hands of justice for distribution, the fiction has not the effect of nullifying rights of preference on the shares of the price accruing to the other co-partitioners. Art. 2021, C.C., which declares in effect that a hypothec upon an undivided portion of an immovable ceases to subsist when a partition or a licitation conveys the immovable to a person other than the one who constituted the hypothec, extinguishes the right to follow the property in the hands of such person, but does not abolish the right of preference upon the share of the price which represents the undivided portion of the immovable which was hypothecated, and which price has been placed in the hands of justice for distribution. The partition or licitation has the same effect as a sheriff's sale, which discharges the property sold from the hypothecs which existed at the time of the sale, but does not destroy the efficiency of such hypothecs upon the proceeds of the sale which represent the property. *Bruneau* v. *Banque Jacques-Cartier*, Q. R. 10 K. B. 525.

Action for—*Plea to—Portion Claimed.*]—It is illegal to plead to an action for partition that the plaintiff's part of the succession is less than that which he claims, his right to demand partition being the same in any case. *Cabana* v. *Latour*, 5 Q. P. R. 102.

Application for Summary Order — Question of title—Direction to bring action. *Tasker* v. *Smith*, 5 O. W. R. 254.

Costs — *Judgment — Substitution — Sale under Execution—Report on Distribution—Contestation of—Curator to Substitution.*]—The plaintiff, a stranger to the substitution, was owner of an undivided fourth of certain immovables, of which the defendant had the other three-fourths, but burdened with a substitution, of which the contestant was the curator. In an action for partition the immovables were divided, and the judgment ordered that the taxed costs of all parties should be massed and the defendant should pay three-fourths of them, and the plaintiff one-fourth. The judgment was registered. R., the plaintiff's advocate, having judgment against the

defendant for costs, caused to be seized and sold a part of the immovables allotted to the defendant in the partition. The contestant was a party to the seizure and sale. The price obtained at the sale was reported by the sheriff with a certificate of the registrar, which stated the substitution and its registration and a hypothec made, since the partition, by the defendant to P., his advocate in the action. The debt of R. having been paid out of the purchase money, there remained a balance which the prothonotary awarded to P. The curator contested this, alleging that P. had been paid his debt, which at any rate, was the defendant's own debt, for which the substitution could not be held bound, and asked that the balance should be paid to him (the contestant). P., while not opposing this demand, and submitting his rights to the Court, alleged that the amount of his hypothec included $45.89 for costs in the partition action, and he said that in case any part of that sum ought to be placed to the charge of the substitution, he was willing to give security for repayment of the portion for which he had no lien. The contestant did not prove that P.'s debt had been paid:—Held, that P.'s declaration was an actual plea, which obliged the contestant to proceed as in a contested cause. 2. That the curator had no status to assert that P.'s debt had been paid. 3. That the partition bound the substitution. 4. That the debt of R. for costs of such partition was preferable to the substitution and was apparent on the record, and the decree had purged the substitution. 5. That R. had a lien on the substituted immovables for his debt. 6. That the defendant and the contestant should, as to costs, join their claims together. 7. That the balance of the purchase money belonged to the substitution, and it was the duty of the curator to see that it was not diverted. 8. That the curator should have proceeded by way of opposition afin de conserver, or by an intervention, but the procedure which he had adopted was equivalent, and should be maintained. 9. That the hypothec made by the defendant, having effect so long as the substitution was not opened, P. had the right to be paid the balance of the purchase money, upon his furnishing security to repay it upon the opening of the substitution. 10. That as to $26, costs of P. usefully incurred in the partition, he had a lien superior to the substitution, and to this extent he was not obliged to give security. 11. That the costs of the contestation should be paid by P., but to be taxed as the costs of a contestation of collocation in law only. *Pelletier* v. *Michaud*, Q. R. 20 S. C. 413.

Counterclaim for Reformation of Deeds — *Defence of Limitations Act—Res Judicata.*] — In an action for partition of land, and land covered with water, of which the plaintiff and defendants were alleged to be tenants in common, the defendants counterclaimed for the reformation of a deed from the plaintiff, to make it include all the plaintiff's interests in the lot in question. The Court refused the reformation claimed, on the ground that the evidence was not sufficient, no mutual mistake, or fraudulent concealment, on the part of the plaintiff, having been proved, and gave judgment in favour of the plaintiff for partition of all portions of the lot not built on, and those built on within 20 years:—Held, that the question of 20 years' adverse possession could not be raised by the defendants in this action, that question having been raised and decided adversely to them in a previous action by the same plaintiff in relation to the same land. *Zwicker* v. *Morash*, 36 N. S. Reps. 365.

Creditor of Co-parcener — *Lien on Lands—Decree.*]—A creditor of the defendant in respect of a sum of money which the defendant has engaged to pay at the time of an expected partition, among the heirs, of entailed property, has the right to be paid out of such property, and in such a case the decree should declare the land free from the entail. *Prévost* v. *Prévost*, 4 Q. P. R. 80.

Lease by Infant Tenant in Common —*Repudiation — Partition by Deed among Tenants in Common—Effect as to Lessees—Reformation of Deed—Trial—Adjournment—Evidence at Former Trial and on Reference —Ouster — Conduct Amounting to—Mesne Profits — Waste—Damages—General Costs —Costs of Proceedings under Order of Reference Subsequently Reversed—Costs of Appeal —Variation of Judgment.*] — Appeal by defendant company from judgment of Teetzel, J. (3 O. W. R. 14), in favour of plaintiff for partition of Monro Park, near the city of Toronto. The partition sought was between plaintiff and defendant company for the remainder of the term of a lease to defendant company, which was not binding on plaintiff, as he was an infant when it was made:—Held, it was manifest, as well from the testimony as from the whole circumstances, that there was no intention on the part of any of the parties to the conveyance to take from plaintiff any part of his rights as the owner of an undivided one-third of the premises, or to give any of his property or rights to his brother and sister, so as to increase their property and rights and leave him with less than each of them was to have. Neither his brother nor sister contended that there was any such intention or that they understood that to be the effect of the conveyance. It was not intended to affect the railway company as lessee of two undivided one-third shares. And if the general words of grant and release contained in the conveyance operated to take away from plaintiff or to convey to his brother and sister any right of his in the premises during the existence of the term, it was proper and just to reform it so as to prevent it from so operating. The railway company could not reasonably complain of this being done. Throughout the litigation they contended that the partition made was not binding on them. So far as the railway company were concerned, it was res inter alios acta. Then, as the railway company were not parties to or bound by it, they could not insist that the conveyance made must stand for their benefit, even though it be shewn or admitted to be contrary to the intention of the parties to it. The railway company gave no new consideration, and their position has not altered. They held their lease and their leasehold interest unaffected by the partition. The railway company can not be permitted to take for their benefit the property of plaintiff because by mistake he had executed a conveyance which appeared to give rise to a claim to that effect. From the date of the repudiation of the lease by the plaintiff, he was entitled to possession of the whole of the premises in common with the railway company, who were bound upon demand to let him into possession along with

them. On 17th August, 1900, plaintiff wrote to the railway company stating his repudiation of the lease and asking the company to give him immediate possession. This demand must be reasonably construed as a claim not for the sole but for the joint possession, and it is apparent from the company's letter in reply of 20th August that it was so understood. The demand was not assented to, but it was sought to induce plaintiff to confirm the lease and accept the rent under it. The railway company had at that time their buildings and tracks upon the premises, and after the demand they continued in possession and used the property in the same way as before. It was a fair inference from all the facts that there was a refusal to permit plaintiff to enter. And when this action was brought, there was not only a refusal of possession on the part of the railway company, but there was a denial of his title. The lease did not come within the provisions of the Settled Estates Act so as to be binding on the plaintiff. Ouster being found, damages either as for trespass or by way of allowance for mesne profits should follow, and upon the evidence as to the value and rental of adjoining properties it cannot be said that the trial Judge has made an excessive award. There was some slight evidence of waste destructive of the freehold, and the amount awarded on this head ($50) should not be disturbed. *Monro* v. *Toronto R. W. Co.*, 4 O. W. R. 392, 9 O. L. R. 299.

No Common Title — *Easement — Summary Application—Adjournment — Action—Order—Appeal.*] — Where, on summary application for partition or sale of lands, it was alleged by the defendant and prima facie evidence given that he had acquired, as to part of the land, title by possession, and as to the residue, had only an easement or right of way over it, and no title to the land itself: —Held, that, there being no common title, no interest in common, an order for partition or sale should not be made. It was not open to the plaintiff by admitting an ownership in the land in the defendants, which the latter did not assert, to get a sale by partition proceedings, and thus force the defendants to protect their easement by purchasing, or permitting it to be destroyed by sale. The Master should, on the question of title being raised, have adjourned the hearing of the application, allowing an action to be brought. An appeal lay to a Judge in Chambers from the Master's order granting the application. *Stroud* v. *Sun Oil Co.*, 24 Occ. N. 298, 7 O. L. R. 704, 8 O. L. R. 748, 3 O. W. R. 806, 4 O. W. R. 212.

Objection by Tenant for Life—*Premature Action—Trustee under Marriage Settlement—Interests of Infant—Will.*]—Under an ante-nuptial settlement lands were settled in trust for, successively, the lives of the plaintiff, the settlor, and his intended wife, and on their death to the children of the intended marriage for such estates or estate as the plaintiff and the intended wife should appoint, and in default of appointment to the children in equal shares, with powers of maintenance during minority. After the marriage the plaintiff conveyed all his interest in the lands to one W., who conveyed to the wife. The wife predeceased the plaintiff, having by her will devised the lands to one E. W., who had been appointed the trustee under the settlement in trust to receive and pay over the income from the said lands to the children during their minority, and on their attaining their majority to hand over to them their shares. There were three children, one of whom died prior to, another subsequent to, the death of the said wife, leaving one surviving. The plaintiff, on his wife's death, claimed to be entitled to a share in the said lands as one of the heirs of the child who had died subsequently to his said wife, and brought an action to have the same partitioned or sold, to which E. W. objected:— Held, that, in the face of the objection of E. W., the trustee and representative of the life estate, the action was premature, her consent being a prerequisite to its maintenance. *Rajotte* v. *Wilson*, 24 Occ. N. 351, 3 O. W. R. 737.

Particulars — *Inscription in Law—Parties—Addition of.*]—If it does not clearly appear from the declaration that a certain person predeceased another, the defendant, in an action for partition, may ask for further particulars, but cannot inscribe in law. 2. The fact that all necessary parties have not been brought before the Court is no ground for the dismissal of an action, but when the original parties fail to add the necessary parties, the Court itself should order the calling in of said parties. *Hurtubise* v. *Stamford*, 5 Q. P. R. 151.

Parties — *Tenants in Common—Lease—Infant—Repudiation.*]—The plaintiff, having when he came of age repudiated a lease to the defendants of land of which he and his brother and sister were tenants in common, made when he was an infant, and having made a partition by deed with his brother and sister, to which the defendants were not parties:— Held, Maclennan, J.A., dissenting, that the brother and sister were necessary parties to the plaintiff's action for a partition as against the defendants in respect of their possession under the lease. Judgment of a Divisional Court, 4 O. L. R. 36, 22 Occ. N. 231, 1 O. W. R. 25, 316, 813, reversed, and judgment of Meredith, C.J., ib., restored. *Monro* v. *Toronto R. W. Co.*, 21 Occ. N. 165, 5 O. L. R. 483, 2 O. W. R. 207, 3 O. W. R. 14, 299, 4 O. W. R. 392.

Pleading — *Share of Plaintiff — Quantum.*]—A defendant, sued for partition of an estate, cannot plead that the plaintiff's share is less than that which he alleges by his declaration. *Cabana* v. *Latour*, Q. R. 23 S. C. 255.

Proof of Lunacy — *Costs.*]—Unsoundness of mind of defendant in a partition suit, proved by affidavits under Supreme Court in Equity Act, 53 V. c. 4, s. 80. Application refused in a partition suit, that costs of appointing guardian ad litem of defendant, a person of unsound mind, not so found, and of proving her unsoundness of mind by affidavits, be borne by a defendant's share in estate. *Masters* v. *Masters*, 23 Occ. N. 266, 2 N. B. Eq. Reps. 486.

Report of Single Expert — *Infants—Order of Court.*]—Where, in an action for partition, in which all the parties are not of full age, a single expert has been appointed, his return will not be homologated until after the consent to having a single expert has been ratified by a Judge. *Farrell* v. *Mount*, 6 Q. P. R. 366.

Right to — Executor—Devisees. *Re Asselstine*, 1 O. W. R. 178.

Right to Undivided Share — *Action against Purchaser—Parties—Defence—Payment—Improvements.*]—The action to recover an undivided part of an immovable of which a purchaser is in possession by virtue of a just title should be an action for an account and partition against the heirs and universal legatees of the grantor of the purchaser, and an action against the purchaser alone will be dismissed upon defence in law. 2. The purchaser, so sued for the recovery of an undivided part of an immovable which he is in possession of as a whole, has a right to set up as a defence the payment made by his grantor and the improvements made by himself upon the immovable in question. *Rougeau* v. *Sicotte*, 3 Q. P. R. 375.

Sale—Oral agreement—Statute of Frauds—Part performance—Acquiescence—Arbitration or valuation—Notice. *Joyce* v. *Joyce*, 1 O. W. R. 479.

Sale — *Special Value—Discretion.*]—The form of judgment for partition or sale (Con. Rules, No. 158) must be read in the light of the legislation by which the Court has been given the right to order a partition instead of a sale, and its meaning is, that a partition is to be made unless it is shewn by those who ask for a sale that a partition cannot be made without prejudice to the interests of the owners of the estate as a whole. A report directing partition was therefore upheld where there was no physical difficulty in dividing the land, and the plaintiffs had been allotted that portion of it adjoining other lands owned by them, the argument in favour of a sale being that the portion allotted to the plaintiffs was of special value to them so that in the event of a sale it would have been necessary for them to purchase the whole of the land at whatever price it might have been bid up to, and thus have benefited the co-owners. History of legislation affecting partition. *Ontario Power Co.* v. *Whattler*, 24 Occ. N. 128, 7 O. L. R. 198, 3 O. W. R. 340.

Succession or Community — *Partition of Part — Property Subject to Usufruct—Movables—Account.*]—One of the several co-owners of an undivided universality, e.g., a succession or a community, is not entitled, in principle,—and without alleging special circumstances shewing that some portion of the property comprised in such universality is temporarily or permanently insusceptible of partition,—to demand the partition of part only of the property comprised in such succession or community. The object to be partitioned is the mass composed of all the property, movable and immovable, comprised in the universality, not the particular properties which go to form the mass, treated separately. 2. The fact that a property forming part of a succession or community is subject to a right of usufruct does not prevent its partition among those having the nue propriété. 3. As regards the movables of a community, the mere fact that they have been converted into money, that the surviving consort has received one-half of the proceeds, and that the other half has been employed by the executor in part payment of debts, is not sufficient to justify the non-accounting for such money by the surviving consort, and by the executor who is one of the co-partitioners, as an incident of the partition. *Mount* v. *Farrell*, Q. R. 21 S. C. 231.

Summary Application — Dispute as to title—Action. *Noel* v. *Noel*, 2 O. W. R. 628.

Summary Application — *Practice — Opposition—Title—Action to Try—Adjournment of Application.*]—Where a motion is made under Rule 956 for a summary order for partition or sale of lands, and it appears on the motion that such order should not be made until after a question of title has been determined, and then only in the event of the determination being against the title set up in opposition to the motion, the practice which should now be adopted is to adjourn the further hearing of the motion, with liberty to the applicant to bring an action to try the question of title. Macdonell v. McGillis, 8 P. R. 339, and Hopkins v. Hopkins, 9 P. R. 71, not followed. *Smith* v. *Smith*, 21 Occ. N. 238, 1 O. L. R. 404.

Tenant by the Curtesy—Mortgagee—Judgment creditor of owner of interest. *Bank of Hamilton* v. *Hurd*, 1 O. W. R. 456.

Tenants in Common — Expensive proceedings—Leave to proceed with former action—Terms. *Mathews* v. *Mathews*, 1 O. W. R. 844.

Undivided Property — *Usufruct.*] — The mere fact that an undivided property is subject to a usufruct does not prevent the co-owners demanding a partition thereof. *Thornton* v. *Thornton*, 7 Q. P. R. 277.

Whole Property — Right to sale of—Partition of part—Reference. *Ontario Power Co.* v. *Whattler*, 2 O. W. R. 811.

PARTNERSHIP.

Account—*Judgment Directing—Extension of Time—Separate Defences of Partners.*]—The Court will not extend the delay, fixed by the judgment, for the defendant to render an account, unless special and sufficient reasons be adduced. The fact that the defendants, co-partners, pleaded separately, and that judgment was rendered against one defendant before the delivery of judgment in the case of the other, is not sufficient ground for extending the delay to account fixed by the first judgment so that the defendants may account together. *Jeannotte* v. *Pgrizeau*, Q. R. 20 S. C. 229.

Accounts — Payments—Evidence of partner—Attempt to contradict his own statements—Books. *Youngson* v. *Stewart*, 2 O. W. R. 112, 270.

Action — *Profits — Expenses.*]—A partner who alleges that his co-partner has received more than his share and must reimburse him for part of the expenses incurred by him for the firm, may bring direct action for those amounts. *Daoust* v. *Chavsse*, 7 Q. P. R. 267.

Action against — Appearance—Amendment after trial—Striking out name of defendant appearing as partner—Terms—Costs. *Boston Rubber Co.* v. *Lang*, 3 O. W. R. 254.

Action against Firm — *Amendment — Abandonment of Part of Claim—Re-service —Parties.*]—The claim in an action against a commercial partnership cannot be amended so as to eliminate all conclusions taken against the firm and one of its members, and continued against another of its members, without service of the claim as amended, or the amendment, the service of this amendment at the same time as of the motion to amend upon the attorneys of this firm being sufficient service upon the partner. *Sykes* v. *Dillon*, 7 Q. P. R. 285.

Action against Firm — *Death of one Partner—Revivor—Personal Representatives.*] —When an action has been brought against a commercial firm, and one of the members of that firm dies while it is still pending, the defence must be taken up by the heirs and representatives of the deceased partner, in his place, and not by the surviving partners, who have become the only owners of the assets of the firm. *Wilkins* v. *Eadie*, 4 Q. P. R. 402.

Action in Name of Firm—*Demand for Names—Sole Member—Motion — Costs.*]— The plaintiff, who carried on business alone in a firm name, brought his action in the firm name. The defendants' solicitor demanded the names and places of residence of all persons constituting the firm, and no answer was given until four days afterwards, when the plaintiff's solicitor gave the information to the defendants' solicitor in the office of a special examiner; but at the same hour notice of a motion by the defendants for an order for the information was served at the office of the plaintiff's solicitor. On the return of the motion counsel for the defendants asked only that the costs of the application be made costs in the cause:—Held, that, as the plaintiff was the cause of the difficulty in using a firm name, he might well have been ordered to pay the costs so occasioned, and an order was made as asked by the defendants. *Cummings* v. *Ryan*, 22 Occ. N. 150.

Action Pro Socio — *When it may be Brought—Account.*] — The action pro socio brought during the existence of the partnership, and before the dissolution thereof, is premature, and will be dismissed, even when only partial settlement or accounting be asked, e.g., where an account is asked as to two of many contracts held by the partnership. *Lachance* v. *Vieu*, Q. R. 25 S. C. 399.

Advocates — *Firm Debt — Several or Joint Liability — Promissory Note.*]—The members of a partnership, in this case a firm of advocates, are not responsible severally for partnership debts, and they are not liable to third persons except jointly in equal parts; this distinction applies to commercial debts which the partnership may contract, as, for instance, a promissory note signed in the firm name. *Drouin* v. *Gauthier*, 5 Q. P. R. 211.

Agency — *Factor — Pledge — Lien — Notice—Res Judicata.*]—A partner intrusted with possession of goods of his firm for the purpose of sale may, either as partner in the business or as factor for the firm, pledge them for advances made to him personally, and the lien of the pledgee will remain as valid as if the security had been given by the absolute owner of the goods, notwithstanding notice that the contract was with an agent only. Where a consignment of goods has been sold and they remain no longer in specie, the only recourse by a person who claims an interest therein is by an ordinary action for debt, and he cannot claim any lien upon the goods themselves nor on the price received for them. The plea of res judicata is good against a party who has been in any way represented in a former suit deciding the same matter in controversy. *Dingwall* v. *McBean*, 20 Occ. N. 374, 30 S. C. R. 441.

Agreement — *Construction — Continuance after Expiry of Term—Deceased Partner —Purchase of Share—Discount—Good-will.*] —A deed, providing for a partnership during seven years from its date, provided for purchase by the survivors of the share of a deceased partner, with a special provision that if one partner, K., should die, the value of his share should be subject to a discount of twenty per cent. After the seven years had expired, the partners continued the business by verbal agreement for an indefinite period, and, while it so continued, K. died:—Held, that, even if the parties had not admitted that the business was continued under the terms of the partnership deed, such terms would still govern, as there was nothing in the deed repugnant to a partnership at will; that the surviving partners had, therefore, a right to purchase the share of K., and to be allowed the deduction of twenty per cent. therefrom, as the deed provided; and that, in the absence of any stipulation in the deed to the contrary, the good-will of the business and K.'s interest therein should be taken into account in the valuation to be made for such purpose. *Hibben* v. *Collister*, 20 Occ. N. 325, 30 S. C. R. 459.

Agreement—*Judgment — Acceptance as Payment—Interest.*]—Judgment in 20 Occ. N. 359 varied as to interest. *Sinclair* v. *Preston*, 21 Occ. N. 97, 13 Man. L. R. 228.

Agreement for Promotion of Company—Purchase of businesses—Division of profits—Offers or options—Assets of partnership—Making over to other promoters—Payment for—Right of partner to share in—Termination of interest — Consideration — Evidence—Account. *Evans* v. *Jaffray*, 2 O. W. R. 678, 3 O. W. R. 877, 6 O. W. R. 733.

Agreement to Form—*Failure to Furnish Capital—Dissolution — Account.*] — A contract by which two persons agree to enter into partnership from a fixed date, which also defines the nature of the business to be carried on, the contributions and shares of the partners, and stipulates a forfeit in case of non-fulfilment of the agreement, creates a valid partnership on and from the date appointed. 2. The failure of one partner to formally tender his share of the capital does not necessarily prevent such agreement from having effect. He would be liable to interest from the day on which he made default to pay, and his partner would have a right to obtain damages and demand a dissolution of the partnership if the default continued. 3. The fact that one of the partners, after acting with the other as his partner, secretly registered the business in his own name, and asserted that he was not a partner, is sufficient ground for an action by the other partner for dissolution of the partnership

and for an account. *Whimbey* v. *Clark*, Q. R. 22 S. C. 453.

Appointment of Liquidator — *Discretion of Court.*]—Petition for the nomination of a liquidator for a limited partnership. By the terms of the partnership agreement, the plaintiff was to furnish his time and skill, and the defendant was to provide the capital. Each party was to draw $20 a week salary. After doing business for five weeks, the firm got into difficulties. The plaintiff ceased work, and brought this action for the appointment of a liquidator. He had at that time drawn out $112:—Held, that the appointment of a liquidator was in the discretion of the Court; that in the present instance it would be merely imposing a useless expense upon the defendant, as the whole cost would fall on him, the plaintiff having no pecuniary interest in the business; and the petition was dismissed with costs. *Sorignet* v. *Henry*, 23 Occ. N. 118.

Assets — *Salary of Partner as Crown Official — Dissolution.*]—While C. and M. were in partnership as architects, M. received an appointment from the Dominion government as supervising architect and clerk of the works, in connection with a government building being erected in Nelson, and for a time M. paid the salary of the office into the partnership funds. M. afterwards notified C. that the partnership was at an end, and thereafter refused to account for the salary. C. sued for a declaration that he was entitled to half the salary since the dissolution: — Held, that, even if it were agreed that the appointment should be for the benefit of the firm, the plaintiff would not have any right to share in the salary after dissolution unless there was a special agreement to that effect. Judgment of Hunter, C.J., 9 B. C. R. 297, affirmed. *Cane* v. *Macdonald*, 10 B. C. R. 444.

Authority of Partner—Bill of exchange —Notice. *Bank of Ottawa* v. *Lewis*, 1 O. W. R. 71.

Company Name—*Security for Costs — Foreign Residence of Partners—Powers of Attorney—Authorization.*]—Although a partnership (formed for the purpose of carrying on insurance business) is authorized by law to sue in its company name, the real parties to the suit are the members of the partnership, and if they are non-resident the partnership will be condemned to furnish security for costs when bringing suit in this province. 2. The production of a power of attorney must be made in the suit where the same is required; and the deposit of a power of attorney at the office of the prothonotary, in compliance with the Insurance Act, is insufficient. 3. The power of attorney required by art. 177, C. P., must confer upon a resident of Canada power to institute suit on behalf of the plaintiffs. *Liverpool and London and Globe Ins. Co.* v. *Macdonald*, 5 Q. P. R. 157.

Contract—Interest — Liability of partner—Holding out. *Deering* v. *Beatty*, 1 O. W. R. 363.

Co-partner—Offer to sell share to—Acceptance — Specific performance—Improvidence—Security—Costs. *Pilgrim* v. *Cummer*, 1 O. W. R. 531.

Creditors of Partner — *Diversion of Money by Formation of Partnership—Fraud —Action Paulienne—Assignment—Gift—Personal Debt—"Person."*]—A partnership cannot be annulled as having been formed in fraud of the creditors of one of the partners, unless its formation has caused them prejudice, and unless the person with whom their debtor has contracted, knew at the time of its formation that it would cause them this prejudice. 2. A creditor who is in a position to bring an action to set aside a transaction as fraudulent, has no right to demand that a third person, who has dealt with his debtor, shall be condemned to pay him what the latter owes him. 3. The payment by a person forming a partnership into the business of fund which constitutes all his property, is not an act à titre universel. 4. An assignment, even à titre universel, does not bind assignee to the payment of the debts of the assignor, unless the assignment is made by way of gift, and not if it is made à titre onereux. 5. When two partners are sued jointly and severally and as partners for a debt alleged to be a debt of the partnership, but which is really only the personal debt of one of the partners, the partner who is the debtor may be, in the action so begun, condemned alone to pay the debt. Quære: Does a partnership in a collective name constitute a "person?" *Waker* v. *Lamoureux*, Q. R. 21 S. C. 492.

Death of Partner — Continuation of business by executors—Sale of business and stock in parcels—Rights of purchasers—Use of firm name—Goodwill—"Business." *Beatty* v. *Dickson*, *Dickson* v. *Beatty*, 3 O. W. R. 2, 5 O. W. R. 568.

Death of Partner—Winding-up—Laches —Appointment of receiver—Ex parte order —Motion to rescind — Variation—Appointment of surviving partner. *Keating* v. *Olsen*, (Y.T.), 2 W. L. R. 497.

Dissolution — Account—Construction of articles—Division of assets. *Goudlock* v. *Baker*, 4 O. W. R. 118.

Dissolution—*Account—Profits from Portion of Assets Withdrawn by Partner.*]—Partners owe each other a reciprocal account of everything that arises from the common property, up to the time of the division to be made of the property, and one of them cannot divide the remedy which the law gives him for the liquidation of the partnership affairs. Therefore, an action does not lie for an account of the profits which one of the partners has made, since the dissolution of the partnership, from the use of an article belonging to the assets of the partnership, when no liquidation has been made of the partnership affairs, and while there still remains common property the division of which is not demanded. *Heffernan* v. *Sheridan*, Q. R. 11 K. B. 3.

Dissolution — *Accounts.*]—One of two partners at will in an hotel business agreed to sell his interest to a third person, and then went away to another province. The purchaser refused to complete because of alleged non-compliance with certain conditions, and the vendor brought this action claiming as against him specific performance, and, in the alternative, as against his partner who had continued to carry on the business, a

dissolution of the partnership:—Held, upon the evidence, that the vendor was not entitled to specific performance; that his withdrawal was absolute and not conditional upon completion of the purchase; that the withdrawal had worked a dissolution; and that the partnership accounts should be taken as of the date of the withdrawal, and an opportunity given to the continuing partner of acquiring the interest of the vendor as at that date. *Kennedy* v. *Gaudaur*, 21 Occ. N. 224, 1 O. L. R. 430.

Dissolution—Claims against withdrawing partner—Moneys of firm used for private purposes — Sale of interest without deduction. *Greig* v. *Macdonald*, 5 O. W. R. 80, 6 O. W. R. 342.

Dissolution—*Conservatory Attachment.*]—Conservatory attachment does not lie in favour of a partner against his former partner, the partnership having been liquidated and bought by the latter. *Brunet* v. *Keegan*, 7 Q. P. R. 75.

Dissolution — *Contracts Previously Made.*]—Notwithstanding the dissolution of a partnership, a partner continues, until a receiver is appointed, to have the same power that he had before the dissolution to complete contracts previously made, for the purpose of winding up the partnership affairs. *Hale* v. *People's Bank of Halifax*, 23 Occ. N. 157, 2 N. B. Eq. Reps. 433.

Dissolution — *Goodwill—Customers — Use of Firm Name—Injunction.*]—An appeal from the decision of McDonald, C.J., 23 Occ. N. 299, was dismissed, the Court holding that the use of the firm name by the defendant was both misleading and injurious to the plaintiff. *Macdonald* v. *Miller*, 24 Occ. N. 137.

Dissolution—*Interlocutory Injunction — Assets.*]—A partner in the course of an action for dissolution of the partnership has, against his co-partner, the right to an interlocutory injunction to restrain the latter from continuing to infringe the rule that the partners must continue in the same position as regards the assets until the action has been tried out. *Bourdon* v. *Dinelle*, 5 Q. P. R. 240.

Dissolution — *Solicitors — Goodwill — Right to Firm Name—Acquiescence—Abandonment — Injunction—Parties.*]—Upon the dissolution of a partnership, in the absence of an agreement between the partners to the contrary, the firm name being a part of the goodwill, and not having been dealt with upon the dissolution, remains the property of all the partners, like any other undisposed of partnership property; and each member of the late partnership is entitled to carry on business in the firm name, subject to the limitation that no man has a right to hold out his late partner as still being his partner in business, contrary to the fact. Burchell v. Wilde, [1900] 1 Ch. 151, followed. A firm of solicitors had carried on business as "Smith, Rae & Greer" down to October, 1902, and after that until the dissolution of the firm in January, 1903, as "Smith & Greer:"—Held, that both the names must be taken to have formed part of the goodwill of the firm at the time of the dissolution. At the time of the dissolution the firm consisted of four members. Three of them formed a new firm and used the name "Smith, Rae, & Greer." The fourth, the defendant, protested against the others assuming that name, but, on their refusing to abandon it, notified his clients, the legal profession, and the public, that he had severed his connection with the firms of Smith, Rae, & Greer and Smith & Greer, and intended to carry on his own business under his own name. For nearly ten and a half months he adhered to this position, frequently addressing his late partners as "Smith, Rae, & Greer," and permitting them to acquire the right to be known by that name as its sole owners:—Held, that he could not, after this conduct and lapse of time, assume the name of Smith, Rae & Greer, and that the members of the firm who had adopted that name were entitled to have him enjoined from using it. Levy v. Walker, 10 Ch. D. 436, 448, followed. Rae had at one time been a member of the old firm of Smith, Rae, & Greer, but had ceased to be so before the dissolution. He permitted his name to be used in the style of the new firm, but was not a member of it, and was not practising as a solicitor:—Held, that he was not a necessary party to the action, nor was there such danger of liability being incurred by him by his being held out by the defendants as a partner as entitled him to an injunction. *Smith* v. *Greer*, 24 Occ. N. 226, 7 O. L. R. 332, 3 O. W. R. 135.

Evidence to Establish—Moneys contributed by partners—Assets—Account—Dissolution. *Meyers* v. *Debolt* (N.W.T.), 2 W. L. R. 452.

Evidence to Establish—Registered declaration—R. S. O. 1897 c. 152—Application to banking business—Partnership in fact—Estoppel—Holding out—Character in which moneys received—Misapplication — Following moneys. *Town of Oakville* v. *Andrew*, 3 O. W. R. 820, 6 O. W. R. 454, 10 O. L. R. 709.

Foreign Judgment—*Corporation — Action—Judgment—Estoppel—Service — Execution—Issue.*]—A judgment was recovered by the plaintiff in Quebec against certain defendants sued and described as "La Compagnie de Publication Le Temps," a corporation having its head office in Ottawa, Ontario, in an action for libel. There was no incorporated company in Ontario of that name, but a partnership in that name was registered in Ottawa, the partners being F. M. and his wife. This action was begun by writ of summons specially indorsed with a claim for the amount of the Quebec judgment. The writ was served upon F. V. M., the manager of Le Temps Publishing Co., but without the notice in writing required by Rule 224, informing him in what capacity he was served. Le Temps Publishing Co. appeared by the name mentioned in the writ as if sued as a corporation, and the plaintiff obtained a summary judgment against the defendants, and afterwards an order to examine F. M. as a partner in what was now called the defendant partnership. Upon a motion by the plaintiff for leave to issue execution against F. M. and his wife, as members of the partnership, an issue was directed to determine whether they were members and liable to execution:—Held, that it must be taken that the judgment in this jurisdiction

was recovered against a partnership, and not against a corporation. If the Quebec judgment was to be regarded as one against a corporation, and therefore not capable of being the foundation of an action thereon against a partnership firm of the same name, that objection should have been taken, but was not, on the motion for summary judgment. On that motion it might have been shewn, but was not, that there never had been an effective service of the writ upon the firm, or the firm might have moved to set aside the faulty service on the manager. Neither of these courses having been taken, there was an unimpeached judgment against a firm, which could not be attacked in a collateral proceeding; and it was open to the plaintiff to apply under part (2) of Rule 228 for leave to issue execution against F. M. and his wife as members of the firm; and, as they disputed their liability, the question, not of the validity of the judgment, but of their liability as members of the firm to execution thereon, should be determined by the issue directed. *Gibson* v. *Le Temps Publishing Co.*, 24 Occ. N. 21, 6 O. L. R. 690, 2 O. W. R. 1122.

Holding out — *Evidence—Admissions — Finding of Trial Judge—Ratification—Consideration — Estoppel.*]—O. purchased goods from the plaintiff on the credit of a partnership, which he represented to the plaintiff existed between himself and the defendant. The trial Judge, on contradictory evidence of the statements and conduct of the defendant after the goods were supplied, accepted the plaintiff's version of what took place, and held that the admissions of the defendant established a partnership. On appeal, the Court, while feeling bound to accept the trial Judge's view as to the credibility of the witnesses, was of the opinion that the evidence did not establish a partnership, but established a ratification by the defendant. Per curiam: A ratification is not a contract; it is the adoption of a contract previously made in the name of the ratifying party, and it requires no consideration to support it. The dissenting judgment of Martin, B., in Brook v. Hook, L. R. 6 Ex. 89, must be taken as an accurate statement of law. Scott v. Bank of New Brunswick, 23 S. C. R. 277, followed. A statement by T., made after the goods were supplied, that he and the defendant were partners, would not,—though a "holding out" to the same effect made before the goods were supplied would,—constitute an estoppel. *Grady* v. *Tierney*, 20 Occ. N. 193, 4 Terr. L. R. 133.

Judgment — Settlement — Accounting. *West* v. *Benjamin*, 1 O. W. R. 212.

Judgment—*Execution Against Partners —Husband and Wife—Separate Estate — Dissolution of Partnership—Registered Declaration.*]—A man and wife made a statutory declaration under R. S. O. 1897 c. 152, that they were partners. A judgment was recovered against the firm. Wife set up that she was incapable of becoming a partner of her husband:—Held, that a registered declaration signed by the husband only that the partnership had been dissolved was no evidence in his favour and that the wife was precluded from setting up that she was incapable of becoming a partner of her husband. Execution against the wife limited to her separate estate. *Gibson* v. *Le Temps Publishing Co.*, 25 Occ. N. 40, 8 O. L. R. 707.

Limited Partnership—*Special Partner —Contribution—Cash — Interest in Previous Partnership.*]—The contribution of a special partner must be in actual cash paid at the time of the formation of the limited partnership. The provisions of art. 1872, C.C., which require that the contribution of a special partner shall be "in cash payments," are not complied with where the circumstances are as follows. A person became a special partner in a firm, for the term of one year. At the end of the year a new partnership was formed, without liquidation of the pre-existing business, and while there were debts of the first firm outstanding. The special partner became a special partner in the second firm, and his contribution was stated in the certificate at $561, in goods then in the possession of the firm. *Barry* v. *Hamel*, Q. R. 26 S. C. 265.

Loss of Capital—*Depreciation in Machinery.*]—Where under a partnership agreement a partner gave to the partnership business his time and skill, and the use of, but not the property in, certain machinery, in consideration of a weekly salary, and one-half of the net profits of the business:—Held, that he was not entitled to an allowance for the depreciation in the value of the machinery arising from ordinary wear and tear on the taking of the partnership accounts, as a loss to him of capital put into the business. *Lawton Saw Co.* v. *Machum*, 21 Occ. N. 133, 2 N. B. Eq. Reps. 191.

Mining Prospectors — Construction of articles — Dissolution—Notice. *Lewis* v. *Banville*, 3 O. W. R. 20.

Non-registration—*Action for Penalty— Affidavit—Requirements of—Pleading — Declaration.*]—In a qui tam action for failure to register a partnership, it is not necessary to state the whole declaration in the affidavit, but only to make such a summary statement as will be necessary to shew that in making the affidavit the plaintiff was referring to the same matter as is stated in the declaration. 2. The words "carry on business" sufficiently designate a commercial or trading business in the sense of arts. 1834 and 1834 (a), C. C., especially where it is further alleged that the defendant acted in violation of those articles. 3. The word "alone" sufficiently indicates that the defendant was not associated in partnership with any other person. 4. The word "transmit" a declaration is not sacramental, and the word "file" may be substituted therefor. 5. The name "Rothholz, Sponging Co.," used as a business name is manifestly such a name as is referred to in s. 5636, R. S. Q. *Bull* v. *Lanigan*, 3 Q. P. R. 329, Q. R. 19 S. C. 30.

Offer of Partner to Sell Share—Acceptance—Specific performance—Covenant — Restraint of trade—Security. *Pilgrim* v. *Cummer*, 2 O. W. R. 443.

Oral Contract—Timber limits—Interest in land — Statute of Frauds—Part performance—Jury. *Hoeffler* v. *Irwin*, 2 O. W. R. 714.

Oral Contract — Purchase and sale of timber limits—Interest in land—Statute of Frauds—Part performance — Findings of jury. *Hoeffler* v. *Irwin*, 4 O. W. R. 172.

Pleading — *Reply — Obligation to Pay for Goods Purchased by Partner before Partnership—Fraud—Formation of Partnership—Creditors—Capital—Assignment — Personal Debt of Partner.*]—A plaintiff cannot, by a special reply, reform, complete, or modify his declaration. 2. One who, not being a purchaser, obtains goods which have not been paid for, does not thereby incur an obligation to pay for them. 3. A partnership can be annulled as having been contracted in fraud of the creditors of one of the partners, only if its formation caused the creditors prejudice, and if he with whom their debtor contracted knew at the time of its formation that it would cause such prejudice. 4. A creditor who is in a position to bring an action to set aside a transaction as fraudulent, has no right to claim from a third person, who has dealt with his debtor, payment of what the debtor owes him. 5. An act by which a person forming a partnership puts in capital constituting all the property he has, is not an act à titre universel. 6. An assignment, even à titre universel, does not impose upon the assignee the obligation of paying the debts of the assignor, unless the assignment is made à titre de donation, and not if it is made à titre onereux. 7. When two partners are sued jointly and severally and as partners for a debt alleged to be the debt of the partnership, but which is in fact only the personal debt of one of the partners, the partner debtor may, in such an action, be adjudged to pay the debt. Judgment in Q. R. 21 S. C. 492, affirmed. *Walker* v. *Lamoureux*, Q. R. 13 K. B. 209.

Practice — Appearance as for — Foreign corporation carrying on business without license. *Duthrie* v. *McDearmott*, 1 O. W. R. 776.

Profits—Dispute as to shares—Finding of equality. *Graham* v. *Frank* (Y.T.), 1 W. L. R. 510.

Promissory Note — *Joint Liability.*]—The obligation of the members of a partnership who sign a promissory note in their partnership capacity, is joint and not several. *Drouin* v. *Gauthier*, Q. R. 12 K. B. 442.

Purchase of Property—*Re-sale at Profit —Agreement for Division — Consideration — Declaration of Trust.*] — Upon information supplied by the plaintiff, the defendant purchased certain property, which upon re-sale yielded a surplus after meeting, a liability the defendant had assumed for the benefit of the plaintiff's father. The defendant promised the plaintiff that in the event of there being a surplus it should belong to him:—Held, that the plaintiff and defendant were not partners in such a way as to entitle the plaintiff to share in the profits from the re-sale of the property, and that the defendant's promise, which was not a declaration of trust, was nudum pactum. *Leighton* v. *Hale*, 25 Occ. N. 88, 3 N. B. Eq. 68.

Real Estate Brokers — *Necessity for Registration—Action for Penalty—Costs.*] — A partnership of real estate brokers is not a partnership for trading purposes, within the meaning of s. 3 of the British Columbia Partnership Act, and a declaration of partnership need not be registered. An action to recover a penalty under the Act being dismissed, it was held that there was power to award costs to the defendants. *Paisley* v. *Nelems*, 25 Occ. N. 111.

Reputed Partner—Liability for moneys misappropriated by co-partner—Executors—Imputation of payments. *Askin* v. *Andrew*, 5 O. W. R. 294.

Reputed Partner—Misappropriation by co-partner—Private bankers—Registration of partnership — Chartered bank—Moneys misappropriated by customer—Trust—Notice—Alteration of bank's position—Cheque. *Ontario Silver and Antimony Co.* v. *Andrew and Ontario Bank*, 5 O. W. R. 206, 6 O. W. R. 63.

Salary of One Partner as Government Architect—*Right of Co-partner to Share in —Receiver—Book Debts.*]—While C. and M. were in partnership as architects, M. received an appointment from the Dominion government as supervising architect and clerk of the works in connection with a government building being erected in Nelson, and for a time M. paid the salary of the office into the partnership funds. M. afterwards notified C. that the partnership was at an end, and thereafter refused to account for the salary. C. sued for a declaration that he was entitled to half the salary since the dissolution, and asked that a receiver be appointed of it, and also of the book debts of the firm, which he alleged M. had been collecting and not accounting for:—Held, by the full Court, that no receiver of the salary could be appointed; that, although the amount of the book debts was small, there should be a receiver in respect to them. Per Hunter, C.J., at the trial: —Even if it were agreed that the appointment should be for the benefit of the firm, all the partners would not have any right to share in the salary after the dissolution of the firm, unless there was a special agreement to that effect. *Cane* v. *Macdonald*, 23 Occ. N. 32, 9 B. C. R. 297.

Sale of Interest of Deceased Partner —Executors — Action to set aside sale—Account—Reference for trial of whole action. *Shortreed* v. *Shortreed*, 3 O. W. R. 867.

Special Partner—Agreement—Construction—Liability for losses—Salary of active partner—Account—Dispensing with reference —Interest—Costs. *Fitzgerald* v. *McGill*, 5 O. W. R. 769.

Syndicate for Promotion of Joint Stock Company—*Trust Agreement — Construction of Contract—Administration by Majority of Partners — Lapse of Time Limit — Specific Performance.*]—A syndicate consisting of seven members agreed to form a joint stock company for the development, etc., of properties owned by two of their number, the defendants, under patent rights belonging to two other members; the three remaining members, of whom the plaintiff was one, furnishing the capital; and all members agreeing to assist in the promotion of the proposed company. In the meantime the lands were acquired by the defendants, and patent rights were assigned to them in trust for the syndicate, and the lands and patent rights were to

be transferred to the syndicate or to the company without any consideration save the allotment of shares proportionately to the interest of the parties. The stock in the proposed company was to be allotted, having in view the proprietary rights and moneys contributed by the syndicate members, in proportion as follows: 37½ per cent. to the defendants who held the property, 32½ per cent. to the owners of the patent rights; the other three members to receive each 10 per cent. of the total stock. A time limit was fixed within which the company was to be formed, and, in default of its incorporation within that time, the lands were to remain the property of the defendants, the transfers of the patent rights were to become void, and all parties were to be in the same position as if the agreement had never been made. The 10th clause of the agreement provided that, in case of difference of opinion, three-fourths in value should control. Owing to differences in opinion, the proposed company was not formed, but, within the time limited, the plaintiff and the other two members, holding together 30 per cent. interest in the syndicate, caused a company to be incorporated for the development and exploitation of the enterprise, and demanded that the property and rights should be transferred to it under the agreement. This being refused, the plaintiff brought action against the trustees for specific performance of the agreement to convey the lands and transfer the patent rights to the company, so incorporated, or for damages:—Held, that the 10th clause of the agreement controlled the administration of the affairs of the syndicate, and that, as three-fourths in value of the members had not joined in the formation of a company, as proposed, within the time limited, the lands remained the property of the defendants, the patent rights had reverted to their original owners, and the plaintiff could not enforce specific performance. *Hopper* v. *Hoctor*, 25 Occ. N. 100, 35 S. C. R. 645.

Winding-up — Assets—Sale of partnership lands—Foreign judgment—Jurisdiction—Amendment — Deed pendente lie — Notice — Lien—Dower—Partition. *McGregor* v. *McGregor*, 2 O. W. R. 96.

Winding-up — *Powers of Liquidators — Actions—Authorization.*]—Liquidators named under art. 1896a, C. C., to liquidate the property of a dissolved partnership, may sue a debtor of the partnership for rent and damages, and claim in the same action the cancellation of the lease, without first obtaining the authorization of the Court or a Judge or of the members of the partnership. *Robert* v. *Gagnon*, Q. R. 10 K. B. 237.

PARTY WALL.

Excavations under—Rights of adjoining owners—Reversioners — Landlord and tenant —Injunction. *St. Leger* v. *T. Eaton Co.*, 4 O. W. R. 205.

Raising—*Damage to Adjoining House — Cause of—Liability—Damages.*]—The owner of a house who wishes to raise the party wall must give previous notice thereof to the owner of the adjoining house, in order to give him time to prepare for the work, and thus avoid all responsibility other than that proceeding from his negligence or want of care. 2. If the damages incurred by the co-owner of the party wall are the result not of the raising of the wall but of the pulling down of the house adjoining the party wall, the one who has done the work of raising is not responsible for these damages. In other words, the co-owner of the party wall has no recourse against the one who raises the wall, when the damages which he suffers are the result of faulty construction of his own building. *Demers* v. *Lemieux*, Q. R. 21 S. C. 26.

Rights of Neighbour — *Foundation — Custom.*]—The proprietor who first builds a house wall, intended to become common, has a right to establish the base of the wall on the first soil sufficiently strong to support the wall which he intends to construct, and is not obliged to go deeper, although his neighbour may require a greater depth, and may offer to bear the cost of the increased excavation and masonry. If the neighbour desires to have a heavier building, necessitating a deeper foundation, he must make the under structure at his own expense. 2. The proprietor first building a wall destined to become common, has a right to extend the footing courses more than 9 inches on his neighbour's land, where such extension is necessary to secure the solidity of his wall. 3. Article 520, C. C., has no application to house walls, but refers to fence walls only; house walls being governed, not by positive law, but entirely by custom, which varies according to local conditions and usages, which, in the city of Montreal, require a footing course wider than the body of the wall, where the same is necessary for the solidity of the wall. *Roy* v. *Strubbe*, Q. R. 24 S. C. 520.

See EASEMENT.

PASSENGER.

See NEGLIGENCE — RAILWAY—STREET RAILWAYS.

PATENT FOR INVENTION.

Action in Superior Court, Quebec—*Stay of—Action in Exchequer Court.*]—In an action based upon a patent of invention, proceedings will be stayed on the demand of one of the parties, if a like cause between the same parties, based upon the same facts, is upon the point of being fixed for final hearing before the Exchequer Court of Canada. *American Stoker Co.* v. *General Engineering Co. of Ontario*, 5 Q. P. R. 73.

Anticipation—*Novelty.*]—A patent for prisms intended for use in deflecting the course of rays of light falling obliquely or horizontally on glass placed vertically, as in the ordinary windows of houses or shops, is not void for anticipation by reason of prior patents for prisms for use where the light falls vertically or obliquely on glass placed horizontally, as in pavements. Semble, that if the former patent were to be broadly construed as for a device for deflecting the course of light passing through glass, it would fail for want of novelty. *Luxfer Prism Co.* v. *Webster*, 22 Occ. N. 426, 8 Ex. C. R. 59.

Assignment for Limited Period — *Sale Thereafter.*] — A person who is the assignee of a patented right for a limited period, with a right of purchase, but who at the expiration of such period elects not to purchase, and reassigns the patent, cannot thereafter sell the patented article, though made during the time he was assignee, his right to make and sell being restricted to such limited period; and under the powers conferred on the Court by s. 31 of the Patent Act, R. S. C. c. 61, an injunction may be issued restraining such sale. *Bennett* v. *Wortman*, 21 Occ. N. 527, 2 O. L. R. 292.

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 hydrochloric 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. *Meldrum* v. *Wilson*, 21 Occ. N. 549, 7 Ex. C. R. 198.

Combination — *Novelty—Infringement.*] — The judgment of the Supreme Court of British Columbia, 7 B. C. R. 197, holding that the plaintiff's patent for a mechanical combination was infringed by the defendant, was affirmed on appeal. *Federation Brand Salmon Canning Co.* v. *Short*, 31 S. C. R. 378.

Combination — *Novelty—Infringement.*] —A patent for a mechanical combination is not infringed unless the combination is taken in essence and in substance. *Jones* v. *Galbraith*, 9 B. C. R. 521.

Conflicting Applications — *Arbitration —Appointment of Arbitrators—Prohibition.*] —When there are more than two conflicting applications for any patent, and one of the applicants has intimated to the commissioner or the deputy commissioner or person appointed to perform the duty of that officer, that he will not unite with the other applicants in appointing arbitrators, the appointment may be made by that official without notice to or consultation of the wishes of the other applicants; and he has the absolute right to decide, without possibility of his decision being reviewed by prohibition or injunction, whether the conditions exist in which he should proceed to exercise the power of appointment. *Faller* v. *Aylen*, 24 Occ. N. 322, 8 O. L. R. 70, 4 O. W. R. 97.

Construction of Articles Previous to Patent—*Right to Sell after Patent—Consent of Inventor.*]—The defendants bought from the plaintiffs a punching bag, which had on it the words "Pat. applied for," and, before the issue of the patent, manufactured and advertised for sale a number of similar bags in spite of the plaintiffs' remonstrances; and, after patent obtained by the plaintiffs, nevertheless continued to sell the bags which they had manufactured: — Held, that the defendants were entitled to do so under s. 46 of the Patent Act, R. S. C. 1886, c. 61; and that it made no difference that they had acted without the consent of the inventor. Fowell v. Chown, 25 O. R. 71, distinguished. Lean v. Huston, 8 O. R. 521, distinguished. *Victor Sporting Goods Co.* v. *Harold A. Wilson Co.*, 24 Occ. N. 211, 7 O. L. R. 570, 2 O. W. R. 465, 3 O. W. R. 496.

Dispute as to True Inventor — Joint invention of plaintiff and defendant—Declaration—Trust—Assignment for use in master's business. *Piper* v. *Piper*, 3 O. W. R. 451.

Expiry of Foreign Patent—*British Patent.*]—By the true construction of s. 8 of the Canadian Patent Act, R. S. C. c. 61, as amended by 55 & 56 V. c. 24, s. 1, a Canadian patent expires as soon as any foreign patent for the same invention existing at any time during the continuance of the Canadian patent expires. A British patent is a foreign patent within the meaning of the Canadian Patent Act. Judgment in 31 S. C. R. reversed, and that in 20 Occ. N. 274, 6 Ex. C. R. 357, restored. *Dominion Cotton Mills Co.* v. *General Engineering Co. of Ontario*, [1902] A. C. 570.

Importation and Non-manufacture—*Patent Act. s.* 37.]—A patentee is not in default for not manufacturing his invention, unless or until there is some demand for it with which he has failed to comply, or unless some person has desired to use or obtain it and has been unable to do so at a reasonable price; and where the invention is a process only, the patentee satisfies the statute and the condition of his patent by being ready to allow the process to be used by anyone for a reasonable sum. Anderson Tire Co. of Toronto v. American Dunlop Tire Co., 5 Ex. C. R. 100, referred to. 2. The effect of s. 31 of the Patent Act is to make the patent void only as to the interest of the person importing or causing to be imported the article made according to the process patented; and importation by a licensee will not avoid the patent so far as the interest of the owner is concerned. 3. Semble, that the importation of an invention made in accordance with a process protected by a patent, is an importation of the invention. But, quære, whether the provision of s. 37 of the Patent Act, requiring the manufacture in Canada of the invention patented, after the expiry of two years from the date of the patent, applied to the case of a patent for an art or process. *Hambly* v. *Albright*, 22 Occ. N. 201, 7 Ex. C. R. 363.

Infringement—Action for — Motion to stay—Proposal to proceed in Exchequer Court to avoid patent. *Parramore* v. *Boston Mfg. Co.*, 4 O. L. R. 627, 1 O. W. R. 643, 716.

Infringement—*Assignee and Assignor—Estoppel—Fair Construction.*] — Where the original owner of a patent had assigned the same, and was subsequently proceeded against by the assignee for the infringement of the patent so assigned, the former was held to be estopped from denying the validity of the patent, but, inasmuch as he was in no worse position than any independent member of the public who admitted the validity of the patent, he was allowed to shew that on a fair construction of the patent he had not in-

fringed. *Indiana Manufacturing Co.* v. *Smith*, 24 Occ. N. 387.

Infringement—Foreign patent—Application for Canadian patent — Time — Evidence. *Milner* v. *Kay*, 1 O. W. R. 200.

Infringement—*Assignee and Assignor—Estoppel—Construction.*]—Where the original owner of a patent had assigned it, and was subsequently proceeded against by the assignee for infringement thereof, the assignor was held to be estopped from denying the validity thereof; but, inasmuch as he was in no worse position than any independent person who admitted the validity of the patent, he was allowed to shew that, on a fair construction of the patent, he had not infringed. *Indiana Manufacturing Co.* v. *Smith*, 24 Occ. N. 387, 9 Ex C. R. 154.

Infringement — *Improvements in Car Wheels—Combination—Utility.*]— The plaintiffs were owners of Canadian letters patent numbered 63,608 for improved abrading shoes for truing up car wheels. The improvement consisted in the use of an abrading shoe in which there were a number of pockets filled with abrading material. Between the pockets were spaces or cavities to receive the material worn from the wheel, the spaces having openings in them to facilitate the discharge of such material. Prior to the alleged invention abrading shoes had been used in which there were similar pockets filled with abrading material; and other shoes had been used in which there were similar spaces or cavities. The plaintiffs' abrading shoe, however, was the first in which these two features were combined, or used together:—Held, that there was invention in the idea or conception of combining these two features for the purpose of truing up car wheels. 2. That the invention was useful. *Griffin* v. *Toronto R. W. Co.*, 7 Ex. C. R. 411.

Infringement—*Lantern Globe—Want of Element of Inventiveness.*]—In an action for infringement of letters patent for improvements in lanterns, one feature only of the lantern, the globe of which could be lifted vertically for the purpose of lighting the lamps, came in question; and as to that, one issue was whether or not in the idea or conception that if the bail of the lantern was made of the right length to drop under the guard or plate of the globe, the bail would hold up the globe while the lantern was being lit, or in the working out of that idea or conception, there was invention to sustain a patent:—Held, that there was no invention to constitute a valid patent. *Kemp* v. *Chown*, 22 Occ. N. 89, 7 Ex. C. R. 306.

Infringement—*Metal Weather Strips — Prior American Patent—Narrow Construction.*]—The defendants had manufactured a form of metallic weather strip in Canada very much nearer to that shewn and described in an American patent to a date prior to the Canadian patent owned by the plaintiffs than it was to any of the forms shewn and described in the plaintiffs' patent:—Held, that if the plaintiffs' patent was good, it was good only for the particular forms of weather strips shewn and described therein; and that upon the facts proved the defendants had not infringed. *Chamberlin Metal Weather Strip Co. of Detroit* v. *Peace*, 25 Occ. N. 144, 9 Ex. C. R. 399.

Infringement—Novelty — Onus. *Lang* v. *McAllister*, 1 O. W. R. 455, 2 O. W. R. 148.

Infringement—*Parties to Action — Service out of the Jurisdiction — Domicil.*]—To an action by the holder of a patent of invention against persons resident within the jurisdiction for an injunction against infringement of the patent and damages, other persons not within the jurisdiction, who make and sell to the defendants the goods which are the subject of the plaintiff's complaint under another patent which the plaintiff alleges to be null and void, are neither necessary nor proper parties, and service upon them of an amended statement of claim asking for damages and an injunction against them and for a declaration that their patent is null and void, will be set aside with costs. The statement of claim did not allege that the non-resident parties had done anything as to which an injunction could be asked against them in Manitoba, and upon its allegations the only relief the plaintiffs could possibly claim against them would be a declaration that their patent was null and void, thus raising two distinct and separate causes of action, one against the parties within the jurisdiction and the other against the non-resident parties, both of which issues should not be tried in one action. Under the Patent Act, R. S. C. c. 61, as amended by 53 V. c. 13, the Court has no jurisdiction to impeach a patent held by a person whose domicil is in another province, but could only, on the application of a defendant sued in this province for an infringement of such a patent, declare it to be void as against him, leaving it prima facie valid as against everyone else. *Maw* v. *Massey-Harris Co.*, 23 Occ. N. 26, 14 Man. L. R. 252.

Interpretation of Letters Patent—*Infringement—Combination of Old Elements.*]—The rules of interpretation to be applied to a patent, which is a contract between the Government or the public and the patentee, are those which are applied to all other contracts. The intention of the parties must be found in the contract itself, and the interpretation of its several clauses is a question of law which is left to the Court. In case of doubt, the contract is interpreted against him who has stipulated, i.e., the patentee. 2. In a patent for a combination of old elements, the subject-matter of the patent is the combination itself taken as a whole, which cannot be infringed unless the whole combination be used, without omitting any element which the inventor himself considered material. 3. In the present case, the hinge joint was a material part of a patent for a hose coupler, and as this was not used by the respondent, there was no infringement. Judgment in Q. R. 18 S. C. 44, reversed. *Came* v. *Consolidated Car Heating Co.*, Q. R. 11 K. B. 103.

License—*Alterations and Improvements—Rights of Licensee.*]—The plaintiff granted to the defendants a license under seal to use a patented invention of his, being an automatic air brake, and to manufacture and equip their rolling stock with the same. He complained that, though the object of his agreement was that his brake might be advertised by its user on the defendants' road in the form in which he had patented it, the defendants were injuring his invention by

substituting in part a different unpatented mechanical device of their own, and using the brake as thus altered to his detriment; and contended that, if the defendants used his invention at all, they must use it in accordance with the form described in his patent, and ask for an injunction:—Held, Armour, C.J.O., dissenting, that, in the absence of agreement to the contrary, as here, there is nothing to prevent a licensee from making such changes or alterations as he thinks proper in the patented invention. Judgment of Meredith, C.J., 2 O. L. R. 190, 21 Occ. N. 466, reversed. *MacLaughlin* v. *Lake Erie and Detroit River R. W. Co.*, 22 Occ. N. 202, 3 O. L. R. 706, 1 O. W. R. 266, 428.

License — Royalties — Assignment of license by licensees—Formation of company—Contract to pay royalties — Statute of Frauds—Consideration. *Woodruff* v. *Eclipse Office Furniture Co.*, 2 O. W. R. 35, 114, 691, 4 O. W. R. 165.

Manufacture—*Extension of Time.*] — A patent of invention expires in two years from its date, or at the expiration of a lawful extension thereof, if the inventor has not commenced and continuously carried on its construction or manufacture so that any person desiring to use it could obtain it or cause it to be made. A patent is not kept alive after two years have expired by the fact that the patentee was always ready to furnish the article or license the use of it to any person desiring to use it, if he has not commenced to manufacture. Smith v. Barter, 2 Ex. C. R. 474, overruled on this point. The power of extension beyond the two years given to the commissioner of patents, or his deputy, can only be exercised once. Quære: Can it be exercised by an acting deputy commissioner?— *Power* v. *Griffin*, 23 Occ. N. 79, 33 S. C. R. 39.

Manufacture of Patented Article—*Violation — Importation — Intention — Forfeiture — Elements — Infringement — Anticipation.*]—1. The object of the law, in requiring the manufacture of the patented article in the country where the patent issues, being to protect the labour and industry of the country, the violation of the law, in order to incur the forfeiture of the patent, must be intentional and of such a character as to injure the national labour. The forfeiture of a patent is not incurred by an importation of a trifling character, or by one made unintentionally. 2. A Canadian patentee is not deprived of his rights under the Canadian patent by the refusal by the United States patent office, through one of its examiners, of a demand by the patentee for a patent similar in effect to one claim of the Canadian patent, and his submission to such decision. 3. The proposition that all elements described in a combination patent of old elements are presumed to be essential, and that such a patent ceases to be protected when one of the elements is left out in the machine of the alleged infringer, is not sustained by the law of Canada. Even the inventor's opinion that the element omitted is essential may be passed over when a better opinion, sustained by experiments, tends the other way. The test of infringement is, whether the substance and essence of the invention has been taken. If the omissions and additions in the machine of the alleged infringer are not material, the mere fact that there are certain parts of the patented combination omitted and certain parts added, cannot prevent an infringement where the substance and essence of the patented invention has been taken. 4. A patent cannot be attacked on the ground of anticipation even where most of the elements, taken separately, were known and used previously, but in a different method, as in the present case, where an entirely different steam hose coupler was used prior to the plaintiff's invention of an end-port steam coupler. *Consolidated Car Heating Co.* v. *Came*, Q. R. 18 S. C. 44.

Novelty — *Patentability — Pleading — Amendment—Costs.*]—S., the plaintiffs' predecessor in title, obtained Canadian letters patent No. 20,566, for certain improvements in wear plates for railway ties, which, according to the specification of the patent, consisted in a flat body-portion, provided at its opposite sides with defending flat-edge flanges, adapted to enter the wooden body of the cross-ties without injuring it, the flanges being relatively parallel and lying in planes approximately at right angles to that of the body-portion. The inventor claimed: (1) a wear plate for railway ties consisting of a body having projecting flanges at its side edges; (2) the combination with a railway rail and supporting cross-tie of a wear-plate consisting of a body having projecting side flanges; the plate being interposed between the rail and tie with its flanges entered into the tie longitudinally or parallel with the grain or fibres of the tie. The substance of the invention was the projecting or defending flanges at the edges of the plate, adapted to enter the wooden body of the cross-tie without injuring it. S. had also obtained an earlier patent, in 1882, which differed from the one above set out only in having one or more flanges or ribs placed under the plate for insertion into the tie, its object being the durability of railway ties. Prior to S.'s improvements, iron or steel plates had been used as tie plates, and it was common knowledge that the insertion of such a plate between an iron or steel rail and a wooden tie would give greater durability to the rail; that reduction of the weight of the plate without loss of strength could be effected by using channel iron or angle iron or by having the plate made with flanges or ribs; and that if such flanges or ribs were sharpened they could be driven into the tie, and that such flanges or ribs would in that position assist in holding the plate in place:—Held, that there was no invention in either of the improvements for which S.'s patents were granted. 2. Costs were withheld because the judgment proceeded upon a defence not raised in the pleadings, but in respect of which the defendants were allowed to amend after the trial. *Servis Railroad Tie Plate Co. of Canada* v. *Hamilton Steel and Iron Co.*, 8 Ex. C. R. 381.

Prior Public User—*Experiments—Dedication to Public.*]—The use of an invention by the inventor, or by other persons under his direction, by way of experiment, and in order to bring the invention to perfection, is not such a public use as, under the statute, defeats his right to a patent. But such use of the invention must be experimental, and what is done in that way must be reasonable and necessary and done in good faith for the purpose of perfecting the device or testing the merits of the invention; otherwise, the

use in public of the device or invention for a time longer than the statute prescribes, will be a dedication of it to the public; and when that happens the inventor cannot recall the gift. *Conway* v. *Ottawa Electric R. W. Co.*, 8 Ex. C. R. 432.

Steadying Device in Cream Separators — *Improvement — Narrow Construction.*]—The invention in question consisted in the substitution of an improved device for one formerly in use as part of a machine, in this case a tubular cream separator:—Held, that the patent must be given a narrow construction, and be limited to a device substantially in the form described in this patent and specification. *Sharples* v. *National Manufacturing Co.*, 25 Occ. N. 146.

PATENT FOR LAND.

See CROWN — DEED.

PATHMASTER.

See WAY.

PAUPER.

Leave to Appeal in Forma Pauperis.]—While no precise or definite rule can be laid down as to the proof to be adduced in support of applications for leave to proceed before the Court of King's Bench in formâ pauperis, the Court will be more exacting in a case like the present, where the appellant, claiming a share of an estate, is appealing from a unanimous adverse judgment of the Court of Review, and is, moreover, still capable of earning a livelihood, than it would be in an action for an alimentary allowance, or for damages by a person incapacitated for work by an accident, and particularly where the judgment appealed from has been in favour of the party making the application. *Boucher* v. *Morrison*, Q. R. 11 K. B. 129.

Maintenance—*Liability of Overseers — "Expenses Necessarily Incurred"—Notice.*]—The defendants declined to pay expenses incurred by the plaintiff in connection with the support and maintenance of C. and her infant child, paupers chargeable to the district, on the ground that the paupers in question had been placed with D. by the overseers, and that they were removed by the plaintiff from the house where they had been placed to his own house, without the knowledge and consent of the overseers:—Held, assuming this to be the case, and that the plaintiff had acted improperly in connection with the removal of the paupers, he was under no obligation to support them longer than he chose to do; that the paupers remained chargeable to the district; and that the defendants, after notice from the plaintiff, must remove the paupers, and provide for them, or pay all charges thereafter necessarily incurred for their support. The care of C., while ill and confined to bed, charges for medical attendance, and expenses of burial, were all necessary expenses, for which the plaintiff was entitled to recover. Medical attendance was an expense necessarily incurred, for which the plaintiff was entitled to recover, although he had not actually paid the bill, such attendance having been furnished at the plaintiff's request, and on his responsibility. The notice given by the plaintiff to the overseers to provide for C., must be held to apply to and include her infant child, who, to the defendants' knowledge, was living with her, although the child was not specially mentioned in the notice. *Naas* v. *Overseers of the Poor for District No.* 3, 35 N. S. Reps. 316.

Relief—*Expenses Necessarily Incurred — Proceedings to Recover—Examination — Notice—Pleading—Reduction of Amount.*]—In an action by the overseers of the poor district of one county against the treasurer of another county, to recover expenses incurred in and about the removal of a pauper, pursuant to an order for removal, and of the relief, on examination, of the pauper, previous to such removal, the order for removal was impeached, on the ground that it did not shew, on its face, that the pauper was examined previous to such removal:—Held, following Rex v. Tavistock, 3 D. & R. 431, that this was unnecessary. The defendant, having had notice of the amount claimed, should have pleaded, if he considered the amount excessive. A statement of claim was good which set out the following particulars, viz., the application to the plaintiffs for relief, that the pauper had no settlement there; examination of the pauper under oath; transmission to the defendant of copies of the depositions; neglect to remove; the making of the order for removal; the amount of expenses necessarily incurred; demand for payment, and refusal. Nevertheless, as the amount claimed appeared to be excessive, the order for judgment for the plaintiffs should be conditioned upon an undertaking on the part of the plaintiffs to reduce the amount. *Cumberland Overseers of the Poor* v. *McDonald*, 35 N. S. Reps. 394.

PAYMENT.

Appropriation of Payments — *Illegal Contract.*]—When a debtor pays money on account to his creditor, and makes no appropriation, the creditor has the right of appropriation and may exercise the right up to the last moment by action or otherwise; he may even appropriate in satisfaction of a debt for which no action would lie by reason of the illegality of the transaction out of which the debt originated. *Mayberry* v. *Hunt*, 34 N. B. Reps. 628.

Appropriation of Payments — Mortgage—Principal or interest—Variation. *Deacon* v. *Webb*, 2 O. W. R. 110.

Payment into Court—*Condition of Payment out—Counterclaim — Costs—Trial — Practice.*]—In an action for the price of land under an agreement for sale, or in the alternative for possession, the defendant filed a counterclaim for specific performance, and paid into Court the amount of the purchase money and interest, demanding therewith a deed with covenants of warranty of title. The plaintiff proceeded with his action, and

recovered judgment at the trial for the amount claimed and costs, including costs of the counterclaim, the decree directing him to give the deed demanded by the defendant as soon as the costs were paid. The verdict was affirmed by the Court en banc; 33 N. S. Reps. 334:—Held, that, as the defendant had succeeded on his counterclaim, he should not have been ordered to pay the costs before receiving his deed; and the decree was varied by a direction that he was entitled to his deed at once with costs of appeal to the Court below and to the Supreme Court of Canada against the plaintiff. Parties to pay their own costs in Court of first instance:—Held, per Gwynne, J., that the defendant should have all costs subsequent to the payment into Court. *Darrow* v. *Millard*, 21 Occ. N. 255, 31 S. C. R. 196.

Recovery Back—*Illegal License Fee — Municipal Corporations—By-law.*]—A municipal corporation passed a by-law providing that (subject to certain exceptions) no butcher should, without being duly licensed, sell any fresh meat in any part of the municipality. The fee was fixed at $10, and the by-law provided that a penalty of not exceeding $50 might be imposed upon summary prosecution. The plaintiff, after some demur, took out licenses for two years, but in the third year refused to do so, and upon appeal by him from his summary conviction for a breach of the by-law, the by-law was held to be invalid, and the conviction was quashed:—Held, in an action brought by him to recover back the fees paid by him, and by other butchers whose rights had been assigned to him, that the fees having been paid under a claim of right, without fraud or imposition, and without actual interference with the business of the butchers, or compulsion exercised upon them, could not be recovered back. *Cushen* v. *City of Hamilton*, 22 Occ. N. 282, 4 O. L. R. 265, 1 O. W. R. 441.

See BANKRUPTCY AND INSOLVENCY—BANKS AND BANKING — BILLS OF EXCHANGE AND PROMISSORY NOTES—COMPANY — EXECUTORS AND ADMINISTRATORS—GIFT —INSURANCE—LIMITATION OF ACTIONS —MORTGAGE — PLEADING — SALE OF GOODS — SHIP—STAY OF PROCEEDINGS —WRIT OF SUMMONS.

PAYMENT INTO COURT.

Pleading — *Defence of Payment in — Money Paid in for Another Purpose.*] — Where an order for summary judgment in favour of the plaintiff is set aside upon payment into Court by the defendant of a specified amount as part security for the plaintiff's claim, the defendant cannot make the money available for the purpose of a plea of payment in, in satisfaction of the plaintiff's claim. *Mendels* v. *Gibson*, 7 O. L. R. 611, 2 O. W. R. 857, 3 O. W. R. 551, 4 O. W. R. 336, 5 O. W. R. 233.

Pleading—*Defence of Tender and Payment in—Motion by Plaintiff for Payment out —Security for Costs—Motion to Rescind Order after Compliance with.*]—The plaintiffs, resident in the United States, in compliance with an order for security for costs, paid $200 into Court. The defendants in their defence set up tender before action and paid into Court $189.52, in full of plaintiffs' claim of $353.89 and costs. On an application by the plaintiffs for an order either for payment out of the money paid in by the defendants or for an order rescinding the order for security for costs and repayment of the $200 paid in by the plaintiffs:—Held, following Griffiths v. School Board of Ystradyfodwg, 24 Q. B. D. 307, that if the plaintiffs elected to take out the money paid in with the plea of tenders, they must take it out in full of their claim, and the defendants would be entitled to their costs:—Held, also, that the order for security for costs having been regularly issued and acted on, it was too late to set it aside; and the motion was dismissed. *American Aristotype Co.* v. *Eakins*, 24 Occ. N. 133, 7 O. L. R. 127, 3 O. W. R. 256, 306.

See APPEAL—BILLS OF EXCHANGE AND PROMISSORY NOTES—DISMISSAL OF ACTION —INSURANCE—LUNATIC — RAILWAY — SHIP—VENDOR AND PURCHASER—WILL.

PAYMENT OUT OF COURT.

Dismissal of Action—*Money Paid in with Defence.*]—The defendant has a right, after a judgment dismissing in toto the action against him, to withdraw the amount deposited by him in the course of the action, and not withdrawn by the plaintiff. *Amiot* v. *Marsan dit Lapierre*, 6 Q. P. R. 461.

Money Paid in as Security for Costs of Appeal—*Surplus — Execution Creditor —Stop Order—Agreement with Solicitors.*] —The defendants, having in the hands of the sheriff an unsatisfied execution against the plaintiff for the costs of the action, and having obtained a stop order against the sum of $200 paid into Court by the plaintiff as security for the costs of an appeal to the Court of Appeal, which had been dismissed with costs, were held entitled to payment of the surplus of the $200, after satisfying their costs of appeal, to be applied on their costs of the action, an agreement alleged by the plaintiff between him and his solicitors, that the surplus should belong to them to be applied upon their costs, not having been satisfactorily established. *Evans* v. *Town of Huntsville*, 24 Occ. N. 297, 7 O. L. R. 540, 3 O. W. R. 423.

See APPEAL—COSTS—DISMISSAL OF ACTION —WILL.

PEACE OFFICER.

See CONTEMPT OF COURT—NOTICE OF ACTION.

PEDDLERS.

See MUNICIPAL CORPORATIONS.

PENALTY.

Action for—*Deposit—Order Nunc Pro Tunc—Terms.*]—Where a plaintiff has neglected to make the deposit of $10 required in

order to bring a suit for a penalty under art. 793, C. M., against a municipal corporation within the limits of whose territory he does not reside, the Court, after contestation and hearing on the merits, will permit the plaintiff to make such deposit, upon the terms of his paying the costs of the motion to obtain such permission, and the defendant will be at liberty to plead de novo after notice that the deposit has been made. *Patterson* v. *Corporation of Nelson*, 4 Q. P. R. 20.

Action — *Non-registration of Declaration —Agent of Insurance Company — Registration on Day of Service of Writ—Institution of Action.*]—The institution of an action dates from the service of the writ, and not from the issue of the writ, and hence, in a qui tam action against the agent of an insurance company to recover a penalty for failure to register the declaration required by art. 4754, R. S. Q., a certificate shewing that the declaration had not been registered within sixty days nor up to the date of issue of the writ, is insufficient to establish default, where it appears that the writ was not served until four days after its issue and that the declaration was duly made and registered on the day of such service. If the writ was served before registration, the burden of proving that fact was on the plaintiff, which proof he had not made. *Inglis* v. *Aitken*, Q. R. 23 S. C. 328.

Action — *Parties—Association—Crown.*]—A suit under s. 12 of 62 V. c. 90 (Q), which makes liable to a penalty of not more than $10 every person who, without a license of the barbers' association of the province of Quebec, shaves or trims the beard or cuts the hair of any person for payment or promise of payment, cannot be begun in the name of the association, but must be in the name of the Crown or of some person suing as well in the name of the Crown as in his own name. *Barbers' Association of the Province of Quebec* v. *Blanchard*, Q. R. 21 S. C. 201.

Action for—*Statute — Parties.*]—Where a special statute, or the Consolidated Statutes of Quebec, or the Municipal Code, authorizes any one to institute an action for a penalty in his own name, he may do so, although the penalty for which he sues is payable half to himself and half to the Crown. *Poirier* v. *Boursier*, 7 Q. P. R. 10.

Affidavit—*Commissioner — Form.*]—The affidavit required for the institution of an action for a penalty under the provisions of the charter of the city of Montreal, may be made before a commissioner of the Superior Court, as well as before a justice of the peace. 2. The defendant suffers no prejudice in fact if the affidavit of the sureties is not in the first person. *Lapointe* v. *Berthiaume*, 6 Q. P. R. 217.

Commissioner of Schools — *Contract with Corporation.*]—The defendant, a commissioner of schools for his parish, had undertaken to warm the school of his precinct, in consideration of $10 a year:—Held, that this trivial contract was not a violation of the spirit of the law, and therefore an action for a penalty brought against him should be dismissed. *Cantin* v. *Lachance*, Q. R. 19 S. C. 144.

Compounding Action for—*Promissory Note for Costs—Failure of Consideration.*]—The plaintiffs instituted an action qui tam for a penalty, and, further, asking for the confiscation of certain pictures. He also lodged a fiat for a writ in an action to recover damages. The penal action was subsequently discontinued, and the plaintiff received from the defendant two promissory notes, in the consideration of which the costs of the action qui tam were included. In an action on the promissory notes:—Held, that the discontinuance or suspension or compounding of a popular or qui tam action, without the consent of the Crown or of the Court, is prohibited by law, and such prohibition applies from the amount of the issuance of the writ in such action. 2. The fact that the plaintiff prayed for the confiscation of the pictures, in addition to a condemnation for penalties in favour of the Crown and himself, did not make it less impossible for him to discontinue or compound the action so far as the recovery of penalties shareable with the Crown was concerned. 3. A promissory note given by the defendant in settlement of such action is null and void, but where the settlement of the penal action formed only part of the consideration, and the settlement of the damages claimed by the plaintiff in the other action was the consideration for the rest of the amount, the note was held good so far as regarded the settlement of damages. *Lapris* v. *Masse*, Q. R. 19 S. C. 275.

Informer—*Right to Sue—Company — "Limited"*]—Any person has a right to bring an action to recover the penalty provided by s. 79 of R. S. C. c. 119, for neglecting to have the word "limited" printed after the name of the company on the outside of the company's office. *Lamalice* v. *Electric Printing Co.*, 4 Q. P. R. 266.

Municipal Corporation—*Action by Informer — Crown—Writ of Summons—Necessary Averments.*]—A person of full age who brings against a municipal corporation an action to recover the penalty provided by art. 793 of the Municipal Code, suing in his own name, must state in the writ of summons that he is suing for the Crown, to whom the penalty belongs; he must claim the penalty, not for whomsoever has a right to it, but for the Crown by name. *Duval* v. *Corporation of St. Alexandre*, Q. R. 24 S. C. 271.

Municipal Corporation—*Right of Action Against—Resident of Municipality.*] — By virtue of s. 335 of 54 V. c. 86, a statute incorporating the town of Drummondville, any adult person residing in the said town may begin in his own name a penal action such as is mentioned in s. 330 of that Act, or such an action as is authorized by s. 4857, R. S. Q., and art. 1046, C. M. *Poirier* v. *Cusson*, Q. R. 21 S. C. 407.

Non-registration of Partnership — *Foreign Partners—Factor—Firm Name.*]—In an action for a penalty brought against C. doing business as C. & Son, for failure to register his business as required by law, it was proved that C. was not carrying on business alone, but was in partnership with another person, and that both partners resided in a foreign country:—Held, that laws imposing penalties cannot be extended beyond their clear provisions, and that the court cannot

extend the scope of the plaintiff's allegation, viz., that the defendant was carrying on business alone under a certain firm name, so as to include the case of the defendant doing business with another person under such name without legal registration. 2. The law requiring registration of partnerships does not apply to the case where a business is carried on by a factor in the Province of Quebec in behalf of persons none of whom are domiciled or resident in the province of Quebec. *Ridgeway* v. *Collier*, Q. R. 21 S. C. 473.

Nova Scotia Towns Incorporation Act — *Qui Tam Action — Right of Informer to Bring—Stay—Statute of Limitations—Interpretation Act.*]—A qui tam action for the recovery of the penalties prescribed by the Towns Incorporation Act, R. S. N. S. c. 71, in the case of a person who acts as mayor after becoming disqualified. Section 56, s.-s. 3, of the Act prescribes the penalty, namely, $20 for each time he so acts. Section 238 provides that "all actions and prosecutions for penalties for breach of any of the provisions of this chapter may, when not otherwise therein provided, be prosecuted by the town or any officer thereof, or any person who prosecutes therefor, and shall be begun by information laid before the stipendiary magistrate of the town." Section 238, s.-s. 2, gives the stipendiary magistrate jurisdiction to enforce such penalties, and s.-s. 3 makes the Summary Convictions Act applicable. Section 242 states that all penalties collected shall form part of the revenue of the town. The plaintiff claimed the right to bring the action as a common informer under s. 23, s.-s. 45, of the Interpretation Act, R. S. N. S. c. 1. The defendant took out a summons to stay the action:—Held, that the action must be stayed. The penalty is not given to a person aggrieved. But for the provisions in the Interpretation Act, the Crown alone could sue thereunder: Bradlaugh v. Clark, 8 App. Cas. 354. But the Interpretation Act does not allow the action to be maintained. Another mode of enforcing the penalty is provided in the Towns Incorporation Act, and if that does not apply, the penalty can be recovered under the Summary Convictions Act. *McDonald* v. *Robertson*, 22 Occ. N. 430.

Ontario Election Act — *Bribery — Recovery of Penalty by Action.*]—The effect of the amendment of s. 159 (2) of R. S. O. 1897 c. 9, made by 63 V. c. 4 (O.), by which persons committing various forms of bribery enumerated in the section (a to e inclusive) become on conviction liable to a fine of $200 and imprisonment, is to take the penalties imposed by the amended clause out of the category of those which may be recovered by action under s. 195. Only one proceeding is contemplated by the amended section, and that is one in which both the penalty may be recovered and the imprisonment imposed. Both must follow on the conviction in one and the same proceeding taken to enforce them. Imprisonment cannot be adjudged in an action under s. 195, which intends a proceeding by action to recover the money penalty only. Judgment of Boyd, C., which followed that of Britton J., in Carey v. Smith, 5 O. L. R. 209, 2 O. W. R. 16, in dismissing the action, varied; and the action held maintainable under s. 195 only for penalties imposed by ss. 162, 163, 165, 166, 168. *Asselstine* v. *Shibley*, 9 O. L. R. 327, 5 O. W. R. 109.

Ontario Election Act — *Bribery — Recovery by Action—Agent at Poll—Certificate — Neglect to Take Oath — Reduction of Penalty*]—An action will not lie under s. 195 of the Ontario Election Act, R. S. O. 1897 c. 9, for the pecuniary penalty for the offence of bribery prescribed by s. 159, s.-s. 2, as amended by 63 V. c. 4, s. 21, until after conviction. The defendant was found guilty of bribery, on the evidence, and the claim for a penalty was dismissed without costs. The defendant was found guilty of bribery, on the evidence, and the claim for a penalty was dismissed without costs. The defendant was held liable to a penalty of $400 under s. 94, s.-s. 5, of the Act, for voting at a polling place where he was acting as an agent of a candidate, under a certificate of the returning officer, without having taken the oath of qualification, but the penalty was reduced to $40, as in the preceding case. *Carey* v. *Smith*, 23 Occ. N. 94, 5 O. L. R. 209, 2 O. W. R. 16.

Ontario Election Act — *Voting without Right—Agent at Poll—Reduction of Penalty.*] — The defendant applied for and obtained registration as a city voter, not knowing that his name was still on the voters' list for the township in which he had formerly resided. Afterwards he agreed to act as agent at the poll for one of the candidates for the electoral district in which the township was situated, at a polling place other than that for the subdivision in which he had formerly resided, and received from the returning officer a certificate entitling him to vote at the place where he was to be stationed. He acted as agent there, took the oath of secrecy, and voted there. No other oath than that of secrecy was administered or tendered or discussed. He was not aware that a non-resident could not vote:—Held, that the defendant was not liable to the penalty imposed by s. 168 of the Ontario Election Act, R. S. O. 1897 c. 9, for voting knowing that he had no right to vote. —South Riding County of Perth, 2 Ont. Elec. Cas. 30, followed. 2. That the defendant was not liable to the penalty imposed by s. 181 of the Act for wilfully voting without having at the time all the qualifications required by law. "Wilfully voting" as in this section and applying it to the facts of the case, was practically the same as voting knowing that he had no right to vote. 3. That the defendant was liable to the penalty of $400 imposed by s. 9, s.-s. 5, of the Act, for not having taken the oath of qualification required to be taken by agents voting under certificate; but, as the defendant was not asked to take the oath, the deputy returning officer not having been aware that it was necessary, and the plaintiff himself was present when the defendant voted, and did not object, the provisions of R. S. O. 1897 c. 108 should be applied, and the penalty reduced to $40. *Smith* v. *Carey*, 23 Occ. N. 93, 5 O. L. R. 203, 2 O. W. R. 13.

Ontario Election Act—*Disqualified Person Voting at Election—Postmaster in City—Sub-postmaster—Post Office Act—Liability to Penalty.*] — Held, a sub-postmaster having charge of a branch office in a city or town is a "postmaster" within the meaning of the Ontario Election Act, and liable to the penalty imposed by that Act for voting at an election for members of the Legislative Assembly. *Lancaster* v. *Shaw*, 6 O. W. R. 316, 10 O. L. R. 604.

See COMPANY—CRIMINAL LAW—DISCOVERY—JUSTICE OF THE PEACE—LIQUOR ACT OF ONTARIO — MUNICIPAL CORPORATIONS — REVENUE—TRADE UNION—VENDOR AND PURCHASER.

PENSION.

See APPEAL—COSTS—RECEIVER—TRIAL.

PEREMPTION.

Action in Warranty—*Intervention.*]—Even if a principal plaintiff, in an action where there is an intervention and a demand in warranty, would be entitled to have any part of the instance perempted, such as the intervention, he cannot obtain such peremption on a motion whereby he simply asks that the present instance be declared peremptied. 2. A principal plaintiff has no interest in moving for the peremption of the action in warranty. 3. The service of such motion is a useful proceeding to interrupt the peremption as regards the intervenant, even if the latter can be considered as a defendant. *Lonsdale* v. *Lesage*, 3 Q. P. R. 364.

Action United with Another.]—A motion for peremption cannot be granted in a case which has been united with another for the purpose of proof, when the latter is still pending. *Cardinal* v. *Brodeur*, 4 Q. P. R. 171.

Appeal—*Useful Proceeding.*]—An appeal from a judgment declaring a cause perempted, and the judgment allowing such appeal, are useful proceedings stopping the peremption. *Wright* v. *Canadian Pacific R. W. Co.*, 4 Q. P. R. 152.

Applicant—*Defendant who has not Appeared—Attorney.*] — A defendant who has not appeared in a suit, either personally or by attorney, has no right to move for peremption through an attorney who is a stranger to the record. *Dumoulin* v. *Lapointe*, 7 Q. P. R. 150.

Application for Rule to Return Property—*Guardian.*] — Peremption applies to all proceedings whose object is the settlement of matters in controversy by a judgment, and therefore, can be invoked with regard to a rule nisi taken out against a guardian who has failed to produce goods seized and placed in his charge. *Dupont* v. *Lacoste*, Q. R. 26 S. C. 33.

Certificate of State of Cause — *Contradicting.*]—A certificate shewing the last step taken in the cause, signed by the prothonotary, is an authentic document, which can only be contradicted by inscription en faux. *Donnelly* v. *Rafter*, 5 Q. P. R. 62.

Commencement of Period.]—The time required for the peremption of a suit after the issues are joined does not begin to run until three days have elapsed after issue joined. *Castelli* v. *Lumkin*, 4 Q. P. R. 32.

Date of Last Filing—*How Determined.*]—A motion for peremption will not be granted although the procedure book states that the filing of the last document took place more than two years before, if the date appearing on the document itself states the contrary. *Ross* v. *Phibé*, 5 Q. P. R. 254.

Demand of — *Peremption of Demand — Useful Proceeding—Stay.*]—A demand of peremption is itself a proceeding susceptible of peremption. Such a demand arrests the proceedings and hinders the peremption from running until the decision upon such demand. A motion to declare perempted the demand of peremption is a useful proceeding which covers the peremption. *Reid* v. *Merizzi*, Q. R. 19 S. C. 428, 4 Q. P. R. 150.

Erroneous Certificate.]—The Court will not declare a suit perempted upon the faith of a certificate which is evidently erroneous, even when it forms part of the record. *Leguerrier* v. *City of Montreal*, 5 Q. P. R. 440.

Interruption — *Assignment—Notice.*] — An assignment of property made by the plaintiff after the commencement of an action, and the sale of the plaintiff's assets by the curator to the assignment, do not interrupt peremption, especially if notice had not been given to the parties to the action. *Dufour* v. *Harvey*, 6 Q. P. R. 110.

Interruption — *Certificate of State of Cause.*]—The fact that the certificate of last proceeding was not filed at the time of the service of the notice of motion for peremption, does not give to the proceedings taken by the plaintiff between the service of the notice of motion and the filing of the certificate, the effect of interrupting peremption. *Brunet* v. *Duperrault*, 6 Q. P. R. 125.

Interruption—*Inscription—Defect in.*] — The filing with the clerk of the Court of an inscription for trial of a cause upon the merits, is a useful proceeding which interrupts prescription, and that is so even where the party filing the inscription does not at the same time file the pleadings upon which issue has been joined, for the use of the trial Judge. *Martin* v. *Gosselin*, 6 Q. P. R. 116.

Interruption — *Negotiations for Settlement—Change of State of Party—Knowledge of Attorney ad Litem—Notice—Interdiction.*]—In order that negotiations for a friendly settlement may have the effect of preventing the action being dismissed on péremption d'instance, they must be put in writing, as, for example, by letters from the party seeking such settlement. A change in the state of a party, unknown to her attorney ad litem, will prevent peremption, even although no notice was given of such change of state. In this case the attorney ad litem, filing his own affidavit that he did not know of the change of state (a party becoming interdict) when the notice of motion for peremption was served, was absolved from giving notice to the opposite party; and the filing of the service of interdiction obliges the Court to take judicial notice of it and justifies a declaration that the action is not perempted. *Guénard* v. *Poitras*, Q. R. 27 S. C. 41.

Interruption — *Useful Proceeding — Motion to Amend — Prescription — Pleading — Exception—Litigious Rights.*]—A motion to amend the declaration is a useful proceeding, and interrupts peremption. 2. The respondents sued the appellant and one C. L., the

latter as carrying on business in the firm name of "C. L. & Co." upon a promissory note. Process in the action was served on the day before the day of the expiry of the period for prescription. C. L. by his defence submitted that the action as against him should be dismissed, alleging that his wife, and not himself, carried on business under the name of "C. L. & Co." After this plea, the respondents desisted as against C. L., and obtained leave to amend the declaration by alleging that the note was signed by C. L.'s wife, carrying on business under the name of "C. L. & Co.," but she was not added as a defendant:—Held, that, in these circumstances, the amendment related back to the date of the commencement of the action, and that it was not prescribed. 3. An exception of litigious rights cannot be set up in answer to an action for a claim included in a general sale of all property and claims, even when the claim in question is in its nature litigious. *Brossard* v. *People's Bank*, Q. R. 13 K. B. 148.

Interruption — *Useful Proceeding — Premature Demand of Peremption—Costs—New Demand.*] — A useful proceeding which may prevent or cover peremption must be a proceeding taken in order to promote the success on the merits of the claim of a party to the suspended cause. 2. A premature demand for peremption is not a useful proceeding to a party to the cause to advance his rights, and therefore it has not the effect of preventing or covering peremption. 3. A party who makes a demand for peremption, which is dismissed as premature, is not obliged to pay the costs incurred by his opponent upon such motion before making a new motion for peremption. *Clifford* v. *Beauport Brewery Co.*, 4 Q. P. R. 295, 324.

Interruption—*Useful Proceeding — Motion to Withdraw Deposit.*] — A motion to withdraw a deposit made with a plea is not a useful proceeding susceptible of preventing peremption. *Primeau* v. *Richard*, 6 Q. P. R. 46.

Interruption—*Useful Proceeding—Withdrawal of Attorney—Petition to Proceed in Formâ Pauperis.*] — The withdrawal of an attorney, not authorized by a Judge, is invalid, and a proceeding made by an attorney substituted without such authorization, is not a useful proceeding having the effect of interrupting peremption:—Quære, Is a petition for leave to continue proceedings in formâ pauperis, a useful proceeding? *Gingras* v. *Syndics of Parish of St. Antoine de Longueuil*, 5 Q. P. R. 300.

Interruption—*Useful Proceeding — Substitution of Solicitors.*]—The substitution of solicitors, by adding to the firm name the name of a junior member who has recently joined the firm, is a useful proceeding to interrupt peremption. *Standard Trust Co.* v. *South Shore R. W. Co.*, 7 Q. P. R. 113.

Interruption—*Useful Proceeding — Subpœna — Examination of Officer of Corporation.*]—A subpœna served on the mayor of a municipal corporation in an action in which the municipality is a party defendant, requiring him to appear and give evidence in the case before it had been set down for hearing, was held a useful proceeding to interrupt peremption, the administration of preliminary interrogatories to the mayor of a defendant corporation being authorized by art. 286, C. P. C. The fact that the witness subpœnaed did not appear on the day appointed would not take away from the subpœna its character as a useful proceeding. Article 286, C. P. C., which provides that when the opposite party is a corporation, the president, manager, treasurer, or secretary thereof may be examined, does not by this enumeration of officers limit the right to examine to them only. The registrar's certificate that no proceeding has been taken in the action for two years is only a ministerial act; this officer may shew whether any proceedings have in fact been taken or not within the time limited, but he has not power to decide whether such proceedings are useful or not. *Boas* v. *Town of St. Hyacinthe*, Q. R. 13 K. B. 431.

Interruption after Time Expired — *Advocates Nominated to Other Offices—Judicial Notice — Defendant's Rights.*] — The Court, of its own motion, takes judicial notice of the nomination of advocates to offices incompatible with the exercise of their profession. 2. Differing from the prescription which gives to a debtor a right acquired from the time that the period has expired, the peremption of a suit does not exist until it is adjudged, and the plaintiff, up to the time of the service of the demand for peremption, even after the period set for peremption has expired, may interrupt such peremption by a useful proceeding. 3. A defendant who has only appeared may demand peremption of the suit. 4. One of several defendants may demand and obtain as to himself alone the peremption of the suit. 5. The fact that the defendant has ceased to be represented by his advocates, who had been called to duties incompatible with the exercise of their profession, does not prevent the peremption from running; it is for the plaintiff to signify his wish to proceed by giving notice to the defendant to authorize a new solicitor. 6. The fact that, after six years having elapsed since the last proceeding, the attorney of the plaintiffs demands the record from the deputy-clerk, who tells her that it is in the hands of the defendant, is not an incident which arrests the proceeding in such a way as to prevent the peremption from taking place where the defendant had the record temporarily and returned it to the clerk upon the first demand. 7. A defendant who has ceased to be represented by his advocates on account of their nomination to positions incompatible with the exercise of their profession, is not obliged to file an appearance, but he may himself sign the demend of peremption, and serve it on the plaintiff, for the demand of peremption is a chief proceeding in itself, having an existence separate and distinct from the action. *People's Bank of Halifax* v. *Labrecque*, Q. R. 20 S. C. 263.

Motion for — *Failure to File Exhibits with Defence.*] — The fact that a defendant failed to file with his defence the exhibits mentioned in support thereof, is no bar to a motion for peremption for want of proceedings during two years. *Leet* v. *Royal Bank of Canada*, 7 Q. P. R. 11.

Motion—*Firm of Attorneys—Incapacity of Member.*] — A motion for peremption of suit, signed by the original attorneys of record, is not invalidated by the fact that one of the

attorneys is now a practising advocate of the Bar of the province of Quebec. *Ross* v. *Elliott*, 5 Q. P. R. 47.

Motion for — *Second Motion after Termination of First.*]—A motion for peremption which has been determined is not an obstacle in the way of the presentation of a second motion for peremption, neither is it a proceeding preventing peremption. *Slater* v. *Slater Shoe Co.*, 7 Q. P. R. 55.

Motion for — *Solicitors — Change in Firm.*]—A motion for peremption may be made in the name of a law firm which has represented the party making the motion, although one of the members thereof no longer practises as a solicitor, utile per inutile non vitiatur. *Hibbard* v. *Williamson*, Q. R. 26 S. C. 34.

New Code of Procedure—*Pending Action.*]—An action begun under the old Code of Procedure may be extinguished if the plaintiff has not taken any useful step in procedure for two years, the peremption having commenced under the new Code. *Lewis* v. *Town of St. Louis*, 3 Q. P. R. 484.

Notice of Motion—*Attorneys—Signature—Partnership Dissolved.*]—The signatures of two attorneys, being the remaining members of a legal partnership dissolved, is sufficient in a notice of motion for peremption. 2. The addition of the name of the attorney who has ceased to be a member of the partnership, does not render void the signatures of the other partners. *Cleve* v. *Bickerdike*, 5 Q. P. R. 391.

Notice of Motion—*Service—Solicitors—Change in Firm.*]—If a firm of advocates is dissolved, a motion for peremption will not be granted, unless it was served upon all of the late partners. Glass v. Eveleigh, 3 Q. P. R. 357, followed. *Lamoureux* v. *Johnston*, 7 Q. P. R. 56.

Notice of Motion—*Service—Solicitors—Death of Partner.*]—When one of the members of a law firm has died during the suit, service of a motion for peremption is validly made upon his surviving partner. *Lipshitz* v. *Montreal Street R. W. Co.*, 7 Q. P. R. 237.

Notice of Motion—*Service—Partnership—Solicitors.*] — In an action brought by a firm of attorneys, of which one member has died since the action was begun and been replaced by another advocate, service of a notice of motion for peremption made upon the partnership as it actually exists, is valid. *Hughes* v. *Montreal Herald Co.*, 5 Q. P. R. 449.

Notice of Motion—*Service—Solicitors—Partners.*]—The service of a motion for peremption upon a firm of solicitors whose members have dissolved partnership since the last proceeding must be made upon both partners, and not only upon one of them as representing the late firm. *Desrochers* v. *Martin*, 3 Q. P. R. 522.

Notice of Motion—*Service—Solicitors—Change in Firm.*] — A notice of motion for peremption is validly served at the office of a firm of solicitors who acted for the plaintiff, although there has been since the last step taken in the action a change in the composition of the firm. *Haggart* v. *Langlois*, 6 Q. P. R. 299.

Notice of Motion—*Time.*]—The period between the service of a notice of motion for peremption and its presentation is one juridical day. *Barbeau* v. *Martin*, 6 Q. P. R. 303.

Old and New Codes — *Interruption — Useful Proceedings — Negotiations.*] — An action begun under the old Code of Civil Procedure may be declared perempted when no useful step has been taken for two years since the coming into force of the new Code. 2. A proceeding, in order to interrupt prescription, must appear by the record or by the procedure book, and must be of such a nature as to advance the cause and aid in its continuance; mere discussions and negotiations, even in Court, to fix a day for proceeding to a hearing, which do not appear upon the record nor in the Court registers, are insufficient to stop peremption, and cannot be established by affidavits subsequent to a motion made to declare the cause perempted. *Schwab* v. *Town of Farnham*, Q. R. 21 S. C. 521.

Retrospective Legislation.] — Where the period of peremption commenced after the promulgation of the new Code of Civil Procedure of the province of Quebec, the exceptions declared by the fourth paragraph of its first article do not prevent the peremption of a suit pending at the time it came into force under the limitations provided by art. 279 of the new Code. Cooke v. Millar, 3 Rev. Leg. 446, 4 Rev. Leg. 240, referred to. *Schwab* v. *Farnham*, 22 Occ. N. 4, 31 S. C. R. 471.

Rule against Guardian.]—Peremption applies to all proceedings taken with the object of obtaining a judgment upon any issue whatever, and consequently to a rule against a guardian. *Dupont* v. *Lacoste*, 6 Q. P. R. 127.

Several Defendants—*Motion by One.*]—One or more joint and several defendants, who have severed in their defence, may move for peremption after two years from the last proceeding as against them, although since that time, proceedings have been had against some of their co-defendants. *Leet* v. *Montreal-Oregon Gold Mines Co.*, 5 Q. P. R. 374.

Suspension—*Proceeding — Agreement — Proof—Oral Evidence.*] — An agreement between the parties, by virtue of which, at the request of the defendant, the plaintiff stayed his action in order to prosecute a claim, including that against the defendant, against a third party, is a proceeding which suspends peremption. 2. Such an agreement may be proved by witnesses in a commercial matter, and the provisions of art. 1235 (1), C. C., which prohibits oral evidence of any acknowledgment or promise which has the effect of withdrawing a debt from the provisions of the statute relating to the prescription of actions, is not to be extended to peremption. *Hendershot* v. *Macfarlane*, Q. R. 24 S. C. 5, 5 Q. P. R. 215.

Suspension—*Infant Attaining Majority—Notice.*]—A change of condition by an infant attaining his majority, which has not been notified and which is not legally proved, cannot suspend peremption. *Elliott* v. *Fraser*, 5 Q. P. R. 5.

Time for—*Negotiations for Settlement.*]—The time during which propositions of settlement, established in an affidavit, the contents of which are not denied, and further established by writings, were pending, must be deducted from the time elapsed between the last proceeding and the making of a motion for peremption. *Machabée* v. *McKerness*, 6 Q. P. R. 219.

PERJURY.

See CRIMINAL LAW—EVIDENCE.

PERPETUATION OF TESTIMONY.

See EVIDENCE.

PERPETUITY.

See WILL.

PERSONATION.

See LIQUOR ACT OF ONTARIO—MANDAMUS.

PETITION.

See COMPANY — DOWER — EVIDENCE — JUDGMENT—MUNICIPAL ELECTIONS—PARLIAMENTARY ELECTIONS.

PETITION OF RIGHT.

See APPEAL—CROWN.

PHARMACY ACT.

See STATUTES.

PHYSICAL EXAMINATION.

See DISCOVERY.

PHYSICIANS AND SURGEONS.

Expulsion of Registered Member of College—Unprofessional conduct — Evidence —Appeal—Costs. *Re Telford* (B.C.), 2 W. L. R. 405.

Medical Professions Ordinance, N. W. T. — *Practising Medicine or Surgery — Midwifery.*]—Section 60 of the Medical Professions Ordinance (C. O. 1898 c. 52) provides: "No unregistered person shall practise medicine or surgery for hire or hope of reward; and if any person not registered pursuant to this Ordinance, for hire, gain, or hope of reward, practises or professes to practise medicine or surgery, he shall be guilty of an offence, and upon summary conviction thereof be liable to a penalty not exceeding $100;"—Held, that midwifery is not included within the terms "medicine and surgery," and therefore no penalty can be imposed for the practice of it by unlicensed persons. *Rex* v. *Rondeau*, 5 Terr. L. R. 478.

See MEDICINE AND SURGERY.

PILOTAGE DUES.

See SHIP.

PILOTS.

Apprentice—*Payment for Presentation to Corporation—Contract—Illegality— Recovery of Money Paid.*]—A contract to pay a pilot for his presentation of an apprentice pilot to the corporation of pilots, is illegal and cannot be enforced. 2. Money paid on a contract null as being contrary to public order, can be recovered by an action en répétition. *Paquet* v. *Pepin dit Lachance*, Q. R. 22 S. C. 155.

Forfeiture of License—*Corporation of Pilots—Acquiescence—Certiorari.*] — A pilot who, in consequence of a temporary forfeiture of his right to exercise his trade, by the Court of Pilots, remits his commission to the Court, thereby acquiesces in the sentence and cannot afterwards proceed against the Court by way of certiorari. *Frenette* v. *Montreal Court of Pilots*, 5 Q. P. R. 415.

Harbour Commission — *Corporation of Pilots — Apprentices — Recommendation — Douceur—Illegality—Public Policy.*] — The statutes concerning pilots and pilotage are of public order. 2. It is the harbour commission of Quebec which commissions the pilots, and from the time that a person is commissioned as a pilot he is a member of the corporation of pilots; it is the harbour commission which prescribes the number of candidates who may be apprenticed to the corporation of pilots; it is the corporation of pilots which chooses the apprentices, who are indentured not to the individual pilots but to the corporation of pilots, whose duty it is to see that they acquire the necessary knowledge. 3. A custom exists among the pilots of Quebec of recommending, each in his turn, an apprentice, and for such recommendation each pilot requires for his personal benefit a fee from the apprentice. Without such recommendation no person is accepted as an apprentice: —Held, that this custom is an abuse and contrary to the public interest, and, therefore, every contract made by a pilot who recommends an apprentice, by which the latter engages himself for such recommendation to pay a sum of money to a pilot, is illegal and contrary to public order. *Raymond* v. *Langlois*, Q. R. 22 S. C. 392.

Suspension—*Harbour Commissioners.*] — The commissioners of the harbour of Montreal have no right to suspend a licensed pilot, upon an irregular complaint, without summons and without notice. *Belisle* v. *Montreal Harbour Commissioners*, 6 Q. P. R. 363.

PLACE OF TRIAL.

See VENUE.

PLAN.

Amendment — *"Party Concerned" — R. S. O. c. 136, s. 110*]—A plan of sub-division of the land of adjoining owners, prepared and registered upon their joint request, may, upon compliance with the statutory conditions be amended upon the application of either owner as far as his own land is concerned, without the consent of the other owner, but that other owner is a "party concerned" within the meaning of s. 110 of the Registry Act, R. S. O. c. 136, and entitled to notice of the application. *In re Ontario Silver Company and Bartle*, 21 Occ. N. 112, 1 O. L. R. 140.

Identity of Island—Description—Acreage—Mistake in patent. *Holstein* v. *Cockburn*, 2 O. W. R. 998.

Subdivision of Lot—*Necessity for Filing Plan—Judgment — Consent of Stranger.*] — The owner of an immovable, situated in a town or village, who divides it into lots, is not bound, as against those to whom he sells these lots, to deposit at the office of the Commissioner of Crown Lands and to have approved by him a plan and book of reference of the division which he has made. The only effect of default to do so is that these lots will continue to be designated according to the provisions of art. 2168, C. C., in place of being designated by the numbers which he has given them. 2. A defendant cannot be ordered by a judgment to do something which is subject to the consent of another person. *Bergeron* v. *Drolet*, Q. R. 23 S. C. 415.

See CONTRACT — EVIDENCE — MINES AND MINERALS—TRESPASS TO LAND.

PLEA.

See PLEADING.

PLEADING.

I. BILL OF COMPLAINT, 1296.
II. COUNTERCLAIM, 1296.
III. CROSS-DEMAND, 1297.
IV. DECLARATION, 1297.
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I. BILL OF COMPLAINT.

Demurrer.]—A bill is not demurrable unless it absolutely appears that on the facts disclosed in the bill being established at the hearing the bill must be dismissed; and where the case for relief contained in the bill depends upon facts admitting of variation in their proof from their statement in the bill, demurrer will not lie, though no relief, or relief in modified form, may be granted at the hearing. *Stewart* v. *Freeman*, 22 Occ. N. 389.

II. COUNTERCLAIM.

Claim on Behalf of Defendant and Others—*Release.*]—The plaintiff, having under her deceased husband's will a charge on land devised by him to the defendant, brought this action to enforce payment of arrears by a sale of the land and for construction of the will. The defendant delivered a counterclaim alleging that he was one of the next of kin of the testator; that the testator by his will directed the plaintiff, who was executrix, and his executors, to manage a farm for the maintenance of the children until the youngest should reach the age of twenty-four; that the plaintiff received all the profits of the farm for many years, and kept them; that the defendant, as one of the next of kin, was entitled to a share; that the executors of the testator had never had control of the land; and that any remedy against them was barred by statute; and he asked for an account and payment into Court of the amount found due by the plaintiff, to be divided amongst the parties entitled. He further alleged that the plaintiff had executed a release of a part of the charge for which she claimed:—Held, that the counterclaim was in effect for a declaration that the plaintiff was a trustee for the defendant and the other next of kin of certain profits of working the testator's farm alleged to have been received by her so many years ago that if she were not a trustee their rights would be barred. The counterclaim was an action brought on behalf of the defendant and the other cestuis que trust, who would be necessary parties at the outset but for Rule 203, and who must be made parties in the Master's Office; and not being for himself alone, but for himself and others, did not come within Rule 248, Pender v. Taddei, [1898] 1 Q. B. 798, followed. The effect of the release was not a matter to be raised by counterclaim, but as a defence. *Hume* v. *Hume*, 22 Occ. N. 147, 1 O. W. R. 156, 187.

Exclusion of — *Defendants to Counterclaim out of Jurisdiction — Foreign Trade Mark—Conspiracy to Defraud.*]—The plaintiffs, an English company, brought an action against the defendants in Ontario to restrain them from exporting goods to and interfering with their business in Australia, in breach of a certain agreement, and the defendants, besides setting up as a defence certain breaches of the agreement by the plaintiffs, counterclaimed against the plaintiffs for damages for such breaches, for a declaration of their rights as to trade with Australia and other countries, and a rectification of the agreement to make it conform to the representations of the plaintiffs. The defendants also counterclaimed against the plaintiffs, and G.

and P., two persons not originally parties to the action, one resident in Ontario and one in Australia, and an Australian company, alleging a conspiracy by them to defraud and cheat the defendants out of certain rights to trade marks they were entitled to in Australia under the agreement by the plaintiffs, assigning the trade marks to G. and P., who, with the Australian company, fraudulently put in force the trade mark laws of Australia, and prevented the defendants exporting their goods to Australia and obstructed them in their business:—Held, that the claims made in the counterclaim against the plaintiffs alone were proper subjects of a counterclaim in the action; but that there was no such intimate connection between the subject of the action and the subject of the counterclaim against the four parties, only one of whom was resident within the jurisdiction or had admitted the jurisdiction of the Court, as to oblige the Court to require both to be disposed of in the same action. South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord, [1897] 2 Ch. 487, followed. *Dunlop Pneumatic Tire Co.* v. *Ryckman*, 23 Occ. N. 106, 5 O. L. R. 249, 1 O. W. R. 699, 820.

Motion to Compel Amendment—Particulars—Premature application—Several defendants—Increase in amount. *Fuller* v. *Appleton*, 2 O. W. R. 424, 448, 829, 1083.

Striking Out—Parties—Action by execution creditor of husband to declare wife trustee for husband—Counterclaim by husband for debt assigned to him. *Ennis* v. *Reade*, 1 O. W. R. 652.

Striking Out—Patent for invention — Trade mark—Contract for right to—Breach of—Injunction. *McArity* v. *Morrison*, 1 O. W. R. 552, 632, 2 O. W. R. 156, 1018.

III. Cross-Demand.

Unconnected Claims—*Defence.*] — A cross-demand must have for its object the defeating or at least the modifying of the principal demand; and therefore a cross-demand filed in answer to an action to set aside an hypothecary inscription, and claiming from the plaintiff payment of a debt alleged to be privileged, does not flow from the same source as the principal demand, and cannot be maintained. 2. A ground of defence to a principal action cannot be set up by way of cross-demand. *Langlois* v. *Bayard*, Q. R. 24 S. C. 195.

IV. Declaration.

Action by Inspector for Cost of Public Road — *By-law.*]—A road inspector who sues to recover the cost of materials used in and work done upon the public highway and sidewalk in front of the defendant's property, should make it appear in his declaration that the construction of the sidewalk was ordered by the municipal corporation, and if he does not allege the existence of a by-law to this effect his action will be dismissed on inscription in law. *Paré* v. *Deschamps*, 7 Q. P. R. 4.

Action for Damages—*Influencing Employers Against Plaintiff—Particulars.*] — A plaintiff who alleges that the defendant, an inspector of roads, used his influence maliciously and irregularly to prevent the plaintiff securing work from the municipal corporation, should state when and how the defendant so acted; but he is not obliged to say, when, how, or by whom the defendant endeavoured to bring a criminal prosecution against him nor to state the kind and nature of the damages which he claims to have sustained. *Simard* v. *Durocher*, 7 Q. P. R. 88.

Alternative Claims—*Will — Usufruct—Substitution—Election.*]—In suing a person for maladministration of an estate of which he is in possession by a title the exact nature of which is ill-defined in the will which creates it, the plaintiff cannot make alternative claims in view of the Court construing the will as giving a usufruct, or a substitution, and the defendant has a right to require, by way of dilatory exception, that an election be made between such alternative demands, if made. *Hurtubise* v. *Decarie*, 6 Q. P. R. 333.

Amendment—*Costs of New Defence.*]—Where the plaintiff by amendment changes his demand by reducing it, upon paying the costs of the motion, the other costs being reserved, the costs of filing a new defence will not be adjudged against the plaintiff until the trial, the trial Judge being left to decide whether the new defence was necessary. *Quinn* v. *Imperial Bank of Canada*, 6 Q. P. R. 352.

Amendment—*New Cause of Action.*]—A plaintiff cannot be allowed to amend his declaration for the purpose of alleging a cause of action which did not accrue until after the institution of the action. *Ward* v. *Merchants Bank of Halifax*, 4 Q. P. R. 407.

Amendment — *Useless Conclusions.*] — A plaintiff should not be allowed to amend his declaration by adding conclusions for coercive imprisonment against the defendant, such amendment serving no useful purpose. *Chartrand* v. *Smart*, 4 Q. P. R. 41.

Claim for Relief—*Inconsistency—Real Action.*]—A real action in which only personal conclusions are made will be dismissed upon demurrer. *Drouin* v. *Laurier*, 4 Q. P. R. 343.

Declinatory Exception—*Jurisdiction—Allegations Shewing.*]—He who brings an action in one district against a person living in another, should allege in his declaration all the facts necessary to give jurisdiction to the Court in which the action is brought; the allegation of these facts in an answer to an exception déclinatoire, is irregular, and such answer will, on motion, be struck from the record. *McKenzie* v. *Person*, Q. R. 26 S. C. 521.

Inconsistent Allegations — *Motion to Compel Plaintiff to Elect—Extension of Time for Pleading.*]—A motion that the plaintiff may be directed to elect between two contradictory allegations of his declaration, is a ground preliminary to the contestation, which has the effect of prolonging the time for pleading, which will not commence to run until judgment is given on such motion. *Blais* v. *Aubé*, 7 Q. P. R. 269.

Inconsistent Claims — *Dilatory Exception—Election.*]—Where a party to an action alleges contradictory grounds of action or defence, the course to be taken by the opposite party is not to inscribe in law, but to proceed by dilatory exception, in order to compel the party to elect; art. 117, C. P. *Crépeau* v. *Bruneau*, Q. R. 24 S. C. 368.

Interest on Promissory Note — *Particularity.*[—An allegation in a declaration that the plaintiff claims a certain sum for interest due upon a promissory note, not otherwise described, is sufficient. *Bromwell* v. *O'Farrell*, 5 Q. P. R. 85.

Irrelevant Allegations — *Action by Physician for Fees—Cause of Injury to Defendant.*[— A physician who sues for the value of professional services, may not allege in his declaration, even in order to justify the amount of his claim, that the injury from which the patient suffered was mentioned in the newspapers, as well as the fact that the services of the plaintiff had been engaged; that the injury was caused by the son of the defendant, who was at the time in custody accused of injuring the defendant. *Marien* v. *Lussier*, 5 Q. P. R. 324.

Joinder of Causes of Action — *Cancellation of Deeds—Account—Injunction — Possession—Sequestration.*]—In the same action may be joined claims for the cancellation of certain deeds made by an inheritor for life, for an account of the rents and profits received by the grantees under these deeds by virtue thereof, for an injunction against the continuance of actions begun under these deeds, for terminating the possession of the inheritor for life, and to place the inheritance under sequestration unless the inheritor should furnish security. *Resther* v. *Hébert*, 7 Q. P. R. 176.

Landlord and Tenant — *Cancellation of Lease.*]—In an action for the resiliation of a lease and for future rent, it is not necessary to allege specifically that the causes mentioned in the declaration entitle the plaintiff to the conclusions of his action. *Desautels* v. *Fortier*, 7 Q. P. R. 85.

Matters Arising after Action — *Discharge of Saisie-revendication — Final Judgment.*]—The plaintiff cannot, by amending his declaration, allege facts arising subsequent to the commencement of the action. 2. In this case the plaintiff could not, in support of his action for damages for the issue without probable cause of a writ of saisie-revendication, allege the discharge of this writ by the Court, if the judgment discharging the writ had only become final after the institution of the action for damages and service of process therein. *Kaine* v. *Matthews*, 4 Q. P. R. 226.

Necessity for Plaintiff's Signature—*Fraudulent Deeds — Inscription en Faux.*]—A plaintiff who begins a suit demanding that certain deeds mentioned in the declaration shall be declared fraudulent, is not obliged himself to sign the declaration, although he indicates in the declaration that he intends to inscribe en faux against such deeds. *Marcopostolon* v. *Fouriesos*, 5 Q. P. R. 315.

Puis Darrein Continuance—*Aggravation of Damages.*]—A plaintiff who complains of injuries caused to him a long time before the institution of the action, cannot, by a proceeding puis darrein continuance, on the eve of the hearing allege facts which would amount to an aggravation of damages. *Brunet* v. *Canadian Pacific R. W. Co.*, 5 Q. P. R. 425.

Questions of Fact and Law—*Distress for Rent—Seizure—Exemption.*] — Although a party cannot raise questions of fact in an inscription in law, he may, nevertheless, set up grounds of law in an exception or reply based upon facts set up. 2. In an action for rent and damages the plaintiff is not bound to allege in the declaration that the defendant has removed the greater part of his effects and that the effects seized were in fact seizable; this ground, which ought to be contested in law, should be set up by a pleading claiming exemption from seizure. *Beaubien* v. *Lynch*, 4 Q. P. R. 183.

Revendication of Goods—*Purchase at Assignee's Sale—Signification of Act of Sale not Alleged.*]—An action in revendication of goods purchased by the plaintiff at an assignee's sale, wherein it is not alleged that signification of the act of sale was made, nor that a copy of it was delivered to the debtor, nor that it is produced with the action, will be dismissed on an inscription in law. *Maller* v. *Levinton*, 7 Q. P. R. 17.

Service — *Time — Saisie-Gagerie.*] — When a writ of saisie-gagerie is made returnable the second day after service, the declaration must be served at the same time as the writ. 2. When the service of a declaration may be made at the office of the clerk of the Court, there must be at least one clear day between such service and the return of the writ. *Dupuis* v. *Mathieu*, Q. R. 24 S. C. 136.

Setting out Previous Proceedings—*Amendment.*]—The plaintiff in an action en reddition de compte will not be allowed to set out at length in his declaration the proceedings in a previous action between himself and the defendant, and such allegations will be struck out upon demurrer. However, as it may be of importance to him to allege such facts in a general way, to justify himself for not having begun his present action earlier, the Court will, proprio motu, permit him to amend his declaration by alleging the previous suit and the judgment therein. *Cheval* v. *Senécal*, 4 Q. P. R. 241.

Time—*Saisie-Gagerie — Exception — Service—Production.*] — In the case of a saisie-gagerie it is sufficient to file the declaration within three days after service of the writ, even if the writ is returnable and returned within two days after its execution. 2. The time allowed for the service of a preliminary exception in this case ran only from the day on which the plaintiff filed the contract of marriage establishing her status as a married woman separate as to property. *Burgess* v. *Work Bulletin Printing Co.*, 6 Q. P. R. 442.

V. Demurrer.

Amendment — *Costs — Setting Down—Waiver of Objection.*]—A defendant may not answer and demur respectively to the whole

bill, for thereby the demurrer is overruled, notwithstanding s. 47 of 53 V. c. 4. Consequently, where a demurrer professed to be to a part, and the answer professed to be to the residue, of a bill, but the demurrer was extended to the whole prayer of the bill, it was held that unless the answer was withdrawn, for which purpose leave of the Court was given, the demurrer should be overruled with costs, but that, if the answer was withdrawn, the demurrer being successful on the merits should be allowed with costs. The objection that an answer and demurrer are respectively to the whole bill, is not waived by the plaintiff setting the demurrer down for argument under s. 41 of 53 V. c. 4. A defendant cannot demur ore tenus where there is no demurrer on the record, as where the demurrer on the record is overruled by the answer. *Abell* v. *Anderson*, 21 Occ. N. 94, 2 N. B. Eq. Reps. 136.

Grounds Specified — *Revivor — Executors—Res Judicata.*]—In adjudicating upon an inscription in law the Court will only take into consideration the grounds which are there specified. 2. A judgment rendered in an action qui tam may be set up by the defendants (executors) in an action brought for the purpose of forcing them to revive an action for damages, when the question in litigation is the same in the two cases. *Marshall* v. *MacDougall*, 5 Q. P. R. 186.

VI. EXCEPTIONS.

Declinatory Exception — *Deposit.*] — When a defendant by a declinatory exception demands simply the dismissal of the action, without complying with the terms of art. 170, C. P., that is to say, without depositing the amount claimed, or the equivalent if it is something else than money which is claimed, his declinatory exception will be considered irregular and will be struck out with costs. *Garneau* v. *Gaudet*, 4 Q. P. R. 370.

Declinatory Exception — *Jurisdiction —Plea on Merits.*]—A party who complains, by way of declinatory exception, of a defect of jurisdiction ratione personæ, cannot afterwards complain of the same defect when pleading to the merits. *Lapierre* v. *Brunet*, 6 Q. P. R. 398.

Declinatory Exception — *Reply — Account—Acknowledgment — Motion to Strike Out.*]—Where a declinatory exception is pleaded to an action upon an account, the plaintiff cannot, in replying to the exception, allege that the defendant has acknowledged owing the account in the district in which the action is brought. 2. Such an allegation may be struck out of reply by motion, and not by inscription in law, it being of a nature to justify the conclusions of the reply. *Theoret* v. *Brunet*, 6 Q. P. R. 441.

Dilatory Exception — *Account — Default of Service.*]—Default of service of an account upon which the action is based is ground for a dilatory exception, and not for an exception to the form. *Dubrule* v. *Leclaire*, 5 Q. P. R. 310.

Dilatory Exception—*Beneficiary Heir—Action Against—Time for Inventory.*]—The beneficiary heir cannot plead a dilatory exception to an action instituted against him in his quality of beneficiary heir, based upon the ground that the term for making inventory and deliberating has not expired. *Standard Drain Pipe Co.* v. *Robertson*, 5 Q. P. R. 70.

Dilatory Exception—*Contractor—Warranty.*]—The owner of a property being sued for a fault of his contractor, is entitled to bring in the latter en garantie by a dilatory exception. *Flanigan* v. *Town of Outremont*, 6 Q. P. R. 22.

Dilatory Exception—*Fiduciary Heir—Action Against—Calling in Widow and Children of Testator.*]—A fiduciary heir, who is sued for a debt of the de cujus, with the payment of which he was specially charged, having received funds therefor, has no dilatory exception to call in the widow, common as to property, and the minor children of the deceased. *Deguire* v. *Lanthier*, 7 Q. P. R. 112.

Dilatory Exception — *Hypothecary Action—Security—Defence au Fonds.*]—A third party who has taken an immovable in payment of his hypothecary debt and who wishes to demand security, under art. 2073, C. C., from a subsequent creditor who is suing him as hypothecary, should do so by defence on the merits and not by way of dilatory exception. *Bastien* v. *Desjardins*, Q. R. 11 K. B. 428.

Dilatory Exception — *Inconsistent Allegations—Motion to Compel Election—Deposit.*] — A motion to compel a defendant to elect between two allegations of his defence is in the nature of a dilatory exception, and must be accompanied by a deposit. *Martineau* v. *Pauzé*, 5 Q. P. R. 412.

Dilatory Exception—*Right of Plaintiff to File.*]—Although arts. 177 and 183, C. P., speak only of the defendant, the plaintiff may demand by dilatory exception an extension of the time for replying to a plea of payment, when such plea renders it necessary to call in his landlord or others en garantie. *Dionne* v. *Ouellet*, 3 Q. P. R. 190.

Exception to the Form — *Action for a Debt by Insolvent after Assignment — Defence on the Merits.*]—The proper answer to an action by an insolvent who sues on an account forming part of his estate, after he has made an assignment, is by a defence on the merits and not by an exception to the form. *Coté* v. *Marinier*, 7 Q. P. R. 110.

Exception to the Form—*Action in Part Summary and in Part Ordinary—Election.*] —Where the plaintiff's claim is in part summary and in part ordinary, the action as a whole is susceptible of different methods of procedure, and the defendant's remedy is to have the plaintiff optate, not to move for the dismissal of the action by exception to the form. *Sun Life Assce. Co.* v. *Piché*, 7 Q. P. R. 227.

Exception to the Form — *Defendant Sued Personally and in Another Capacity.*] —Where an exception to the form filed by a defendant sued personally is dismissed, the

defendant, sued afterwards in another capacity, by an amendment, can offer the same objection in the character in which he is sued, but not personally. *Cantlie* v. *Cantlie*, 7 Q. P. R. 308.

Exception to the Form—*Loss after Filing — Record — Copy.*]—An exception to the form, accompanied by the deposit required in similar cases filed at the office of the Court within the time fixed by law, is regularly upon the record, and, therefore, before the Court, and if, in the time which elapses between its filing in the office and the day of its presentation before the Court, the original exception to the form is lost without any fault on the part of the party who filed it, the Court will order the filing, as part of the record, of a copy of such exception in place of the original. *Bélanger* v. *Mercier*, Q. R. 12 K. B. 428.

Exception to the Form—*Misnomer — Amendment.*]—A defendant who complains, by exception to the form, that the plaintiff does not describe himself under his true name, but without setting forth such true name, will not be allowed to amend his exception, after the delays within which it must be filed, by adding thereto an asserfion of the true name of the plaintiff. *Dufour* v. *Poirier*, 7 Q. P. R. 162.

Exception to the Form — *Notice of Deposit.*]—The Court will not hear an exception to the form when no notice of the deposit made therewith has been given to the opposite party. *Merchants Bank of Canada* v. *Republic Consolidated Gold Mining Co.*, 5 Q. P. R. 202.

Exception to the Form—*Prejudice — Service.*]—No exception to the form will be entertained in the absence of an allegation and proof of prejudice; and in this case it did not appear that the service of process in the action after 7 o'clock in the evening (admitting that the delay was proved) had prejudiced the defendant. *Meunier dit Lagacé* v. *Laurin*, 7 Q. P. R. 281.

Exception to the Form—*Residence of Defendant.*]—An exception to the form alleging that the defendant is described as being of the village of St. Louis, whereas he resides at Montreal, where process in the action has been served upon him, will be dismissed with costs. *Brunet* v. *Tison*, 5 Q. P. R. 459.

Exception to the Form — *Summary Procedure — Time — Waiver.*]—A defendant sued in tort under the Summary Procedure Act, may proceed by way of exception to the form within the time limited and if he has pleaded to the merits he cannot complain of the defect of form at the time of the setting down of the cause for hearing. *Levy* v. *Strathcona Rubber Co.*, 5 Q. P. R. 341.

Form — *Waiver — Appearance by Another Solicitor—Ground of Exception—Particulars.*]—When a defendant appears separately by two solicitors and one of them files an exception to the form, the defendant is held to have waived, by reason of the other appearance, his objections to the form of the plaintiff's pleading. 2. It is not a ground of exception to the form that the pleading does not give sufficient particulars, but only a ground for asking further particulars. *Moreau* v. *Lamarche*, Q. R. 18 S. C. 34.

Opposition to Judgment — *Cross-Demand—Set-off—Waiver—Jurisdiction.*] — In framing an opposition or petition in revocation of judgment, the defendant, in order to comply with art. 1164, C. P. Q., is obliged to include therein any cross-demand he may have by way of set-off or in compensation of the plaintiff's claim, and, unless he does so, he cannot afterwards be permitted to file it, as of right. A cross-demand, so filed with a petition for revision of judgment, is not a waiver of a declinatory exception previously pleaded therein, nor an acceptance of the jurisdiction of the Court. In order to take advantage of waiver of a preliminary exception to the competence of the tribunal over the cause of action on account of subsequent incompatible pleadings, the plaintiff must invoke the alleged waiver of the objection in his answers. *Magann* v. *Auger*, 21 Occ. N. 329, 31 S. C. R. 186.

Preliminary Exception — *Deposit.*] — The requirements of art. 165, C. P., as regards the deposit to be made with preliminary exceptions, are peremptory, and must be strictly complied with. *Leclerc* v. *Ayer*, 5 Q. P. R. 253.

Preliminary Exception — *Long Vacation — Computation.*] — Article 10, C. P., which dispenses with the necessity of proceeding during the long vacation, applies to preliminary exceptions. Thus, when an action has been commenced between the 30th June and the 1st September, it is deemed to have been so commenced on the 1st September, and preliminary exceptions can then be made on the 2nd, 3rd, or 4th September, or any juridical day immediately following the 4th September, if the latter is not a juridical day or a Saturday. *Trusts and Guarantee Co.* v. *Bélanger*, 7 Q. P. R. 291.

Preliminary Exception—*Order Allowing after Time Expired—Appeal.*] — The Court has discretionary power to allow the filing of preliminary exceptions, and particularly of an exception to the form, after the delays, when sufficient reason for the delay is shewn. 2. A judgment allowing a defendant to file an exception to the form after the delays, without adjudicating upon its merits, is not an interlocutory judgment from which leave to appeal can be granted. *Lefebvre* v. *Heirs of Everett*, 6 Q. P. R. 188.

Preliminary Exception — *Plea to the Merits—Postponement.*]—To a demand for an assignment the debtor filed an exception and contested the demand upon the merits before adjudication upon the exception:—Held, that it is lawful for a party who had filed a preliminary exception to plead to the merits before the contention upon the exception is decided; but in this case the hearing upon the merits should be postponed until the exception should be decided, and if it should be maintained, the defendant would have no right to costs of the contestation: if the exception should be dismissed, the contestation would proceed in the ordinary way. A motion to set aside the contestation was dismissed. *McCall* v. *Godmaire*, 5 Q. P. R. 210.

Preliminary Exceptions — *Pleading to the Merits.*]—The fact that a plaintiff has answered preliminary exceptions, does not prevent his requiring the defendant to plead to the merits in spite of such exceptions. *Roy* v. *Quesnel*, 7 Q. P. R. 148.

Preliminary Exception — *Service — Deposit — Notice.*]—It is not sufficient in the signification of an exception to the form, to serve notice that the certificate of the prothonotary as to the deposit will be filed at the time of the return of the motion, but a copy of the certificate itself ought to be served; and the defendant will not be allowed to serve such copy after the return of the motion. *Roberge* v. *Bélanger*, 7 Q. P. R. 80.

Preliminary Exception — *Time — Computation—Vacation.*]—Although art. 10, C. P., says that "in the computation of the time for pleading or for trial the first day of September is considered to be the day immediately following the 30th day of June," it does not follow that every day after the 30th June is to be considered as being the 1st September, and, therefore, the three days allowed by art. 164, C. P., for the service of preliminary exceptions begins to run, in the case of an action brought during vacation, upon the first and not the second day of September. *Barbeau* v. *Jubin*, 5 Q. P. R. 457.

VII. Incidental Demand.

Action by Husband and Wife—*Joint Cause—Separate Cause—Joinder.*]—In an action brought by both husband and wife for attacks made upon them in common, whereby they jointly suffered, an incidental demand based upon the husband's dismissal, will be rejected upon exception to the form. *Villeneuve* v. *Anderson*, 7 Q. P. R. 290.

Filing — *Amendment.*]—An incidental demand whereby a plaintiff claims something which he had omitted to ask for by his action, is not in the nature of an amendment, and leave to file it is not necessary. *Scottish Union Assurance Co.* v. *Quinn*, 5 Q. P. R. 262.

Leave to Present in Forma Pauperis —*Terms.*] — The authorization to begin an action for a certain sum, in forma pauperis, does not extend to a supplementary incidental demand, filed at a later stage in the same cause. 2. In such case the person making the incidental demand will be ordered to affix to his demand the necessary stamps, and to obtain permission to proceed in forma pauperis upon his incidental demand; upon his default to conform to such order within the time fixed by the judgment, his incidental demand will be dismissed upon exception to the form. *Vitale* v. *Canadian Pacific R. W. Co.*, 4 Q. P. R. 335.

Supplementary Answer—*Rights Arising since Action.*] — An incidental demand does not lie where it claims a right which did not exist at the time of the institution of the action, especially if such right does not constitute an answer to the contentions of the adverse party, but may at the most serve as a basis for a new action on the part of the one who invokes it. 4. The supplementary answer to an action or to a plea, of which art. 199, C. C. P., speaks, must constitute a good defence to such action or a good reply to such plea, and it must not be founded upon facts subsequent to the institution of the action which do not contribute a reply to the defendant's plea, but which might, at most, support a fresh action by the plaintiff against the defendant. *Dupuis* v. *Dupuis*, Q. R. 19 S. C. 509.

VIII. Inscription in Law.

Allegations of Fact—*Documents.*]—An inscription in law ought to be directed against the facts alleged, and the documents produced in support of the claim ought not to be taken into consideration. *Lewis* v. *Cunningham*, 7 Q. P. R. 238.

Amendment—*Leave.*]—An inscription in law, once served and filed, cannot thereafter be amended without leave of a Judge. *Grossman* v. *Cloman*, 7 Q. P. R. 281.

Conclusions.]—An inscription in law or demurrer must contain a conclusion or prayer. *Préfontaine* v. *Compagnie de Publication de la Patrie*, 6 Q. P. R. 183.

Grounds of—*Conclusions.*] — An inscription in law should contain not only grounds but conclusions of law. *Delisle* v. *McCrea*, Q. R. 27 S. C. 76.

Practice.]—An inscription in law founded on grounds which apply to several paragraphs of a pleading, should be directed against all of such paragraphs, and not against only one of them. *In re Victoria Montreal Fire Ins. Co.*, 6 Q. P. R. 302.

IX. Intervention.

Preliminary Plea—*Time for Service of Motion to Strike Out—Defences—Coverture—Absence of Deposit.*]—A motion to strike out certain allegations of an intervention, as being in the nature of a preliminary plea, is itself a preliminary plea, and should be served within three days of the filing of the intervention. 2. An intervener may plead that the plaintiff, being commune en biens, is not entitled to the damages which she claims. Quære, whether an intervener may set up the want of the deposit required by art. 793, C. P., when the defendant has not set it up. *Prevost* v. *Village of Ahunstsic*, 5 Q. P. R. 131.

X. Notice of Defence.

County Courts—*Striking Out.*]—In an action in a County Court the fact that the special matters set out in a notice of defence could be given in evidence under the general issue, is not necessarily a good ground for an application to strike the notice out. *Bennett* v. *Cody*, 35 N. B. Reps. 277.

XI. Pleas.

Affirmative Plea—*General Denial—Election — Husband and Wife — Separation.*] — When a defendant pleads an affirmative plea

at the same time as a general denial, the plaintiff has no right to have the affirmative plea struck out; he must confine himself to a motion to make the defendant elect between the two pleas. 2. A defendant who denies only a part of the allegations of the declaration may plead at the same time an affirmative plea. 3. In an action for separation of persons or property, the defendant may plead at the same time a general denial and an affirmative plea. *Vachon* v. *Rochette*, Q. R. 25 S. C. 242.

Amendment after Judgment—*Amount of Damages—Petition—Clerical Error—Procedure.*]—The advocate of the defendant had omitted to deny allegation 4 of the plaintiff, which was, that the damages caused by the defendant amounted to $200. The Judge, supposing that this allegation had not been denied, awarded the plaintiff the $200 as damages. Then the defendant's advocate for the first time perceived his omission and made an affidavit to that effect, adding that it was by error and inadvertence that he did not deny such allegation. He then presented, pursuant to notice, a petition to the Court:—Held, that the nine cases mentioned in art. 1177, C. P., in which a petition lies, are not limitative. 2. That the defendant should not suffer from such an inadvertence, which is equivalent to a clerical error and affords ground for a petition. 3. That the petition should be received by the Court, in order that the petitioner might proceed upon it according to the ordinary rules of procedure. *Roy* v. *Davis*, Q. R. 21 S. C. 184.

Amendment—*Exception to the Form.*]—An amendment to a plea, which contains only matters of exception to the form, such as the nullity of the writ for non-user during six months, will be rejected on motion to that effect. *Demers* v. *Girard*, 7 Q. P. R. 60.

Amendment—*Must be Before Judgment.*]—A Judge is invested with a discretionary power, but he ought to exercise it within the limits of justice, and he cannot permit an amendment at the same time that he renders his final judgment; the amendment of any pleading should always be made before judgment: arts. 516, 518, 520, and 522, C. P.; Hall, J., dissenting. *Guillot* v. *Garant*, Q. R. 21 S. C. 282.

Breach of Contract — *Non-delivery of Goods—Justification—Insolvency—Facts Constituting.*]—An inscription in law is not well founded in spite of the fact that the allegations by which a vendor, being sued for cancellation of a contract of sale of goods for non-delivery, seeks to justify his refusal, do not contain the word "insolvent," when they sufficiently allege the facts to justify proof of insolvency within the meaning of art. 1497, C. C. *Pineau* v. *Letellier*, 7 Q. P. R. 203.

Cheque—*Consideration — Presentment for Acceptance or Payment.*]—An action on a cheque will not be dismissed on an inscription in law because the declaration does not allege the consideration nor presentation for acceptance or payment; and an allegation in a pleading setting up absence of consideration is not a good defence to the action; but an allegation of want of presentation for payment is good as a defence. *Aumont* v. *Massey*, 7 Q. P. R. 67.

Contentions in Law — *Principal and Agent.*]—In the Quebec system of procedure, the Courts having to adjudicate upon both fact and law, contentions of law are allowable in pleadings. 2. The allegations in a defence that the defendant has acted not personally but as mandatary of a third person, whose he names, are pertinent; the mandatary who acts in his own name within the limits of his authority, binding his principal as well as himself. *Dubois* v. *Gohier*, 5 Q. P. R. 228.

County Court—*Action against Administrator.*]—Where the defendant, being sued in the County Court as an administrator, pleaded that the intestate was never indebted, and for a second plea, plene administrainit, the Court ordered the second plea to be struck out, on the ground that more than one plea can only be pleaded by leave of the Court. *Belyea* v. *Hatfield*, 23 Occ. N. 158.

Conversion—*Denial—Dates.*]—The statement of claim alleged that on or about a certain date the plaintiff was the owner of certain goods and chattels described, and that, on or about the date mentioned, the defendant converted them to his own use:—Held, that pleas which denied that the plaintiff was the owner of the goods and chattels described, without adding the words "or any of them," and which confined the denial of the plaintiff's ownership of the goods and chattels, and the defendant's conversion of them, to the dates mentioned in the statement of claim, were bad and must be set aside. *McDonald* v. *Lowe*, 34 N. S. Reps. 531.

Default — *Leave to File—Regularity — Order—Appeal from—Time.*]—A party in default for the filing of a pleading in the matter of the contestation of a demand for an assignment, may obtain from a Judge leave to file such pleading, and if such permission is granted the filing will be regular. 2. An order permitting the filing of a pleading after the proper time, obtained ex parte, is a judgment, and the party complaining of such judgment must in proceeding to have it reviewed do so within the proper time. *Filion* v. *Mussen*, 5 Q. P. R. 284.

Default of Plea — *Non-production of Documents—Ex parte Inscription — Striking Out—Costs.*]—When the actual documents invoked in support of an action are not produced at the time the action is instituted, a defendant can be foreclosed from pleading only under an order of a Judge, even if such documents are produced after the return as to the service of process, and notice duly given of their production. 2. So long as a foreclosure has not been obtained as above, the plaintiff cannot inscribe for examination and hearing ex parte. 3. A motion of the defendant to strike out such an inscription and for permission to plead will be granted with costs against the plaintiff. *St. Aubin* v. *Lamarche*, 4 Q. P. R. 434.

Default of Plea — *Non-production of Documents—Ex parte Inscription — Striking Out—Costs.*]—Until the actual proofs invoked in support of an action have been produced by the plaintiff, and notice given to the opposite party, the plaintiff cannot foreclose the defendant from pleading and inscribing for judgment ex parte. A motion of the defendant to set aside the foreclosure and the in-

scription will be granted with costs. *Lafontaine* v. *Choquette*, 4 Q. P. R. 437.

Default of Plea — *Noting Pleadings Closed—Neglect of Plaintiff to Produce Documents—Irregular Inscription—Leave to Plead —Costs.*]—When the documents relied upon in support of the claim in an action are not produced with the return of the writ of summons, the defendant will not be foreclosed from pleading upon default of pleading within the usual time, except by the order of a Judge, even if such documents are afterwards produced. 2. The inscription ex parte of the action for examination and hearing under these circumstances is irregular and illegal, and will be struck out of the record. 3. The defendants having declared that they had a good defence and having produced affidavits to that effect with their motion, were allowed to file their defence, the whole with costs against the plaintiff. *St. Aubin* v. *Lamarche*, 5 Q. P. R. 41.

Filing after Time Expired—*Terms—Costs.*]—If a plea is filed after the time fixed, without the consent of the opposite party or the permission of a Judge, the Court, upon motion of the plaintiff, will order the defendant to pay, within a fixed time, the costs occasioned by his default, upon failure of which his plea will be regarded as not filed. *Sun Life Assurance Co. of Canada* v. *Davelay*, 6 Q. P. R. 346.

Inconsistency — *Denial — Subsequent Allegations.*] — A defendant has a right to deny one by one all the paragraphs of the declaration and to follow this denial by other allegations. *Dansereau* v. *Latreille*, 6 Q. P. R. 464.

Inconsistency—*Settlement—Merits.*]— A defendant who pleads the settlement of a claim is not prevented thereby from contesting the foundation of the claim. *Dubeau* v. *Nadon*, 6 Q. P. R. 224.

Inconsistent Pleas—*Denial—Payment—Set-off.*]—A defendant may plead at the same time that the debt sued for never existed and that it has been extinguished by payment or set-off. *Lemoine* v. *Caisse Generale*, 23 S. C. 390.

Inconsistent Pleas—*Denial — Set-off — Election.*]—A defendant who pleads set-off, however irregularly, is not thereby taken to have admitted the allegations of the declaration. 2. In such case the defendant cannot be placed in the position of having to elect between his denial of the allegations of the declaration and his plea of set-off. 3. The denial of certain allegations of the declaration only does not constitute a general denial, and, consequently, in accordance with the terms of paragraph 2 of art. 202, C. P., does not exclude every other defence. *Palliser* v. *Duff*, 5 Q. P. R. 7.

Inconsistent Pleas—*Denial—Special Defence.*]—A special denial of each one of the allegations of the declaration is not a general denial within the meaning of art. 202, C. P., and does not exclude another special defence. *Beaulac* v. *Lupien*, Q. R. 21 S. C. 216.

Inconsistent Pleas — *General Denial — Exclusion of Confession and Avoidance.*] — Where the defendant pleads a denial that the accident alleged by the plaintiff took place, and that if it did take place it occurred by reason of the fault of the person injured, the defendant cannot have the benefit of both pleas: art. 202, C. C. P. *McLeod* v. *Montreal Street R. W. Co.*, Q. R. 20 S. C. 8.

Inconsistent Pleas — *General Denial — Set-off—Payment.*]—There is no incompatability between a plea by which a defendant denies having ever owed the plaintiff the sum demanded, and one by which he pleads set-off of the said sum if the Court is of the opinion that he owes it, or payment; a defendant may plead these three defences by the same pleading. *Lemoine* v. *LaCaisse Générale*, 5 Q. P. R. 104.

Inconsistent Pleas — *General Denial — Special Allegations.*]—Where the defendant, in his plea, begins by denying generally all the allegations of the plaintiff's declaration, he is excluded, under art. 202 of the Code of Procedure, from proceeding to special allegations upon the facts of the case. *Chapleau* v. *Town of St. Louis*, Q. R. 20 S. C. 238.

Inconsistent Pleas—*General and Special — Election.*] — When a defendant pleads a general denial in the two first allegations of his plea, and then pleads specially in the remaining paragraphs, on motion of the plaintiff to reject the special allegations of the plea, defendant will be permitted to make option within four days, and if he fails to do so, the special allegations will be struck from the plea. *Rutherford* v. *Macy*, 4 Q. P. R. 326.

Inconsistent Pleas—*Ignorance—Set-off.*] —A plea in which the defendant commences by saying that he is ignorant of the facts alleged by the plaintiff does not hinder the defendant from pleading set-off at the same time, because the defendant must have a certain latitude in defending himself, and also because everything which prevents the useless multiplication of actions ought to be favoured. *Godbout* v. *McPeak*, Q. R. 20 S. C. 294, 4 Q. P. R. 190.

Inconsistent Pleas—*Method of Attacking—Dilatory Exception—Slander—Irrelevant Plea.*]—A dilatory exception, and not an inscription in law, is the proper remedy to compel a party to optate between different paragraphs of his pleading. 2. In a plea to an action in damages for slander, the words, "et qu'i dit à la prière de son curé,' are irrelevant and in no wise constitute a legal justification in respect of an action of this nature, and, on an inscription in law, will be struck from the plea with costs. *Bourget* v. *Lefebvre*, 4 Q. P. R. 325.

Inconsistent Pleas — *Purchase of Litigious Rights—Deposit of Price.*]—A defendant, being sued by the assignee of litigious rights, may, in a defence, in which he contests the demand on the merits, also invoke the benefit of art. 1582, C. C., and deposit the amount which he alleges to be the price of the sale of such rights to the plaintiff, inasmuch as, by such deposit, he offers to take the plaintiff's bargain, and thereby, in effect, ceases to control it. *Crevier* v. *Evans*, Q. R. 20 S. C. 179.

Inconsistent Pleas—*Striking Out—Election.*]—Allegations which contradict the preceding allegations of the same plea, containing admissions, will be struck out upon motion of

the plaintiff, without allowing the defendant the option of having the preceding allegations struck out. *Destroismaisons* v. *Dominion Ice Co.*, 4 Q. P. R. 368.

Intervention—*Time—Service—Exception to Form.*]—The time for pleading is computed from the day of the service of the intervention, and an exception to the form of the intervention must be filed within three days after the service thereof. *Beauchamp* v. *Beauchamp*, 4 Q. P. R. 367.

Irregular Default Note—*Effect of — Vacation.*]—If a foreclosure to plead has been unduly entered during vacation, the lapse, after vacation, of the ordinary delay to plead does not affect the defendant until the plaintiff has removed the foreclosure. *Bernard* v. *Carbonneau*, 6 Q. P. R. 348.

Irregularity—*Reply—Waiver.*]—A party who has replied without reservation to a plea irregularly filed, is considered to have renounced the right to take advantage of the irregularity. *Bergeron* v. *Campeau*, Q. R. 25 S. C. 26.

Irrelevant Plea—*Negligence — Fire — Building.*]—In an action for damages against an electric light company for loss by fire by reason of defective wiring and excess of electric current, an allegation in the plea which states that the building was refused as a risk by the insurance companies, will be struck from the plea, on an inscription in law, as being irrelevant to the issue and in no wise supporting the conclusions of the plea. *West* v. *Lachine Rapids Hydraulic and Land Co.*, 4 Q. P. R. 314.

Judgment—*Promissory Note — Affidavit.*]—Where a defendant, in his pleading, denies that a promissory note signed by him is the consideration for a judgment whereon the plaintiff is suing him, such plea will not be struck out of the record for default of an affidavit in support of it: arts. 208 and 209, C. P., not being applicable. *Penfold* v. *Piggott*, 3 Q. P. R. 361.

Mortgage Action—*Foreclosure—Neglect to File Exhibits—Plea Filed without Leave.*]—The default to file, with the return of the action, exhibits which are not of a nature to suspend the delay for foreclosure, does not prevent the filing of a plea, and a plea filed without leave will be rejected on motion to that effect. *Melancon* v. *Archambault*, 7 Q. P. R. 38.

Motion to Strike Out—*Particulars — Preliminary Exception—Deposit.*]—A motion to strike out certain allegations of the defence as foreign to the litigation, vague, and indeterminate, and, as a subsidiary matter, for particulars of some of such allegations, is a preliminary exception, and will be dismissed if it is not accompanied by a deposit. *Cohen* v. *Lipschitz*, 3 Q. P. R. 577.

Municipal By-law—*Invalidity — Advice of Solicitor.*]—It is not lawful to plead in attacking the validity of a municipal by-law relied on by the plaintiff, that it was passed contrary to the opinion of the advocate of the municipality. *Town of Westmount* v. *McKim*, 5 Q. P. R. 134.

Propositions of Law—*Salary—Representations — Set-off — Preuve Avant Faire Droit.*]—The Court will not strike out upon demurrer, legal propositions set forth in a plea, which do not require proof. 2. To an action for salary the defendant cannot plead that the plaintiff was engaged on certain conditions by reason of representations made by him, which have since proved false. 3. It is, however, not illegal to plead that the plaintiff has not fulfilled the obligations undertaken by him, and has thereby caused damage, and to demand on that account set-off equal to the damage caused; and preuve avant faire droit will be ordered upon such allegations. *Sexton* v. *Violett*, 6 Q. P. R. 413.

Puis Darrein Continuance—*Facts Arising since Action—Affidavit—Documents—Judgment.*]—The facts contained in a plea or a reply puis darrein continuance must have arisen since the contestation. 2. Such a plea or reply must be accompanied by an affidavit attesting the facts and allegations, unless these facts are stated by an authentic document. 3. A certified copy of a judgment proves its contents, but does not by itself prove the relation which exists between the adjudication and the facts which are set up in the proceedings in which it is delivered. *McDonough* v. *Catholic Institution of Deaf Mutes*, 5 Q. P. R. 436.

Striking Out—*Demurrable Plea.*]—A plea which is open to a general demurrer will not be struck out on a summary application under s. 133 of the Supreme Court Act; it must be demurred to. *Clark* v. *Miller*, 35 N. B. Reps. 42.

Striking Out—*Embarrassment—Duplicity—Bail—Equitable Defence.*]—To a declaration for breach of a limit bond given in a case wherein one of the defendants had been arrested upon an execution issued upon a judgment obtained in the St. John City Court, the defendants by a plea negatived the jurisdiction of such Court by reason of the cause having been tried and judgment entered upon a day upon which the Court was not authorized by law to sit, of which trial and entry of judgment the defendant had no notice:—Held, that the plea should not be struck out as embarrassing; if it were bad in substance, the plaintiff should demur. 2. To the same declaration the defendants pleaded on equitable grounds that the note upon which the original action was brought in the City Court had been paid; that the plaintiff, notwithstanding payment, retained the note in his possession, and fraudulently obtained judgment thereon in the City Court; that the defendant was an official Court stenographer and was privileged from arrest on civil process while in the performance of his civil duties, yet the plaintiff caused him to be arrested while he was performing such duties; that the defendant only went beyond the limits assigned in the bond when he was compelled to do so in order to perform his official duties:—Held, that this plea was bad as being both embarrassing and double. Semble, that bail cannot by plea take advantage of matters forming grounds for equitable relief, but should apply to the Court by motion. *Dibblee* v. *Fry*, 35 N. B. Reps. 109.

Striking Out Allegations in—*Preliminary Objection—Deposit.*]—A motion for

the rejection of certain allegations of a plea, and that the defendant be ordered to furnish certain details, is of the nature of a preliminary exception, and will be rejected if not accompanied by a deposit. *Clermont* v. *Bilodeau*, 7 Q. P. R. 68.

Submission of Rights—*Law Stamps.*] —A declaration of a defendant that he submits his rights to the Court, especially if accompanied by documents in support of it, is a pleading, and will be set aside if it is not stamped as such. *Dagenais* v. *Desnoyers*, 5 Q. P. R. 384.

XII. REJOINDER.

Admission or Denial — *Ignorance — Amendment.*] — Each party must reply specially and categorically to the allegations of the opposite party, either by admitting or denying them, or by declaring that he is ignorant of them. But, on a motion to reject an allegation of the replication to the answer to plea, the defendant will be permitted to produce a new allegation. *Viger and* v. *Kilburn*, 4 Q. P. R. 316.

XIII. REPLY.

Amendment — *Full Court—Statute of Limitations.*]—The full Court has power to allow, on terms, an amendment for the first time of a pleading by setting up a fact which would, if proved, be a good answer to a plea of the Statute of Limitations. *Jones* v. *Davenport*, 7 B. C. R. 452.

B. C. Rule 168—*New Points Raised on Appeal—Condition Precedent.*] —The B. C. Supreme Court Rule 168 provides that "any condition precedent, the performance of which is intended to be contested, shall be distinctly specified in his pleadings by the plaintiff or defendant (as the case may be), and, subject thereto, an averment of the performance or occurrence of all conditions precedent, necessary for the case of the plaintiff or defendant, shall be implied in his pleadings." In an action for trespass and a mandatory injunction, the defendants pleaded the right of entry under a private Act, and the consent or acquiescence of the plaintiffs. The plaintiffs replied setting up the failure of the defendants to comply with certain conditions precedent to the exercise of the privileges claimed, but did not set up another condition precedent upon which the judgment appealed from proceeded, though it was not referred to at the trial:—Held, Killam, J., contra, that the Rule refers rather to cases founded on contract than to those where statutory authority is relied upon, and that the plaintiffs need not have replied as they did, but having done so without setting up the conditions specially relied upon in appeal, thereby possibly misleading the defendants, they were properly punished by the Court below by being deprived of their costs in appeal. —Per Killam, J. —It was improper for the Court appealed from to allow the absence of proof to be set up for the first time on the appeal. Judgment in 10 B. C. R. 361 varied. *Sandon Waterworks and Light Co.* v. *Byron N. White Co.*, 35 S. C. R. 309.

Close of Pleadings—*Joinder—Necessity for Filing—Motion for Nonsuit—Costs.*] — A motion for judgment as in case of a nonsuit for not proceeding to trial after issue joined, according to the course and practice of the Court, was met by an affidavit made on behalf of the plaintiff shewing that no replication or joinder of issue had been filed. The defendant in reply proved that a joinder of issue had been served in compliance with a demand of replication made by him, and urged that it would be permitting the plaintiff to take advantage of his own wrong if this motion were refused on account of the plaintiff's neglect in filing the joinder:—Held, that the motion must be refused, because the cause is not at issue until the joinder is filed as well as served. Parties are not only at liberty to search to see whether or not pleadings have been filed, but are entitled to a fee for so doing. Moreover, as a fee is payable to the Crown for the filing of such papers as replications and joinders, it would be a fraud on the revenue to permit parties to proceed without filing and paying the fee. As the plaintiff's course was open to objection, he should be deprived of his costs upon dismissal of this motion. *Gallagher* v. *Wilson*, 21 Occ. N. 54.

Consideration—*Departure.*] — A party who sues on a writing alleged to have been given in execution of a natural obligation, cannot, in reply to a plea of no consideration, set out a wholly distinct and additional consideration; and the paragraphs of his reply relating thereto will be rejected on motion. *Brulé* v. *Brulé*, 5 Q. P. R. 263.

Contract—*Lease or Sale—Amplification of Plea.*]—If a party, in his plea, calls a certain contract a lease, and the plaintiff, as his answer, sets up that it is a sale, the defendant may, in his replication, allege that it is immaterial whether the writing is interpreted as a lease or as a sale. 2. A replication cannot set up in detail allegations already set up in a plea; such allegations being either useless or irregularly pleaded in a replication. *Migneron* v. *Williams Manufacturing Co.*, 5 Q. P. R. 226.

Departure—*Contract—Repudiation— Reformation.*]—The plaintiffs alleged that they supplied the defendants, under an agreement, with patent brakes for use on their railway, and that the defendants altered them and infringed their patent. The defendants alleged that they had a right under their agreement with the plaintiffs to do what they had done. The plaintiffs, by their reply, denied any such agreement, and alleged that if the written agreement did give any such right, it was not the true agreement, and they asked to have it reformed: — Held, that there was no departure in the reply; for the fact that, by mutual mistake, the written agreement did not set forth the true agreement between the parties in this particular respect was a perfectly good answer to the plea of the agreement, and it was not necessary that the agreement should be actually corrected before the mistake could operate as an answer to its terms:—Held, also, that, even if the portion of the agreement upon which the defendants relied was contained in the same instrument as the "agreement" mentioned in the statement of claim, the plaintiffs might, consistently with their relying upon one part of

it, ask to have another part reformed. *MacLaughlin* v. *Lake Erie and Detroit River R. W. Co.*, 21 Occ. N. 405, 2 O. L. R. 151.

Departure — *Striking Out — Demurrer — Tenus — Particulars — Estoppel—Deed—Cutting Down—Evidence.*]—A pleading cannot be struck out on summary application on the ground that it is bad in law, unless it discloses no reasonable cause of action or answer (R. 151), or is so framed as to prejudice, embarrass, or delay the fair trial of the action (R. 127), but the opposite party may raise the point of law under Rule 149, or the Court or Judge may under Rule 251 direct the question of law, if there appear to be one to be raised by special case or in such other manner as the Court or Judge may deem expedient; or semble, the opposite party may take the point at the trial though it has not been otherwise previously taken. Even assuming that English Order 19, r. 6 (Mar. R. 202), is in force, before an application to strike out a pleading for want of particulars can be made, an application must first be made for further and better particulars under R. 212. Upon such an application, the Judge may impose the term that if the particulars ordered are not furnished, the pleading shall be struck out. Where the statement of claim set up a case for reformation of a document on grounds other than that of fraud, and by the reply fraud was set up, it was held that the reply was bad in law, under Rule 117, as being a departure:—Held, as against the objection that the plaintiff was estopped by the recitals and other statements in the deed, of which he sought reformation, that parol evidence to shew that a conveyance absolute on its face was intended to take effect as a mortgage only, is admissible, but that such evidence must be of the clearest, most conclusive, and unquestionable character. The evidence on the plaintiff's behalf was in this case held to be sufficient to establish the plaintiff's case. *Boardman* v. *Handley*, 4 Terr. L. R. 267.

Departure from Declaration.] — A plaintiff cannot, by a special reply, remodel, complete, or modify his declaration. *Walker* v. *Lamoureux*, Q. R. 21 S. C. 492.

Falsity of Quittance Pleaded — *Inscription en Faux.*]—To a plea of payment based upon a notarial quittance the plaintiff may reply that the quittance is false, and this although the falsity cannot be proved without an inscription en faux. *McCarthy* v. *Laviolette*, 5 Q. P. R. 87.

Grounds of Original Claim—*Motion—Demurrer.*]—The plaintiff in his reply to a plea of the defendant must confine himself to setting up grounds going to shew that the plea is not sustainable, and must not allege grounds tending to augment or reinforce his claim. 2. The fact that allegations necessary to sustain the claim are made in the reply, instead of being in the declaration, must be invoked by motion and not by demurrer. 3. Nevertheless, a demurrer may in certain cases be treated as a motion. *Fox* v. *Morris*, 4 Q. P. R. 345.

Insufficiency of Particulars — *Exception to the Form—Demurrer.*]—An inscription in law does not lie against a reply to a plea in which the details are insufficient. An exception à la forme is the proper recourse. 2. An allegation of a reply, insufficient in itself to displace the plea, but which tends to prove the truth of the plaintiff's action, will not be dismissed on inscription in law. *Vipond* v. *Kilburn*, 4 Q. P. R. 376.

Intervention — *Supplementing Petition—Exception to Form.*]—A reply to an intervention containing conclusions which should have been made in the petition for a writ of mandamus, is irregular. 2. Such a reply should be attacked by exception to the form, and not by demurrer. *Grier* v. *David*, 4 Q. P. R. 373.

Joinder—*Denial — Fresh Allegations.*]—A party who, by his reply to a plea, joins issue upon one allegation of such plea, and denies all the others one by one, has the right in such reply also to make new allegations. *Provincial Bank of Canada* v. *Lacerte*, 4 Q. P. R. 292.

Leave to Deliver — *Time — Jury Notice — Discretion — Notice of Trial — Close of Pleadings.*]—Where an order was made by the Master in Chambers allowing the plaintiff to deliver a reply after the regular time for replying had expired, a Judge refused to interfere with the discretion exercised, although the reply was open to the objection that all that it sought to put in issue was already in issue by the statement of defence, the purpose being to enable the plaintiff to file a jury notice, and the case being one in which the plaintiff should be allowed to file a jury notice and thus leave it to the discretion of the Judge at the trial to say whether it should be tried with or without a jury. The pleadings were not closed until the lapse of four days (excluding the Christmas vacation) after the delivery of the reply, or until the defendants had joined issue; and a notice of trial given before the lapse of that time, and without a joinder of issue having been delivered, was irregular; and the Judge had no power to allow the notice of trial thus irregularly given to stand. Rules 257, 258, 262, considered. *Qua* v. *Canadian Order of Woodmen of the World*, 23 Occ. N. 51, 5 O. L. R. 51, 2 O. W. R. 8.

Negligence — *Denial — Reiteration.*]—In an action for damages caused by an automobile going at an imprudent rate of speed, the plaintiff may meet allegations of the defence stating that it was only going at 3 miles an hour and was stopped immediately after the accident, by stating the rate of speed at which the automoblie was going, and asserting that it was not under control. *Abrahamson* v. *Yaile*, 7 Q. P. R. 61.

New Facts—*Departure.*] — The plaintiff in his reply to the defence must confine himself to what is strictly in reply; he may not add to his original claim nor allege facts which should have been set up in the declaration or which might serve as a basis for another action. *Jobin* v. *Rainville*, 5 Q. P. R. 93.

Parties—*Departure — New Action — Substitution.*]—In an action based upon an act of obligation executed in favour of the curator to a substitution and of three heirs,

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id of three heirs,

and brought by one of the heirs and other persons whose rights as creditors are not parent title, set up the title of these persons, a plea of the absence from the record of the curator and two of the heirs, and of the presence as plaintiffs of persons without apparent title, set up the title of these persons, and such part of the reply will be struck out on motion as tending to reconstitute the action. *Desrivières* v. *Delaney*, 3 Q. P. R. 384.

Regularity — *Title to Land — Assignment of Mortgage—Attacking.*]—The statement of claim, in an action for a declaration that the plaintiff was entitled to a share in certain lands and to recover possession, alleged that the defendant society were in possession of the whole of the lands and in receipt of the rents and profits, under a mortgage of a share or interest therein made by two of the remaining defendants, who derived their title from the plaintiff's father or some of his heirs. The defendant society sought to defend their possession and to hold the rents and profits by setting up in their statement of defence the assignment to them of a mortgage made by the plaintiff's father. The plaintiff replied that there was no consideration for the assignment of such mortgage, and that the alleged assignor was at the time of making it of unsound mind, to the knowledge of the defendant society:—Held, that the reply raised an issue which the plaintiff was entitled to have tried, and it was not irregular or improper to raise it at that stage. *Smith* v. *Smith*, 21 Occ. N. 531, 2 O. L. R. 410.

Replication—*Demand — Leave to Plead and Demur—Time—Replevin.*] — Where a plaintiff has been served with a demand of replication, and has afterwards obtained an order allowing him to plead and demur at the same time to the defendant's pleas, he must do both within the time allowed by the demand. If a replication is served within such time, and a demurrer after it has expired, the latter will be set aside. In replevin the time for the plaintiff to reply to the defendant's pleas is ten, and not twenty days. *Macmonagle* v. *Campbell*, 36 N. B. Reps. 468.

Settlement of Action.]—A settlement of the cause entered into between the parties thereto cannot be set up by way of a supplementary reply. A motion for leave to file such a reply will be dismissed with costs. *Gilbert* v. *Tremblay*, 4 Q. P. R. 438.

Striking Out — *Embarrassment.*] — Detinue for an engine. The defendants justified under a writ of attachment against the goods of F., an absent or absconding debtor, the engine being seized as F.'s property, and also under execution against the goods of F. The plaintiff replied (4) that when the writ of attachment was issued F. was not an absent or absconding debtor; (5) that the summons and attachment were never personally served upon F., who did not owe the defendants the whole amount of their judgment, and that such judgment was obtained by collusion with F.; (6) that the judgment was paid before this action; (7) that since the recovery of the judgment large sums had been paid by F. which had not been credited thereon, and F., in addition, gave the defendants certain stock as collateral security for all sums due, which stock should have been sold, and would, if sold, have yielded sufficient to pay all amounts due. These paragraphs of the reply having been struck out by order as irrelevant and tending to prejudice, embarrass, and delay the fair trial of the action:—Held, that the order was wrong as to the 4th, 5th, and 6th paragraphs, but right as to the 7th. *Leonard* v. *Sweet*, 33 N. S. Reps. 197.

XIV. Statement of Claim.

Allegation of Immaterial Fact — Striking out—Rule 268—Evidence. *Prince* v. *Toronto R. W. Co.*, 5 O. W. R. 88.

Allegation of Material Fact.] — Where the failure to prove a fact will cause the action to fail, that fact is a material one upon which the plaintiff relies, and, under Rule 306 of the King's Bench Act, R. S. M. 1902 c. 40, should be set out in the statement of claim. *Makarsky* v. *Canadian Pacific R. W. Co.*, 15 Man. L. R. 53.

Alternative Claim — Embarrassment—Partnership. *Hives* v. *Pepper*, 6 O. W. R. 713.

Alternative Claim—Sale or conversion —Doubtful facts. *Leader* v. *Siddall*, 1 O. W. R. 337.

Amendment—*Causes of Action Arising Pendente Lite—Appeal—Time.*] — There is nothing in Rule 349 of the King's Bench Act to warrant the amendment of the statement of claim by setting up matters which have arisen since the commencement of the action except by way of answer to a counterclaim set up by the defendant. That Rule confers on the Court no new power of amendment, but merely defines the procedure to be followed in exercising powers of amendment, which exist apart from it, and as to which the procedure is not pointed out by the Rules preceding it. Toke v. Andrews, 8 Q. B. D. 432, distinguished. The referee having previously made an order allowing such an amendment to be made, the plaintiff made the amendment without waiting for the expiration of the time for appealing:—Held, that this was no reason for disallowing the appeal, which was made within the time allowed by the Rules. *Speton* v. *Gilmour*, 24 Occ. N. 157, 14 Man. L. R. 706.

Amendment — *Conformity with Writ—Incorporated Company — Slander — Joinder of Causes of Action — Trial.*]—The writ of summons claimed damages against an incorporated company for wrongful dismissal and slander. The original statement of claim was confined to the former cause of action, but, after defence and before reply due, the plaintiff amended on præcipe by adding a claim for slander:—Held, that it was competent for the plaintiff to do so, under Rule 300. Semble, that an incorporated company may be liable for slander if spoken by its servants or agents in direct disobedience to its orders; and held, that, at all events the pleading setting up slander should not be struck out summarily, but should be adjudicated on. Leave to the defendants to have the question of law first determined.

The two causes of action were properly joined; but application might be made under Rule 237 to direct the method of trial. *Rodger* v. *Noxon Co.*, 21 Occ. N. 78, 19 P. R. 327.

Amendment — *Conversion—Prayer for Relief—Payment into Court—Judgment — Costs—Appeal.*]—The judgment in 4 Terr. L. R. 498 varied by striking out the order to amend the plaintiffs' statement of claim as unnecessary, and directing that judgment be entered for the defendant, and that the amount paid into Court by the defendant be paid out to the plaintiffs; the plaintiffs to have the costs of the action up to the time of the second payment into Court, the defendants to have the general costs of the action after that date, and the plaintiffs to have the costs of the issues upon which they succeeded. The trial Judge having reserved judgment came to the conclusion that the plaintiffs were entitled to the moneys paid into Court by the defendant. He held, however, that they were not so entitled under the form of the statement of claim (4 Terr. L. R. p. 498), but only under a claim for conversion, and accordingly in his reasons for judgment—the formal order had not been taken out before the appeal—he stated that under the authority of Rule 189 of the Judicature Ordinance, C. O. 1898 c. 21, he "amended the statement of claim so as to determine the real question at issue according to the evidence adduced," and thereupon directed judgment to be entered for the plaintiffs for the amount paid into Court, without costs:—Held, that no amendment was necessary; that if, as in this case, the facts alleged shewed a wrongful conversion, that was sufficient, although the specific words were not used, and that, so far as the relief claimed was concerned, the Court was entitled under English O. 20, rule 6 (introduced by J. O., 1898, s. 21), and J. O., 1898, s. 8, s.-s. 5, to give, and ought to give, any appropriate relief to which the plaintiffs were entitled, though it was not specifically claimed. 2. That where money is paid into Court (though with a denial of liability) it is to be taken to be pleaded as an alternative defence going to the whole cause of action, and if the plaintiff fails to shew himself entitled to a greater sum the defendant is entitled to judgment on this defence, and that the proper judgment as to costs is:—The plaintiff to have the costs of the action up to the time of payment into Court; the defendant to have the general costs of the action from that time, and the plaintiff to have the costs of the issues found in his favour. 3. That although by Rule 500 of the J. O., C. O. 1898 c. 21, no appeal lies without leave from any judgment or order as to costs only which by law are left to the discretion of the Court or Judge making the judgment or order, and although the Court will not as a rule interfere with such discretion unless it has been exercised on a wrongful principle, nevertheless when the judgment or order dealing with the question of costs is appealed from on other grounds, the Court has power under Rule 507 to make any order which ought to have been made by the Court or Judge, and this Rule authorizes the Court in banco to deal with the question of costs below in any way which may appear necessary or expedient by reason of its varying or reversing the judgment or order appealed from. *Imperial Bank* v. *Hull*, 5 Terr. L. R. 313.

Amendment—*Delivery of Amended Statement—Irregularity — Time — Validating Order — Terms — Costs — Stay of Proceedings — Appeal — Waiver — Compliance With Terms.*]—After the delivery of the statement of claim an order for particulars was made, and the time for delivering the defence was extended until the expiry of six days after the delivery of the particulars. Before this period had elapsed, and before any statement of defence had been delivered, and more than four weeks after the appearance, the plaintiff, without leave and without the defendant's consent, delivered an amended statement of claim:—Held, that the delivery of the amended statement of claim was irregular under Rule 300. An order was made, upon the defendant's application to set aside the amended statement of claim for irregularity, validating the delivery of it, but directing that the plaintiff should pay the costs of the motion and other costs occasioned by the irregularity, and that until payment of such costs further proceedings on the charges introduced by the amendment should be stayed, or, if such costs should not be paid within one month after taxation, that the amendments should be struck out. Mere compliance with the terms of an order, by the party to whom an indulgence or relief is granted on terms, does not preclude him from moving against the order. Anlaby v. Praetorius, 20 Q. B. D. 764, Hewson v. Macdonald, 32 C. P. 407, and Duffy v. Donovan, 14 P. R. 159, followed. *Anthony* v. *Blain*, 23 Occ. N. 50, 5 O. L. R. 48, 1 O. W. R. 841.

Amendment—*Description of Defendant—Married Woman—Widow.*]—If a wife, common as to property, who is described as a widow in a contract, is described in the same manner in an action founded upon the contract, to which she is defendant, and pleads that she is a wife and common as to property, the plaintiff will not be permitted to amend by changing the description. *Merrill* v. *Laprade*, 6 Q. P. R. 242.

Amendment—*Exceeding Terms of Order Allowing—Waiver of Right to Object.*]—Two weeks after the receipt of an amended statement of claim the defendant's solicitors wrote to the plaintiffs' solicitor that they would "prepare and file a new statement of defence according to the amendment you have made," and two weeks later took out a summons to strike out the amended statement of claim, on the ground that it exceeded the terms of the order authorizing amendment: — Held, that the defendants had waived their right to object. *Centre Star Mining Co.* v. *Rossland Miners' Union*, 23 Occ. N. 57, 9 B. C. R. 325.

Amendment—*Increasing Amount Claimed—Mistake—Money Paid into Court—Acceptance by Mistake.*]—The plaintiff was allowed under Rule 312 to amend his statement of claim in an action upon a building contract by increasing the amount claimed for extras, and to amend his reply by changing acceptance into non-acceptance of money paid into Court by the defendant, notwithstanding that the plaintiff had filed a memorandum of acceptance, under Rule 423, although he had not taken the money out of Court; the Court being satisfied that the plaintiff had made a mistake, and, on finding it out,

had moved with reasonable promptness to correct it, and that no real prejudice was done to the defendant. Emery v. Webster, 9 Ex. 242, followed. *Chevalier* v. *Ross*, 22 Occ. N. 96, 3 O. L. R. 219, 1 O. W. R. 12, 115.

Amendment—*Limitation of Actions.*] — That the time allowed by a statute for the commencement of the action has expired when a demurrer to the statement of claim was argued, was held to be no objection to the allowance of amendments which did not seek to introduce any new parties or different causes of action. *Makarsky* v. *Canadian Pacific R. W. Co.*, 15 Man. L. R. 53.

Amendment—*Misnomer of Petitioner — Impossibility of Amending Security-bond.*]—If a petition in contestation of an election of a school commissioner may be amended by changing the first name of one of the petitioners, such change cannot apply to the security-bond given by the petitioners, which is a contract, and the petition cannot be amended if the security is not. *Dame* v. *St. Germain*, 6 Q. P. R. 449.

Amendment—*Misnomer of Plaintiff — Affidavit.*]—The fact that the plaintiff is described in the writ of summons and declaration as "Charles Averill Kennedy," instead of "Charles Avery," causes no prejudice, and does not afford ground for an exception to the form. 2. In any case such an exception ought to be accompanied by the affidavit required by Rule 47 of the Rules of Practice. *Kennedy* v. *Shurtleff*, 3 Q. P. R. 421.

Amendment—*New Claim after Trial.*]—A motion to amend will not be allowed after the close of the trial, especially if the new claim attempted to be set up is not supported by the evidence. *Archambault* v. *Melancon*, 7 Q. P. R. 36.

Amendment — *Ordinary Action—Appearance—Change to Summary Action.*] — A plaintiff cannot, after the appearance of the defendant, by simple amendment change an ordinary action into a summary action; and such an amendment will be struck out upon motion. *Trahan* v. *Morin*, 4 Q. P. R. 378.

Amendment—Parties—Joinder of causes of action—Specific performance—Recovery of land. *Lee* v. *Gallagher* (Man.), 2 W. L. R. 305.

Amendment at Trial—*Trespass to Land—New Cause of Action—Mine—Inspection.*]—In an action for damages for trespass and for an injunction the statement of claim alleged that the defendant, who was in occupation of adjoining property which was being operated as a coal mine, had entered upon and under lots B. and C. owned by the plaintiff, and had moved coal and minerals therefrom. From the evidence for the defence it appeared that no excavations had been made on lots B. and C. since the date trespass was alleged to have commenced, but that the defendant's tunnel had extended into other adjoining lands owned by the plaintiff in respect of which no complaint had been made. The plaintiff at the close of the defendant's case applied for leave to amend the statement of claim under s. 164 of the Judicature Ordinance, by alleging that the trespass had been committed upon these last mentioned lands:—Held, that the real controversy between the parties was whether the defendant had committed trespass upon lots B. and C., and no amendment was necessary for the purpose of determining that question, and it would be an unreasonable exercise of the powers conferred by the section to allow the plaintiff, after the close of the evidence, to amend by setting up a new cause of action discovered from the evidence for the defence:—Held, also, that a refusal by the defendant to allow inspection by the plaintiff of the workings of the mine was not sufficient reason for allowing the amendment, as the defendant might have obtained an order for inspection. Greater latitude should be allowed to a defendant in amending by setting up new grounds of defence than to a plaintiff in setting up new causes of action, because a defendant cannot afterwards avail himself of such defence, while a plaintiff does not lose his claim in respect of such cause of action. *Moran* v. *Graham*, 2 Terr. L. R. 204.

Amendment—*Writ of Summons — Two Causes of Action—Election to Pursue One—Penalty — Discovery — Dominion Elections Act, 1900.*]—The writ of summons (issued 30th January, 1901) was indorsed with a claim to recover penalties under the Dominion Elections Act, 1900, and for damages for wrongfully depriving the plaintiff of his vote at an election held on the 7th November, 1900. The statement of claim (delivered 14th March, 1901) did not assert any claim to penalties, but was confined to the common law cause of action. The statement of defence (delivered 27th March, 1901), denied the allegations of the statement of claim and alleged want of notice of action. The plaintiff obtained the usual discovery from the defendant, without objection. On the 31st December, 1901, after such discovery, and when the action was ready for trial, the plaintiff applied for leave to amend the statement of claim by adding a claim for the penalties mentioned in the indorsement of the writ:—Held, that the defendant in an action for penalties might have successfully resisted an attempt to compel him to submit to an examination for discovery. Regina v. Fox, 18 P. R. 343, distinguished. The plaintiff, having by proceeding at common law obtained from the defendant the discovery which he could not have had in an action for penalties, and having allowed more than a year to elapse before applying for leave to amend, must, notwithstanding the indorsement of the writ, be taken to have conclusively elected to pursue his common law remedy; and leave to amend was properly refused. Sections 19, 131, 133, and 142, of the Dominion Elections Act, 1900, discussed. *Rose* v. *Croden*, 22 Occ. N. 135, 3 O. L. R. 383, 1 O. W. R. 170.

Amendment before New Trial—*Rule 312—"At any Time"—Special Damage.*]—All necessary amendments may be made "at any time" under Rule 312, and an action in which a nonsuit has been set aside as against one defendant and a new trial ordered as to him by a Divisional Court, is in the same position as if it was at issue and had not been tried; and the plaintiff was allowed to amend the statement of claim by inserting a paragraph alleging special damage. The Duke of Buccleuch, [1892] P. 201, referred

to. Semble, that, while it may be convenient to submit a draft amendment upon a motion for leave to amend, it is not necessary to do so. *Hunter* v. *Boyd*, 24 Occ. N. 61, 6 O. L. R. 639, 2 O. W. R. 1055.

Cause of Action — Damages for not transferring stock — Principal and agent. *Dierlamm* v. *Toronto Roller Bearing Co.*, 2 O. W. R. 463, 479.

Chambers Motion — *Exhibits.*]—It is not necessary to file exhibits referred to in an affidavit filed on an application in Chambers. *Larsen* v. *Bauer*, 5 Terr. L. R. 458.

Damages—Breach of covenant — Necessary allegations—Particulars. *Robinson* v. *Trustees of Toronto General Burying Grounds*, 2 O. W. R. 891.

Declaratory Judgment—Statements of reasons for seeking relief—Embarrassment—Pleading to claim—Waiver. *Harris* v. *Harris*, 1 O. W. R. 684, 734.

Defamation — Privilege — Motion to strike out paragraph—Pleading over—Waiver — Embarrassment—Indefinite charge—Mitigation of damages — Understanding of bystanders of words complained of. *Laurie* v. *Maxwell*, 3 O. W. R. 38, 134, 284.

Delivery after Defence—*Irregularity.*]—The defendant entered an appearance and at the same time filed a statement of defence and counterclaim, which he then served, and gave notice to the plaintiffs that he did not require the delivery of a statement of claim:—Held, that a statement of claim subsequently delivered by the plaintiffs was irregular. The indorsement on the writ of summons had become the statement of claim, and if not sufficient could be amended without leave. Rules 171, 243, 247, 256, 300, considered. *Confederation Life Association* v. *Moore*, 24 Occ. N. 25, 6 O. L. R. 648, 2 O. W. R. 941, 1030, 1087, 1120.

Delivery of Amended Pleading—Time—Leave—Consent—Order validating—Terms—Stay of proceedings — Payment of costs. *Anthony* v. *Blain*, 1 O. W. R. 841.

Discretion—*Appeal.*]—When a Judge to whom an appliaction has been made to strike out a statement of claim, on the ground that it discloses no reasonable cause of action, has exercised a discretion and made an order refusing the application, that order ought not to be interfered with on appeal unless the Judge below decided the case upon an erroneous principle or omitted to take into consideration something which ought to have influenced his judgment. *Cooper* v. *Yorkshire Guarantee and Securities Corporation*, 11 B. C. R. 97.

Embarrassment — *Cause of Action — Crown—Ownership of Foreshore.*]—In an action by the Attorney-General for the province for damages and an injunction the statement of claim alleged that the defendant company had wrongfully erected an embankment on the foreshore of Burrard Inlet, and thereby obstructed the outfall of sewers, to the damage and annoyance of the people of Vancouver:—Held, on an application to strike out the pleading as embarrassing and as disclosing no cause of action, that the pleading was good. In such an action it is not necessary for the plaintiff to allege ownership in the foreshore. Semble, a combined application may be made under Order XIX., r. 27, and Order XXV., r. 4, to strike out a statement of claim on the grounds that it is embarrassing and discloses no reasonable cause of action, and such precedure is not limited to cases which are plain and obvious. *Attorney-General for British Columbia* v. *Canadian Pacific R. W. Co.*, 10 B. C. R. 108.

Enlargement of Writ—Wrongful dismissal of servant—Depreciation in stock of company—Particulars. *Morley* v. *Canada Woollen Mills Co.*, 2 O. W. R. 457, 478.

Extension of Claim in Writ — *Service by Posting—Subsequent Appearance — Waiver.*]—The claim indorsed on the writ of summons was for specific performance of an agreement for the purchase and sale of land. The statement of claim prayed cancellation of the agreement and possession of the land:—Held, a legitimate extension of the claim within Rule 244. The defendant not having appeared within the proper time, service of the statement of claim was effected, pursuant to Rule 330, by posting up a copy in the proper office, after which the defendant entered an appearance and therein required the delivery of a statement of claim:—Held, that the defendant had waived any right to complain of the variation made in the extended pleading; and the order made upon a motion to set aside the statement of claim, allowing it to stand as of the date of the order, was the proper one. Gee v. Bell, 35 Ch. D. 160, distinguished. *Gibson* v. *Hieb*, 21 Occ. N. 211, 1 O. L. R. 247.

Extension of Claim Indorsed on Writ of Summons—*Service out of Jurisdiction.*]—The plaintiffs began an action against three defendants all resident in England, and served the writ of summons on one of the defendants while temporarily in British Columbia, and then under Order XI. served the other defendants in England. The claim indorsed on the writ was for damages for non-transfer to the plaintiffs of shares according to agreement and for failure to hold certain stock in trust. By the statement of claim the plaintiffs set up in effect a claim for damages against the defendants for fraudulently manipulating certain companies so that the stock had become worthless:—Held, that the matters alleged in the statement of claim were within the scope of the indorsement. In deciding whether or not the cause of action indorsed on a writ has been unduly extended in the statement of claim, the fact that one of the defendants was served within the jurisdiction and the others were subsequently served without the jurisdiction under Order XI., is immaterial. *Oppenheimer* v. *Sparling*, 10 B. C. R. 162.

Fraud—Notice—Embarrassment. *Beatty* v. *McConnell*, 5 O. W. R. 541.

Illegal Trade Combination — Prefatory statements—Embarrassment — Damages — Particulars —Discovery — Privilege. *Grocers' Wholesale Co.* v. *Beckett*, 6 O. W. R. 531.

Joinder of Causes of Action—Introductory statements — Libel — Special dam-

age—Infringement of several patents for inventions—Company—Wrongs before incorporation. *Copeland-Chatterson Co.* v. *Business Systems Limited*, 6 O. W. R. 555.

Malpractice — *"Efficient"* — *Amendment.*]—The word "efficient," as applied to a medical practitioner in a statement of claim for damages for his unskilful treatment of the plaintiff, was held to be ambiguous, inasmuch as it might be taken to mean that the practitioner was merely competent, or that he was not only competent, but would in fact skilfully treat, and the statement of claim was therefore held to be embarrassing. Judge's order dismissing application to amend by setting up objection in law, varied, and plaintiff given leave to apply to amend, and in default defendant given leave to apply to strike out portion of claim as embarrassing. *Schiller* v. *Canada North-West Coal and Lumber Syndicate*, 1 Terr. L. R. 421.

Mortgage Action — *Alternative Provisoes — Embarrassing or Unnecessary — Striking Out.*]—Allegations in a statement of claim unnecessary inasmuch as they merely anticipate a possible defence, are not necessarily embarrassing. The plaintiffs in paragraph 2 of their statement of claim alleged that the defendant by deed dated 13th November, 1888, in consideration of £1,003 lent him by one A. M., mortgaged his reversionary interest in his father's estate, and that in the said deed it was provided that if the defendant should within ten years after the date of the mortgage become entitled to the said reversionary interest by the death of the tenant for life, and should within 30 days after obtaining possession of the same pay the said A. M. $2,000, with compound interest at 10 per cent. per annum, then the mortgage should be void. In paragraph 3 it was alleged that it was further provided by the mortgage that if the defendant should at the expiration of 10 years from the date of the mortgage repay to A. M. the said sum of £1,003, with interest compounded yearly at 10 per cent., then the mortgage should be void. In paragraph 4 it was alleged that the defendant covenanted in the said deed to pay the mortgage money and interest and observe the provisoes therein contained. In paragraph 5 it was alleged that A. M. had duly assigned the mortgage to the plaintiffs; in paragraph 6, that the defendant did not within 10 years become entitled to the property mortgaged by the death of the life tenant; and in paragraph 7, that the defendant had not paid any sum whatever on the mortgage. The plaintiff claimed £1,003 and interest at 10 per cent. compounded yearly: — Held, on an application to strike out the whole statement of claim, or at any rate either paragraph 2 or paragraph 3 as embarrassing, that the pleading was not embarrassing, and should stand; that so far as any of the allegations might be unnecessary they merely anticipated a possible defence, and were not on that account embarrassing. *Vancouver Land and Securities Co.* v. *McKinnell*, 5 Terr. L. R. 27.

Motion to Strike Out Part—Execution against interest in land—Judgment—Remedy by summary application. *Bowerman* v. *Hall*, 5 O. W. R. 225.

Motion to Strike Out Parts—Allegations of material facts. *Slemin* v. *Toronto Police Benefit Fund*, 5 O. W. R. 178, 239.

Non-conformity with Writ of Summons — Action begun by co-partnership — Statement of claim in name of incorporated company—Statute of Limitations. *Muir* v. *Guinane*, 5 O. W. R. 324, 6 O. W. R. 64, 383, 844.

Non-conformity with Writ of Summons—Amendment—Practice. *Blackwell* v. *Blackwell*, 2 O. W. R. 411, 507.

Particulars—*Copyright in Book—Registration—Infringement.*]—In an action for infringement of copyright in a book, the statement of claim alleged that the plaintiffs were the proprietors of a subsisting copyright duly registered, but did not mention the date of registration, and further alleged that the defendants printed for sale a large number of copies of another book a part whereof was an infringement of the plaintiffs' copyright:—Held, that the defendants were entitled to particulars shewing the date of registration of the plaintiffs' copyright, and shewing what part of the defendants' book infringed the plaintiffs' right. Sweet v. Maugham, 11 Sim. 51, not followed. Mawman v. Tegg, 2 Russ. 385, 390, and Page v. Wisden, 20 L. T. N. S. 435, followed. *Liddell* v. *Copp-Clark Co.*, 21 Occ. N. 126, 19 P. R. 332.

Particulars — Mortgage — Sale under power — Conspiracy — Account. *Huffman* v. *Hull*, 1 O. W. R. 242.

Personal Injuries—*Negligence — Defective Machine—Insurance against Accident—Irrelevancy.*]—In an action for damages for personal injuries caused by a machine alleged to have been defectively constructed, belonging to the defendants, the fact that the defendants were insured in an insurance company against such accidents, cannot be given in evidence, as it is not in any way relevant; and an allegation in the statement of claim that such insurance existed was struck out, as embarrassing to the defendants. *Flynn* v. *Industrial Exhibition Association of Toronto*, 24 Occ. N. 58, 6 O. L. R. 635, 2 O. W. R. 1047, 1075.

Personal Injuries by Electric Wires —Subsequent removal of wires—Admissibility of evidence. *Gloster* v. *Toronto Electric Light Co.*, 4 O. W. R. 532.

Striking Out—*Cause of Action—Embarrassment—Demurrer—Amendment—Terms — Rules 259, 261, 298.*]—In an action to recover the amount of an insurance upon the life of C., under a policy issued by the defendants and assigned to the plaintiff, the plaintiff alleged, in the alternative, that the defendants had re-insured with another company, and after the death of C. the defendants requested the reinsuring company to pay the amount reinsured to the defendants, which the reinsuring company did, with a direction to pay the amount over to the plaintiff, which the defendants refused to do: — Held, that this amounted to an allegation that the defendants had received a sum of money to the use of the plaintiff, which they refused to pay over to him, and that they were trustee thereof for him; and the paragraphs of the statement of claim containing the alternative allegations should not be struck out summarily under Rule 261 as disclosing no reasonable cause of action, nor under Rule 298 as tending to prejudice, embarrass, or delay the fair trial of

the action. Rule 261 is intended to apply only where the pleading is obviously bad. A party may still have a point of law disposed of, although he is not at liberty to demur: Rule 259. Attorney-General of the Duchy of Lancaster v. London and North-Western R. W. Co. [1892] 3 Ch. 274, and Kellaway v. Bury, 66 L. T. N. S. 599, followed. Semble, that where a pleading is struck out and the party pleading is allowed to amend, there is no authority for imposing the term that he is to file with the amendment an affidavit shewing prima facie its truth. *Brophy* v. *Royal Victoria Ins. Co.*, 21 Occ. N. 589, 2 O. L. R. 651.

See DAMAGES—MECHANICS' LIENS—RAILWAYS AND RAILWAY COMPANIES — TRADE-MARK AND TRADE-NAME.

XV. STATEMENT OF DEFENCE.

Action Brought in Name of Company—Question of practice — Use of company's name as plaintiff in actions—Discretion—Motion to stay. *Saskatchewan Land and Homestead Co.* v. *Leadley*, 2 O. W. R. 745, 850, 917, 944, 1075, 1112, 3 O. W. R. 133, 191, 4 O. W. R. 39, 378, 5 O. W. R. 449, *Saskatchewan Land and Homestead Co.* v. *Moore*, 2 O. W. R. 916, 944, 1075, 1112, 4 O. W. R. 39, 378.

Amended Pleading—Leave to deliver—Company — Lien—Solicitor—Adding party—Pleading over. *Ryckman* v. *Toronto Type Foundry Co.*, 3 O. W. R. 267, 290, 434, 522.

Amendment—Statute of Frauds—Terms—Costs. *McLeod* v. *Crawford*, 6 O. W. R. 797.

Application to Strike Out—Irrelevant matter. *Preet* v. *Malaney*, 2 O. W. R. 388, 410.

Application to Strike Out—Defence in bar—Prosecution for crime. *Canada Biscuit Co.* v. *Spittal*, 2 O. W. R. 387, 735.

Contributory Negligence — Particulars — Postponement till after discovery. *Kelly* v. *Martin*, 6 O. W. R. 141.

Denial of Plaintiffs' Title—*Defendants' Title—Laches.*] — The statement of defence traversed allegations in the claim to the effect that plaintiffs were entitled to mine certain coal under the sea, without shewing the defendants' title in the defence, and further set up laches as an alternative defence:—Held, that the defendants were bound to set forth their title in their statement of defence. Decision in 6 B. C. R. 306 reversed. *Esquimalt and Nanaimo R. W. Co.* v. *New Vancouver Coal Co.*, 9 B. C. R. 162.

Embarrassment — *Action against Trade Union—Defence of Nul Tiel Corporation — Application to Strike Out.*]—It is open to either party to an action up to the time of the trial to attack the other's pleadings. In an action against a labour union for damages in respect of a strike, the union pleaded that "they were not a company, corporation, copartnership, or person, and not capable of being sued in this or any action:"—Held, bad plea. Questions of law going to the merits of a case will not be decided on an application to strike out pleadings as embarrassing. *Centre Star Mining Co.* v. *Rossland Miners' Union*, 23 Occ. N. 272, 9 B. C. R. 531.

Embarrassment—Master and servant—Wrongful dismissal — Denial — Justification. *Wall* v. *McNab & Co.*, 2 O. W. R. 1128.

Embarrassment—*Striking Out.*]—Questions of substantial difficulty or importance raised by the statement of defence should not be disposed of on motion in Chambers, under Rule 318 of the King's Bench Act, 1895, to strike out paragraphs of the statement of defence as embarrassing, but should be left to be dealt with at the trial of the action. The defences herein were held to present questions of such substantial difficulty and importance that they should not be struck out on motion in Chambers. Ætna Life Ins. Co. v. Sharp, 11 Man. L. R. 141, discussed and explained. *Long* v. *Barnes*, 14 Man. L. R. 427.

Embarrassment—*Striking Out—Partnership—Bills of Sale.*]—Matter in a statement of defence, attacked as tending to prejudice, embarrass, or delay, will be struck out less freely than in a statement of claim. McEwen v. North-West Coal and Navigation Co., 1 Terr. L. R. 203, followed. Statement of claim set up a partnership between the plaintiff D. and the defendant P., a mortgage by D. and P. of partnership goods to C., and a mortgage of P.'s interest therein to C. Bros. The 1st paragraph of the defence of C. Bros. denied the partnership. The 2nd paragraph set up that, "whatever relationship existed" between D. and P., that relationship was put an end to and the entire ownership of the goods mortgaged then vested in D. free from any interest of P.:—Held, that the 2nd paragraph was embarrassing, inasmuch as, while it assumed some relationship to have existed between D. and P., and alleged it to have been put an end to and the property to have vested in D., it did not allege (1) the nature of the relationship, and (2) the mode in which the relationship had been terminated and the property become vested in D., i.e., whether by operation or implication of law or by agreement of dissolution or other agreement stating the nature of such other agreement. The 7th paragraph of the defence of C. Bros. alleged that, even if the mortgage to C. constituted a partnership liability, C. Bros. had a separate claim against D. before C. acquired any such partnership liability:—Held, that the 7th paragraph was embarrassing, inasmuch as it did not allege that the separate claim of C. Bros. was the same as that for which they held the chattel mortgage, and as, if that was not the case, the whole paragraph was entirely immaterial. The 8th paragraph of the defence alleged that the mortgage to C. was void, and did not comply with the Bills of Sale Ordinance, and no affidavit of bona fides accompanied it:—Held, that the 8th paragraph was embarrassing, inasmuch as it was uncertain whether it intended that the mortgage was void on the ground only of the absence of an affidavit of bona fides, or as well for non-compliance with other requirements of the Bills of Sale Ordinance, or on grounds apart from that Ordinance. *Davis* v. *Patrick*, 2 Terr. L. R. 9.

Exclusion of Counterclaim—Action for price of goods — Counterclaim for malicious

prosecution—Parties — Added defendant by counterclaim — Convenience. *A. MacDonald Co.* v. *Logan* (N.W.T.), 2 W. L. R. 23.

Exclusion of Counterclaim—Action on foreign judgment — Counterclaim for libel. *Molsons Bank* v. *Hall*, 4 O. W. R. 452, 5 O. W. R. 625.

Exclusion of Counterclaim—Inconvenience—Delay—Mortgage action—Counterclaim for wrongful seizure and sale of goods — Forum. *Imperial Bank of Canada* v. *Martin*, 6 O. W. R. 485, 736, 824.

Immaterial Issue—*Striking Out.*]—The plaintiff's claim was for work done and materials provided for a company for which the defendants had agreed to become responsible. The statement of claim set out the items of the claim. By one paragraph of the statement of defence the defendants set up that no account of the moneys claimed by the plaintiff, except as to one disputed item, had been rendered to the defendants, and that payment had not been demanded before action brought; and by another paragraph, that before the commencement of the action the defendants offered to the plaintiff a specified sum (less than the amount claimed) and that the plaintiff had not demanded nor made any claim for any amount in excess thereof:—Held, that no issue or an immaterial issue was tendered by these paragraphs, and that they were embarrassing and must be struck out. *Webb* v. *Hamilton Cataract Power, Light and Traction Co.*, 7 O. L. R. 607, 3 O. W. R. 384.

Leave to Amend—Adding defence—Attaching order. *Gearing* v. *McGee*, 1 O. W. R. 213.

Malicious Prosecution.] — *Kearns* v. *Bank of Ottawa*, 2 O. W. R. 483.

Motion for Leave to Add New Defence—Mortgage action — Illegal consideration—Bank—Future advances—Affidavits of merits—Delay. *Imperial Bank of Canada* v. *Martin*, 6 O. W. R. 485, 736, 824.

Motion to Strike Out—Embarrassment —Previous action — Res judicata. *Barrette* v. *Canadian Bank of Commerce* (Y.T.), 1 W. L. R. 171.

Motion to Strike Out—Embarrassment —Rules of pleading. *Schweiger* v. *Vineberg* (Man.), 2 W. L. R. 266.

"Not Guilty by Statute" — *Particulars.*]—A railway company cannot be required to give particulars of the defence of "not guilty by statute." The right to plead such a defence being expressly preserved by Rule 286, the application of Rule 299 is excluded. Jennings v. Grand Trunk R. W. Co., 11 P. R. 300, overruled. *Taylor* v. *Grand Trunk R. W. Co.*, 21 Occ. N. 437, 2 O. L. R. 148.

Noting Pleadings Closed—Long delay in proceeding with action — Presumption of abandonment — Notice to parties affected. *Radford* v. *Barwick*, 6 O. W. R. 765, 10 O. L. R. 720.

Payment into Court — *Acceptance of Money paid in—Expiry of Time for—Extention—Reply—Costs—Discretion.*]—Action by an executrix for damages for an alleged unlawful detention of the plaintiff's goods. The defendant pleaded a number of defences, and paid into Court $1, which, he said, was sufficient to satisfy the plaintiff's claim. A motion was made by the plaintiff at Chambers for an order allowing him, notwithstanding the time limited for so doing had expired, to file and deliver a reply accepting the sum of money paid into Court by the defendant, and enlarging the time for payment of the money out of Court:—Held, in Chambers, that, although there was a technical right on the part of plaintiff to recover nominal damages, the action should not have been commenced for the value of the property, and, for this reason, the plaintiff should be refused assistance over the technical difficulty which stood in her way on account of her not having replied within the ordinary time:—Held, on appeal, reversing the order in Chambers, that in case of a plea of payment of money into Court to satisfy the claim of the plaintiff, whenever the plaintiff becomes ready to accept such sum, his right to amend so as to accept such sum, paid in in full must be allowed, subject to such terms as the law requires. Per Meagher, J., dissenting, that, as the amendment sought did not go to the merits of any question to be tried, but affected the right to costs merely, the Chambers Judge had a discretion to grant or refuse the indulgence asked. *Miller* v. *Archibald*, 19 Occ. N. 400, 20 Occ. N. 136, 33 N. S. Reps. 189.

Promissory Note—Illegality—Failure to set forth necessary facts — Striking out — Amendment. *Ireland* v. *Andrew* (N.W.T.), 1 W. L. R. 346, 575.

Promissory Note — *Indorsement without Value—Fraud—Set-off Defeated.*]—Action by an indorsee against the maker and the indorser of a promissory note. Defence that the indorser, for whose benefit the note was made, and who had received the consideration, indorsed it to the plaintiff's brother, who when he was indebted to the indorser, in collusion with the plaintiff, and for the purpose of defrauding the indorser, and preventing him from collecting the sums due by the plaintiff's brother, indorsed the note to the plaintiff without consideration:—Held, that the plea was no defence to the action and must be struck out as embarrassing. *Caldwell* v. *McDermott*, 2 Terr. L. R. 249.

Real Property Limitation Act—*Section Relied on—Appeal—Practice—Costs.*]—Held, by the Master and a Judge in Chambers, following Pullen v. Snelus, 40 L. T. N. S. 363, that a defendant pleading the Real Property Limitation Act must set out in his statement of defence, or give particulars shewing, the section or sections on which he relies:—Held, by a Divisional Court, that the defendant should have been content in such a matter with his appeal to the Judge in Chambers, and should not have incurred useless costs by a further appeal. *Dodge* v. *Smith*, 21 Occ. N. 162, 1 O. L. R. 46.

Repetition of Counterclaim — *Tender and Payment into Court—Judgment—Costs.*]—In an action for the price of goods sold and delivered, the defendant counterclaimed for damages for breach of contract, and, for grounds of defence, repeating the clauses of the counterclaim, pleaded (1) payment into Court of an amount alleged to be sufficient to

satisfy the plaintiffs' claim, and (2) tender before action brought of the amount paid into Court. The plaintiffs replied, (1) denying that the amount paid in was sufficient to satisfy their claim, and (2) objecting to the paragraphs of the defence, so far as they incorporated the paragraphs of the counterclaim, as bad in law, on the ground that the counterclaim was no defence to the action, and could not be so pleaded:—Held, that the defence was no answer to the action, and the plaintiffs were entitled to recover the amount of their claim. The tender was bad, being pleaded to the whole cause of action, and being insufficient to cover it. The trial Judge having found in favour of the defendant on the counterclaim, and his finding being supported by the evidence, it should not be disturbed. Judgment for the plaintiffs upon their claim with costs, and for the defendant on his counterclaim with costs—the two amounts to be set off pro tanto. No costs of appeal. *Bauld* v. *Fraser*, 34 N. S. Reps. 178.

Sale of Medical Practice — *Covenant not to Open an Office—Injunction Restraining from Practising—Judgment not Supported by Pleading.*] — The defendant agreed with the plaintiff "not to open an office or have one for the practice of medicine in," etc. The plaintiff sued, alleging that the defendant had agreed "to refrain from practising as a physician," and that he had not ceased to practise "as he had agreed to." The relief sought was an injunction "to restrain the defendant from practising." The defendant admitted that he had agreed "not to open an office, nor to have one for the practice of medicine." At the trial the plaintiff's evidence was directed to proving that the defendant, in breach of the agreement, did "open and have an office," and the defendant, relying on the pleadings, which had not been amended, offered no evidence. Judgment was given restraining the defendant from opening or having an office:—Held, on appeal, that the judgment was not supported by the pleadings, and must be set aside. *King* v. *Wilson*, 25 Occ. N. 51, 11 B. C. R. 109.

Striking out—No claim against plaintiff—No prayer for relief—Third parties. *Wade* v. *Pakenham*, 2 O. W. R. 1183, 3 O. W. R. 47.

Striking out Defence as Embarrassing—*Third Party Proceedings—Stay of Proceedings.*]—In an action for foreclosure of a mortgage made by the defendant and his deceased partner, paragraphs of the defence alleging in effect that the administratrix of the estate of the deceased partner was a necessary party to the action, inasmuch as the defendant was entitled to contribution from the estate, and as an order that no action should be brought against the administratrix as such, and staying all pending proceedings against her as such administratrix for four months, prevented the defendant from pursuing his remedy in that behalf, were struck out as embarrassing: the defendant's proper course being an application under the third party procedure, and the plaintiff not being affected by the effect of the order upon the defendant's rights or remedies. *Paul* v. *Flinn*, 2 Terr. L. R. 406.

Time for—*Noting for Default — Security for Costs—Payment into Court—Notice of.*] —Where a plaintiff, having complied with an order for security for costs by paying money into Court, gives notice thereof, as required by Con. Rule 1207, the defendant is entitled to at least one day to ascertain if payment has really been made, and to file his defence, before the plaintiff can note the pleadings closed for default of defence—the order for security for costs having stayed the proceedings the day before the last day for delivering the defence. *Northern Elevator Co.* v. *North-West Transportation Co.*, 6 O. L. R. 23, 2 O. W. R. 525.

PLEAS.

See PLEADING.

PLEDGE.

Bailment of Animal—Pasturage—Subsequent advances—Distinction between pledge and chattel mortgage. *Kelly* v. *Pollock*, 1 O. W. R. 735.

Deposit with Tender — *Forfeiture — Breach of Contract—Municipal Corporation—Right of Action—Damages—Set-off—Restitution.*]—C., on behalf of a firm of contractors of which he was a member, deposited a sum of money with the city of Montreal as a guarantee of the good faith of the firm in tendering to supply gas. After the construction of some works and laying of pipes in the public streets, the firm transferred their rights and privileges under the contract to another company, and ceased operations. The plaintiff, afterwards, as assignee of C., demanded the return of the deposit, which was refused by the city council, which assumed to forfeit the deposit and declare the same confiscated to the city for non-execution by the firm of their contract. After the transfer, however, the companies supplying the gas in the city reduced the rates to a price below that mentioned in the tender, so far as the city supply was affected, although the rates charged to citizens were higher than the contract price:—Held, that the deposit so made was a pledge subject to the provisions of tit. 16 of the Civil Code of Lower Canada, and which, in the absence of any express stipulation, could not be retained by the pledgee, and that, as the city had appropriated the thing pledged to its own use without authority, the security was gone by the act of the creditor, and the debtor was entitled to its restitution, although the obligation for which the security had been given had not been executed. As the city had not been obliged to pay rates in excess of those fixed by the contract, no damage could be recovered in respect to the obligation to supply the city, and the breach of contract in respect to supplying the public did not give the corporation any right of action for damages to individuals. Prospective damages which might result from the occupation of the city streets by the pipes actually laid and abandoned were too remote and uncertain to be set off against the claim for the return of the deposit. *Finnie* v. *City of Montreal*, 22 Occ. N. 356, 32 S. C. R. 335.

Revendication by True Owner.] — One who is in possession of a watch pledged to him for advances which he has made to the possessor of such watch, and who does not

come within any of the cases mentioned in arts. 1488 and 1489, C. C., cannot oppose the revendication of such watch by the true owner. *Marcotte* v. *Fortin*, Q. R. 21 S. C. 102.

Securities—*Bank—Power of Sale—"By Giving"—Notice—Auction—Private Sale—Purchasers for Value.*]—As collateral security to a promissory note the makers deposited with a bank certain railway bonds, and by a memorandum of hypothecation authorized the bank, upon default, "from time to time to sell the said securities by giving 15 days' notice, in one daily paper published in the city of Ottawa with power to the bank to buy in and resell without being liable for loss occasioned thereby." Default having been made, notice of intention to sell was duly published, and, pursuant to the notice, the bonds were offered for sale at public auction, after two postponements at the request of the pledgors, but no sale was made for want of bidders. The bank afterwards made a private sale of the bonds without further notice:—Held, that the words "by giving" in the memorandum were equivalent to "after giving" or "first giving" or "giving," and the condition of publication of the notice having been performed, the power to sell arose and might be exercised afterwards without fresh notice:—Held, also, that there was nothing upon the evidence to shew that the purchasers were not bona fide purchasers for value or that they had any reason to suppose that the bank were not authorized to sell; and under these circumstances the construction of the power of sale should not be strained against the purchasers. *Toronto General Trusts Corporation* v. *Central Ontario R. W. Co.*, 24 Occ. N. 319, 7 O. L. R. 660, 3 O. W. R. 520.

Securities — *Railway Bonds — Sale by Pledgees—Compliance with Terms of Hypothecation—"By Giving"—Notice—Abortive Sale—Subsequent Private Sale.*]—Dispute as to which of two parties were entitled to prove in respect of 300 bonds issued by the railway company for the sum of $1,000 each, with interest coupons attached, which had been pledged by Ritchie to the Bank of Ottawa, as security for a promissory note of $50,000 made by him, bearing date 30th November, 1900, and payable 15 days after date, with interest at 6 per cent. per annum from 31st May preceding. Blackstock and Weddell claim as purchasers of the bonds from the bank, after default in payment of the note, at the rate of 22½ cents on the dollar of the principal money of the bonds, and to have paid the purchase money therefor, amounting to $67,500. Ritchie, on the other hand, contends that the bank having held the bonds in pledge by way of security, the sale made by them was irregular and void, and that the purchasers, having bought with notice of the character in which the bank held the bonds were affected by the invalidity of the sale:—Held, that the respondents had notice before completion that the bank held the bonds as pledgees and not as owners. The contract authorizes the bank, in default of payment of the note at maturity, "from time to time" to "sell the said securities or any part thereof by giving 15 days' notice in one daily paper published in the city of Ottawa, as to the said bank shall seem proper, with power to the bank to buy in and resell without being liable for loss occasioned thereby." The bank published a notice of a sale of the bonds by auction on 11th March, 1902, and it was published in the Ottawa "Evening Journal" daily for 15 days before the day of sale. There was no sale at the time appointed. On 19th August an offer was received by the bank from Mr. Blackstock, one of the respondents, of 22½ cents in the dollar on the par value of the principal money of the bonds, and, after much correspondence, a sale of the whole of the bonds, with unpaid coupons attached, was made to Mr. Blackstock, on behalf of himself and the other respondent, and completed on or about 30th September. At the time of the sale the par value of the bonds, with interest coupons in arrear, was, as found by the Master, about $66,000; the debt due to the bank was $56,872.78, and the purchase money received was $67,500, or $10,627.22 more than was due. So that the bank sold nearly five bonds, with attached coupons, the par value of which was $11,000, more than was necessary to pay their debt, no effort having been made to restrict the sale to so many as was necessary for that purpose. On receiving Blackstock's offer of 19th August, the bank telegraphed to Ritchie at Akron, Ohio, where he lived, that they had an offer for the bonds, not stating what it was, and that they would sell unless payment was made by 12 o'clock on the 21st. To this they received an answer on the same day that arrangements were being made to pay the debt, and protesting against the sale. No further communication was made to Ritchie, and the fact of the sale was apparently not made known to him until 21st October afterwards:—Held, the sale was not made with reasonable care nor with proper regard to the rights and interests of Ritchie. No attempt had been made to reach the inquirers referred to in Mr. Burn's letter of 18th March, and who were expected at that time to become purchasers, and when the offer of 19th August came, its terms were not communicated to Ritchie, but he was called upon to redeem within 48 hours, or in default it would be accepted. That offer was about 10½ cents in the dollar of the bonds and arrears of interest which were sold. The very first offer was accepted, because it was sufficient to pay the bank's debt, although they knew there were other inquirers for the bonds, who, as they had reason to believe and expect, might become purchasers. They also carelessly sold more than were necessary to pay their debt, without any effort to restrict the sale to what was sufficient for the purpose, and, although the offer was at so much in the dollar, and not a fixed sum for the whole, such a sale, even if the bank had power to sell by private contract, which they had not, cannot be supported as between the bank and Ritchie, and by reason of notice to respondents cannot be maintained by them any more than it could be by the bank. The appeal allowed, and the decision of the Master restored. *Toronto General Trusts Corporation* v. *Central Ontario R. W. Co.*, 5 O. W. R. 600. See 3 O. W. R. 520, 7 O. L. R. 660, 10 O. L. R. 347.

POLICE COMMISSIONERS.

See NEGLIGENCE.

POLICE FORCE.

See MUNICIPAL CORPORATIONS—NORTH-WEST MOUNTED POLICE.

POLICE MAGISTRATE.

Jurisdiction — *City and County — Summary Trial for Indictable Offence.*]—A police or stipendiary magistrate for the county of Westmoreland, with jurisdiction in the city of Moncton, has no authority to try summarily a person charged with an offence under LV. of the Criminal Code, s. 785, s.-s. 2, as amended by the Criminal Code Amendment Act, 1900, giving jurisdiction to police or stipendiary magistrates of cities and incorporated towns to try summarily indictable offences. *Rex* v. *Bennet*, 35 N. B. Reps. 632.

Jurisdiction—Fraud at municipal election —Information—Prohibition. *Rex* v. *Thompson*, 3 O. W. R. 155.

Powers of Deputy—*Conviction—Information, before Whom Taken.*]—An information was sworn before the police magistrate for a city, but the case heard and conviction made by the deputy police magistrate. The conviction recited that it was made by R. E. K., deputy police magistrate, acting at the request of G. T. D., police magistrate:—Held, having regard to the Municipal Act, R. S. O. c. 223, s. 486, the Act respecting police magistrates, R. S. O. c. 87, ss. 10, 13, the Ontario Summary Convictions Act, R. S. O. c. 90, s. 2, and the Criminal Code, s. 842, s.-s. 7, that the deputy police magistrate was acting within the powers and authority conferred upon him by statute, and it was not necessary for the magistrate trying the case to be the magistrate who took the information. *Regina* v. *Duggan*, 21 Occ. N. 35.

Summary Trial—*Perjury—Acquittal — Further Prosecution—Indictment.*]—A person accused of perjury may, with his own consent, be summarily tried before a police magistrate: Criminal Code, ss. 145, 539, 782, 785. And where the defendant sought and consented to be tried summarily under s. 785, pleading "not guilty," and the magistrate, upon hearing the evidence, adjudicated summarily and dismissed the charge under s. 787:—Held, that the magistrate was right in refusing thereafter to bind the prosecutor over to prefer and prosecute an indictment against the defendant, as provided for in s. 595; for the magistrate has, under s. 791, to determine, before the defence has been made, whether he will try the case summarily or not. *In re Rex* v. *Burns*, 21 Occ. N. 236, 1 O. L. R. 341.

POLICE OFFICER.

See ASSAULT—COSTS—NOTICE OF ACTION.

POLL TAX.

See ASSESSMENT AND TAXES.

POLYGAMY.

See CRIMINAL LAW.

POSSIBILITY OF ISSUE EXTINCT.

See VENDOR AND PURCHASER.

POSTMASTER.

See CROWN.

POST OFFICE.

See CONTRACT — CRIMINAL LAW.

POSTPONEMENT OF TRIAL.

See TRIAL.

POUNDAGE.

See SHERIFF.

POWER OF ATTORNEY.

See COMPANY — COSTS — PRINCIPAL AND AGENT — SUCCESSION—WRIT OF SUMMONS.

POWER OF SALE.

See MORTGAGE.

PRACTICE.

See ABSENTEE — ACCOUNT — ADMINISTRATION — AMENDMENT — APPEAL — APPEARANCE — ARBITRATION AND AWARD —ARREST — ATTACHMENT OF DEBTS — BANKRUPTCY AND INSOLVENCY — BILLS OF EXCHANGE AND PROMISSORY NOTES—BOND—CANADA TEMPERANCE ACT—CERTIORARI—CHOSE IN ACTION, ASSIGNMENT OF — CHURCH—COMPANY—CONSOLIDATION OF ACTIONS—CONTEMPT OF COURT —CONTRIBUTION — COSTS—COURTS — CRIMINAL LAW — CURATOR — DEFAMATION — DEVOLUTION OF ESTATES ACT—DISAVOWAL — DISCONTINUANCE OF ACTION — DISCOVERY — DISMISSAL OF ACTION — EQUITABLE EXECUTION — EVIDENCE — EXECUTION — EXECUTORS AND ADMINISTRATORS — HUSBAND AND WIFE —INDEMNITY — INFANT—INJUNCTION —INSURANCE — INTEREST — INTERVENTION — JUDGMENT—JUDGMENT DEBTOR —JUDICIAL SALE OF LAND — JUDICIAL SECURITY — LANDLORD AND TENANT — LIS PENDENS — LUNATIC—MASTER AND SERVANT — MASTER IN CHAMBERS—MECHANICS' LIENS — MISNOMER — MORTGAGE — MUNICIPAL CORPORATIONS—MUNICIPAL ELECTIONS — NEW TRIAL—NOTICE OF ACTION — NOTICE OF MOTION—OPPOSITION — PARLIAMENTARY ELECTIONS—PARTICULARS — PARTIES—PARTITION — PARTNERSHIP—PAYMENT INTO COURT—PAYMENT OUT OF COURT—PENALTY—PEREMPTION — PLEADING—PROCURATION—PUBLIC MORALS—REAL PROPERTY ACT — RECEIVER — REFERENCE—REVIVOR — RULE NISI—SET-OFF—SHERIFF — SOLICITOR — STAY OF PROCEEDINGS — SUMMONS — TIME — TRIAL — VENUE — WILL — WRIT OF SUMMONS.

PREFERENCE.

See BANKRUPTCY AND INSOLVENCY—FRAUDULENT CONVEYANCE—PARTITION.

PREFERENCE SHARES.

See COMPANY.

PRESCRIPTION.

See ASSESSMENT AND TAXES—ATTACHMENT OF DEBTS—BANKS AND BANKING—BILLS OF EXCHANGE AND PROMISSORY NOTES—COPYRIGHT—CROWN—DEFAMATION—EASEMENT—ESTATE—EVIDENCE—HUSBAND AND WIFE—LIMITATION OF ACTIONS—MUNICIPAL CORPORATIONS—PEREMPTION—RAILWAY—SOLICITOR—TRESPASS TO LAND—WATER AND WATERCOURSES—WAY.

PRESSURE.

See BILLS OF SALE AND CHATTEL MORTGAGES—FRAUDULENT CONVEYANCE.

PREVENTIVE OFFICER.

See REVENUE.

PRINCIPAL AND AGENT.

Account — Contract — Construction — Parol variation—Competing business—Goods supplied — Profits — Remuneration — Damages — Special services—Method of accounting—Burden of proof—Disbursements. *Pain v. Code*, 5 O. W. R. 677, 6 O. W. R. 833.

Account — Contract — Construction—Reformation — Liabilities of sureties for agent—Alteration in contract—Conditions of bond. *Great West Life Assce. Co. v. Mooring*, 6 O. W. R. 176, 600.

Account — Sale of goods—Onus. *Henry v. Nelson* (Man.), 2 W. L. R. 32.

Agent's Commission — *Exchange of Lands—Double Commission.*]—An agent acting for and representing the vendor of real estate is not entitled, in the absence of an agreement to that effect, to recover from the purchaser a commission on the value of a property belonging to the latter, which was accepted by and transferred to the vendor in part payment of the price. *Browne v. Gault*, Q. R. 19 S. C. 523.

Auctioneer — *Sale of Property—Concealment of Material Fact—Action of Deceit—Depriving of Commission.*]—An action of deceit will lie against an auctioneer who, being employed to effect the sale of a piece of property, concealed from his principal a material fact, by reason of which concealment the latter sold the property for a smaller sum than he could have obtained if he had been in possession of all the facts. Such failure of duty on the part of the auctioneer towards his principal deprives him of any right to the compensation agreed to be paid to him upon the sale being effected. *Ring v. Potts*, 36 N. B. Reps. 42.

Authority of Agent—*Husband and Wife—Surrender of Lease.*]—Authority to accept surrender of a lease will not be implied from the fact that a husband living with his wife has collected the rents of the property and looked after repairs made. *Rex v. Forbes, Ex p. Bramhad*, 36 N. B. Reps. 333.

Authority of Agent — *Sale of Land—Contract—Statute of Frauds—Evidence—Vendor and Purchaser — Specific Performance—Appeal—Findings of Judge.*]—1. Although an agent for the sale of land, having only an oral authority from the owner, may sign for him a contract of sale of the land which will be binding under the Statute of Frauds, yet, if disputed, the evidence of the agent should not be accepted as sufficient proof of such authority without corroboration, unless it is of the clearest and most convincing kind and such as bears overwhelming conviction on its face. 2. The authority ordinarily conferred upon a broker employed in the sale of land is limited to the duty of finding a purchaser ready and willing to buy the property at the named price and on specified terms and to introduce him to his principal; and, without a clear and express provision, such authority does not warrant the agent in signing a contract of sale so as to bind the principal. 3. Where the owner has authorized his agent to sell on terms requiring payment of $1,000 cash, this will not authorize him to sign an agreement of sale by which the purchaser is to pay the money "on acceptance of title." 4. Although accepting the findings of the trial Judge as to the credibility of the witnesses, the Court in appeal may review the evidence and reverse the decision arrived at as to the legal conclusions to be drawn from the admitted facts. Rosenbaum v. Belson, [1900] 2 Ch. 267, commented on and distinguished. *Gilmour v. Simon*, 15 Man. L. R. 205, 1 W. L. R. 417.

Authority of Agent to Pledge Credit of Principal — Advertising contract—Manager of hotel—Ostensible authority—Liability of proprietor — Correspondence — Conflict of evidence — Credibility of witnesses. *H. W. Kastor & Sons Advertising Co. v. Coleman*, 6 O. W. R. 791, 11 O. L. R. 262.

Broker — *Gambling in Stocks—Advances by Agent—Criminal Code, s. 201—Promissory Note—Consideration.*]—P. speculated on margin in stocks, grain, etc., through C. & Son, brokers in Toronto, and in March, 1901, directed them to buy 30,000 bushels of May wheat at stated prices. The order was placed with a firm in Buffalo, and, the price going down, C. & Son forwarded money to the latter to cover the margins. P., having written the brokers to know how he stood in the transaction, received an answer stating that "no doubt the wheat was bought and has been carried, and whether it has or not our good money has gone to protect the deal for you," on which he gave them his promissory note for $1,500, which they represented to be the

amount so advanced. Shortly afterwards the Buffalo firm failed, and P. became satisfied that they had only conducted a bucket shop, and the transaction had no real substance. He accordingly repudiated his liability on the note, and C. & Son sued him for the amount of it:—Held, Davies and Killam, JJ., dissenting, that the evidence shewed that the transaction was not one in which wheat was actually purchased; that C. & Son were acting therein as agents for the Buffalo firm; that the transaction was not completed until the acceptance by the firm in Buffalo was notified to P. in Toronto; and being consummated in Toronto it was within the terms of s. 201 of the Criminal Code, and the plaintiff could not recover:—Held, also, Davies and Killam, JJ., dissenting, that, assuming C. & Son to have been agents of P. in the transaction, they were not authorized to advance any moneys for their principal beyond the sums deposited with them for the purpose. Per Davies and Killam, JJ., that the transaction was completed in Buffalo, and, in the absence of evidence that it was illegal by law there, the defence of illegality could only be raised by plea under Rule 271 of the Judicature Act of Ontario. Judgment of the Court of Appeal, Carpenter v. Pearson, 3 O. W. R. 483, reversed. *Pearson* v. *Carpenter*, 25 Occ. N. 26, 35 S. C. R. 380.

Commission on Sale of Land—Reopening negotiations — Agent's advertising expenses. *Thompson* v. *King*, 1 O. W. R. 119.

Company — Liability of—Holding out of person as general manager—Costs. *Davis* v. *Rideau Lake Navigation Co.*, 1 O. W. R. 229.

Contract Made by Agent — Scope of authority — Principal not bound. *Goderich Elevator Co.* v. *Dominion Elevator Co.*, 4 O. W. R. 175.

Contract on Behalf of Company not Formed—Personal liability—Evidence. *Gamble* v. *Spencer* (B.C.), 1 W. L. R. 189.

Execution against Agent—*Seizure of Goods Intrusted for Sale—Fraud—Sheriff.*]—On the evidence it was found that an arrangement, between merchants and an insolvent person, against whom there were unsatisfied judgments—whereby the former supplied the latter, as their agent, with goods to be exchanged with Indians for furs, which were to be delivered for sale to the merchants, who were to retain from the proceeds of the sale of the furs the invoice price of the goods, plus 10 per cent. thereon and 2½ per cent. of the selling price of the furs, the agent getting all further profit as his remuneration—was established as against the defence that it was an arrangement in fraud of the agent's creditors; and it was held, that such an arrangement was legal, and that therefore the merchants were entitled to damages against the deputy sheriff, who had seized some furs comprised in the agreement under an execution against the agent. *MacDonnell* v. *Robertson*, 1 Terr. L. R. 438.

Fraud of Agent — *Pleading.*]—The first count of the declaration alleged that the defendant was hired for the purpose of receiving and forwarding to the plaintiffs applications for fire insurance, yet the defendant, not regarding his duty, negligently and wrongfully received and forwarded to the plaintiffs an application for insurance containing statements which he knew at the time to be false, and material to the risk, and the plaintiffs relying upon the truth of the application, accepted the risk, and issued a policy thereon which became a claim, and the plaintiffs were put to great costs in defending an action at law. The second count alleged that the false statements were received and forwarded to the plaintiffs by the defendant fraudulently and in collusion with the applicant against the company:—Held, that both counts stated a cause of action and were good on demurrer. *Norwich Union Fire Ins. Co.* v. *McAlister*, 35 N. B. Reps. 691.

Hotel Manager — *Moneys Received by—Liability to Account.*]—The defendant was the manager of the plaintiffs' hotel, and at the close of each day went over the receipts and disbursements and entered a summary thereof in a book, the receipts being classified according to the department of the business from which they were derived, and took over the money which constituted the balance on hand, as shewn by such entries, which he kept in his possession all night, and subsequently made deposits with the plaintiffs' bankers. During the day the money was kept in a safe in the office to which a clerk and a stenographer employed in the office, as well as one of the plaintiffs, who for two or three days in each week took part in the management and supervision of the hotel, had access. When any money was taken out, it was the duty and practice to put in a slip shewing the amount so taken and the purpose. The defendant, while admitting the accuracy of the balance up to a specified date, claimed that he was not responsible thereafter, by reason of his not being then able, through overwork, to actually count the money taken over by him:—Held, under the circumstances, and in the absence of a positive statement shewing the inaccuracy of the daily balance, that the defendant was bound to account therefor. *Clayton* v. *Patterson*, 21 Occ. N. 117, 32 O. R. 435.

Husband and Wife—Authority of husband as agent—Sale of goods on husband on his credit—Erection of house on wife's land—Action against wife for price of materials—Payment by wife to husband while latter regarded as principal. *Arbuthnot* v. *Dupas* (Man.), 2 W. L. R. 445.

Implied Authority of Notary Public—*Payment—Discharge of Mortgage—Evidence—Commencement of Proof in Writing—Admissions — Objections.*]—A notary public in the province of Quebec has no actual or ostensible authority to receive moneys for his clients under deeds of obligation executed and in his custody as a member of the notarial profession of that province. Admissions to the effect that a notary had invested money and collected interest on loans for the plaintiff do not constitute proof of agency on the part of the notary, nor a commencement of proof in writing under art. 1233, C. C., and art. 316, C. P., Q., sufficient to permit the adducing of parol testimony as to the authorization of the notary to receive the capital so invested, or as to payment thereof alleged to have been made to him as the mandatary of the creditor. The rules of the Civil Code prohibiting parol testimony in certain cases, are not rules of public order which must be judicially noticed, and, where such evidence has

been irregularly admitted at the trial without objection, the opposite party cannot on appeal take exception to the irregularity. *Gervais* v. *McCarthy*, 24 Occ. N. 301, 35 S. C. R. 14.

Insurance Agent — *Agreement to give Notice of Further Insurance—Omission—Liability—Gratuitous Undertaking — Mandate.*]—The defendant, a general insurance agent, undertook gratuitously to have an additional $500 policy placed on the property of the plaintiffs; and, before completion of this transaction, he also undertook, at the plaintiffs' request, to notify the companies already holding policies, of the additional insurance, as was required under their policies. A loss occurred and, owing to the defendant having failed to give such notice, the plaintiffs were placed in the power of the insurance companies and had to accept $1,000 less than they otherwise would have received:—Held, that the transaction was one of mandate. If the defendant had not entered upon the execution of the business intrusted to him, he would have incurred no liability, but, having undertaken to perform a voluntary act, he was liable for negligently performing it in such a manner as to cause loss or injury to the plaintiffs. Coggs v. Bernard, 1 Sm. L. C. 182; Judgment of Lount, J., 4 O. L. R. 541, 22 Occ. N. 372, 4 O. W. R. 554, affirmed. *Baxter* v. *Jones*, 23 Occ. N. 258, 6 O. L. R. 360, 2 O. W. R. 573.

Insurance Agent — *Breach of Duty—Neglect to Insure—Damages—Amendment.*]—The defendant, who was the agent of a fire insurance company, was applied to by the plaintiff for an insurance upon certain buildings. The defendant filled out a form of application, which was signed by the plaintiff's uncle and guardian, and received the premium, but neglected to insure. The buildings having been burnt, the plaintiff was held by the trial Judge entitled to recover their value as damages. But his decision was reversed by the full Court, which held that the plaintiff's case was not proved; that at most it was proved that the defendant was to forward the application to a loan company, the holders of a mortgage on the premises in question, and that the company were to be expected to apply for the insurance; and an amendment to make that case was refused. *Henry* v. *Beattie*, 23 Occ. N. 30, 250.

Insurance Agent — *Agreement to Give Notices — Breach — Damages.*]—An insurance agent who, in consideration of his being given the right of effecting a firm's insurance in companies represented by him, undertakes to attend to the insurances, to see that the policies are duly made out, and to give the necessary notices required to be given from time to time, but, upon a further insurance being subsequently effected, omits to give any notice thereof, whereby the firm is damnified, is liable to the firm in damages for his default. *Baxter* v. *Jones*, 22 Occ. N. 372, 4 O. L. R. 541, 1 O. W. R. 554, 2 O. W. R. 573.

Mandate — *Revocation — Notice — Indemnity — Admission—Offer of Settlement.*]—An agreement between the parties, by which the defendants were to pay the plaintiff a fixed sum per month for receiving, storing, handling, and shipping such goods as might be consigned to him for and on account of the defendants, is a contract of mandate; and such contract may be revoked, without notice, at any time by the mandator, whether the mandatary is salaried or unsalaried, subject to his right to be indemnified against all loss directly flowing from the mandator's wrongful act, where he has acted wrongfully or unjustly in revoking the mandate,—which was not proved in the present case. 2. The plaintiff cannot avail himself of an offer contained in a proposition of settlement made by the defendant (but which he, the plaintiff, refused to accept), as a recognition or admission of his demand to that extent. *Galibert* v. *Atteaux*, Q. R. 23 S. C. 427.

Misrepresentation of Authority by Agent—*Contract for Sale of Land—Personal Liability—Damages.*]—1. An agent who, by misrepresentation of his authority, procures a person to enter into an agreement with his principals for the purchase of land, will be personally liable to the intending purchaser for damages in an action for specific performance against himself and his principals, if they afterwards repudiate the agreement and prove that the agent had no authority to bind them. 2. In such a case, the plaintiff is entitled not only to the expenses actually incurred, but also to the loss of the profit he would have made if the bargain had been carried out. *Mancer* v. *Sanford*, 24 Occ. N. 70, 13 Man. L. R. 181.

Power of Attorney — *Authorization of Action—Delay in Production.*]—1. The attorney appointed by a non-resident plaintiff must be a resident of the Province of Quebec, and not a person only temporarily present therein. 2. It must appear that the plaintiff, or his attorney, has authorized the institution of the suit. 3. An action will not be dismissed on account of plaintiff's failure to produce a proper power of attorney, if he has shewn willingness to comply with the order of the Court, but an additional delay will be granted to him. *Glasgow and Montreal Asbestos Co.* v. *Canadian Asbestos Co.*, 5 Q. P. R. 20.

Promissory Notes—*Authority of Agent —Husband Acting for Wife.*]—Where a wife separated as to property is carrying on business as a trader, and the husband is acting as her manager under a general power of attorney, the wife is liable to bonâ fide holders, for value, of negotiable instruments signed or indorsed by the husband for the purposes of such business, and particularly where there is no pretension that the husband appropriated to his own use any part of the funds obtained on such negotiable instruments. *Quebec Bank* v. *Jacobs*, Q. R. 23 S. C. 167.

Proof of Agency—Work and labour—Action for price. *McGhie* v. *Rabbits*, 2 O. W. R. 323.

Purchase of Goods by Agent — Commission—Damages. *Henry* v. *Ward*, 1 O. W. R. 222, 652, 2 O. W. R. 422.

Purchase of Goods—*Purchase in Agent's Name—Insolvency of Agent—Claim by Curator.*] — Goods bought by an agent for his principals, for which he was to be paid a commission, are the property of the principals even when bought in the name of the agent. *In re Lemelin*, Q. R. 22 S. C. 87.

Purchase of Land by Agent—Compensation—Liability as trustee—Indemnity—Account—Mortgage—Release of surety. *Murphy*

v. *Brodie*, 1 O. W. R. 429, 681, 2 O. W. R. 106, 3 O. W. R. 508.

Purchase of Land by Agent — Proof that purchase made for principal—Parol evidence—Statute of Frauds. *Lundy* v. *Gardiner*, 2 O. W. R. 1104.

Sale and Purchase of Land—*Contract—Construction—Agency.*] — In an action by the appellant for a declaration that he was entitled as purchaser to a conveyance from the respondent of the property in suit:—Held, on consideration of all its terms and of the surrounding circumstances, that the agreement sued upon was not a vendor and purchaser agreement, but an agency agreement; that the appellant never came under any personal liability, present or future, to purchase, the arrangement contemplated being on behalf of third parties who might thereafter be accepted by the respondent. *Livingstone* v. *Ross*, [1901] A. C. 327.

Sale of Goods—*Commission—Evidence.*] —The plaintiffs claimed a commission of ten per cent. on a sale of electric lighting apparatus, made by the defendants, to an electric lighting company. The plant of the company having been destroyed by fire, the plaintiffs, who had from time to time sold electrical supplies for the defendants, and received commissions therefor, notified the defendants of the loss and asked for quotations for a new plant, and offered to look after the defendants' interests. The defendants replied offering a new plant at a price which included a commission to the plaintiffs. The defendants, in order to ensure making a sale, sent on a special agent, who was directed to call upon plaintiffs, and who was accompanied by one of the plaintiffs, and was introduced to officials of the electric lighting company. The latter declined to purchase the plant offered them through the plaintiffs, but subsequently, on the same day, purchased from the defendants, through their special agent, another plant, which was offered them by the latter at a special price:—Held, that the plaintiffs were not entitled to the commission claimed on the sale; but that the plaintiffs' claim, if any, for compensation for their services, would be on a quantum meruit. *Starr, Son & Co.* v. *Royal Electric Co.*, 33 N. S. Reps. 156; affirmed 30 S. C. R. 384, 29 Occ. N. 323.

Sale of Goods—Contract—Goods sold by another agent in plaintiff's territory. *Webster* v. *Luzfer Prism Co.*, 3 O. W. R. 197.

Sale of Goods — *Payment to Agent of Vendor—Forged Receipt—Warning.*] — The defendant had bought goods of the plaintiff through an agent of the plaintiff who came to the defendant to take an order. The goods were delivered to the defendant by the agent, accompanied by a signed invoice of the plaintiff, upon which was written, "Pay no account without my written authority." Afterwards the agent of the plaintiff came to collect the amount due for the purchase, and the defendant said that he would pay him upon an order or receipt of the plaintiff. The agent came back with an account receipted and signed with the name of the plaintiff, and the defendant paid him. The signature of the plaintiff was forged, and the agent was not authorized to receive payment of the account:—Held, that, in these circumstances, the defendant, having been warned not to pay without an order signed by the plaintiff, should have assured himself that the signature presented to him was really that of the plaintiff, and the latter was entitled to recover the amount of the account. *Girard* v. *Beauchemin*, Q. R. 18 S. C. 111.

Sale of Goods by Agent—Commissions—Territory—Contract. *Banfield* v. *Hamilton Brass Mfg. Co.*, 1 O. W. R. 293, 2 O. W. R. 837.

Sale of Goods by Agent — *Violation of Authority—Notice to Purchaser—Bona Fides—Factors Act.*] — D. was intrusted by the plaintiffs with carriages for sale, under an agreement in writing by which he was authorized to sell only to responsible persons, and by which it was provided: "Notes of the purchaser only will be taken for goods in this contract; old machines, horses, or trades of any kind are entirely at the risk of agents, and they will be held strictly responsible for all such notes." D. disposed of two of the carriages to the defendant, taking for one goods to be supplied out of the defendant's shop for the use of his (D.'s) family, and for the other cash and a waggon of the defendant's. In an action by the plaintiffs for a return of the carriages or the value, the jury found that the defendant had no notice or knowledge that D. had no authority to dispose of the carriages in the way he did; that the defendant did not know or believe that D. was merely an agent, but believed he was the owner, and had no reason to suppose he was an agent. The Court directed a new trial:—Held, inter alia, that the provisions of the Factors Act were inapplicable. *Macnab* v. *Shaffner*, 34 N. S. Reps. 402.

Sale of Land—Agreement for commission—Forfeited deposit — Right of agent to expenses — Commission on deposit. *Grace* v. *Hart*, 23 Occ. N. 239.

Sale of Land—Agreement for sale procured by agent—Terms of sale not authorized by principal. *Boyle* v. *Grassick* (N.W.T.), 2 W. L. R. 99, 284.

Sale of Land—Amount of commission—Evidence — Dealings with father and son. *Land* v. *Gesche* (N.W.T.), 2 W. L. R. 456.

Sale of Land—*Authority of Agent—Price of Sale—Specific Performance.*]—M., owner of an undivided three-quarter interest in land at Sault. Ste. Marie, telegraphed to her solicitor at that place: "Sell, if possible, writing particulars; will give you good commission." C. agreed to purchase it for $600, and the solicitor telegraphed M.: "Will you sell three-quarter interest, sixty-seven acre parcel, Korah, for six hundred, hard cash, balance year? Wire stating commission." M. replied: "Will accept offer suggested. Am writing particulars; await my letter." The same day she wrote the solicitor: "Telegram received. I will accept $600; $300 cash and $300 with interest at one year. This payment I may say must be a marked cheque at par for $300, minus your commission, $15, and balance $300 secured." The property was incumbered to the extent of over $300, and the solicitor deducted this amount from the purchase money, and sent M. the balance, which she refused to accept. He also took a conveyance to himself from the former owner, paying off the mortgage held by the latter.

In an action against M. for specific performance of the contract to sell:—Held, affirming the judgment of the Court of Appeal (6th November, 1901), that the only authority the solicitor had from M. was to sell her interest for $585 net, and the attempted sale for a less sum was of no effect. Held, further, that the conveyance to the solicitor by the former owner was for M.'s benefit alone. *Clergue* v. *Murray*, 22 Occ. N. 354, 32 S. C. R. 450.

Sale of Land—*Breach of Duty — Secret Profit.*]—D. represented to the manager of a land corporation that he could obtain a purchaser of a block of land, and was given the right to do so up to a fixed date. He negotiated with a purchaser who was anxious to buy but wanted time to arrange for funds. D. gave him time, for which the purchaser agreed to pay $500. The sale was carried out, and D. sued for his commission, not having then received the $500:—Held, reversing the judgment appealed from, 14 Man. L. R. 233, 23 Occ. N. 26, that the consent of D. to accept the $500 was a breach of his duty as agent for the corporation, which disentitled him to recover the commission. *Davidson* v. *Manitoba and North-West Land Corporation*, 24 Occ. N. 51; *Manitoba and North-West Land Corporation* v. *Davidson*, 34 S. C. R. 255.

Sale of Land—*Commission for Procuring Purchaser—Company Law—Commercial Corporation — Contract — Powers of General Manager.*] — A land broker volunteered to make a sale of real estate owned by a trading corporation, and obtained from the general manager a statement of the price and other particulars with that object in view. He brought a person to the manager who was able and willing to purchase at the price mentioned, and who, after some discussion, made a deposit on account of the price and proposed a slight variation as to the terms. They failed to close, and the manager sold to another person on the following day. The broker claimed his commission as agent for the sale of the property, having found a qualified purchaser at the price quoted:—Held, affirming the judgment in 14 Man. L. R. 650, Taschereau, C.J.C., and Girouard, J., dubitantibus, that the broker could not recover a commission, as he had failed to secure a purchaser on the terms specified. Under the circumstances, as the owner did not accept the purchaser produced and close the deal with him, there could be no inference of the request necessary in law as the basis of an obligation to pay the plaintiff a commission. Per Taschereau, C.J.C., and Girouard, J., that the general manager of a commercial corporation could not make a binding agreement for the sale of its real estate without special authorization for that purpose. *Calloway* v. *Stobart Sons & Co.*, 35 S. C. R. 301.

Sale of Land—*Commission—Secret Bargain between Purchaser and Agent of Vendor.*]—F., an agent of the defendant company, agreed with the plaintiff that he would withhold 18,000 acres of the company's lands from sale for 16 days to give the plaintiff an opportunity to complete negotiations for the sale of the land, and promised that if he sold the land he should receive a commission of 2½ per cent. The plaintiff afterwards entered into negotiations with one G., who represented a number of investors desiring to purchase a large quantity of land, but G. was not prepared to bind himself at once and wanted time to make financial arrangements and at the same time to have the opportunity kept open, and agreed to pay the plaintiff $500 if he would give him the desired time. The plaintiff then agreed to and did give the time and reported to F. that he had done so, but did not inform F. that he expected to be paid for it. The plaintiff never received the $500, nor any part of it, and G. and his associates carried out the purchase of 18,400 acres of the company's lands at the price agreed on:—Held, that, although the secret bargain was a breach of the plaintiff's duty to the defendants, and, if the money had been received, the plaintiff would have to account for it to them, yet it was not such as to disentitle the plaintiff to the stipulated commission for the service which he had fully performed. Boston Deep Sea Fishing Co. v. Ansell, 39 Ch. D. 339, and Culverwell v. Birney, 11 O. R. 265, followed. *Davidson* v. *Manitoba and North-West Land Corporation*, 22 Occ. N. 305, 23 Occ. N. 26, 14 Man. L. R. 232.

Sale of Land — Conflicting evidence — Corroboration. *Scott* v. *Benjamin* (N.W.T.), 2 W. L. R. 528.

Sale of Land — Finding purchaser—Contract—Purchaser declining to complete. *Copeland* v. *Wedlock*, 6 O. W. R. 539.

Sale of Land—*Exclusive Right of Sale—Commission—Contract.*]—In order to vest a real estate agent with the exclusive right of sale of an immovable, and entitle him to a commission, there must be a contract in writing, or, at least, an equivalent admission on the part of the owner, of the existence of a contract. The mere statement of a price which the owner is willing to take, and of a commission which he is willing to pay, does not constitute such a contract. *Mainwaring* v. *Crane*, Q. R. 22 S. C. 67.

Sale of Land—*Finding Purchaser—Subsequent Negotiations — Appeal—Reversal of Findings of Fact.*]—The defendant commissioned the plaintiff to sell his house and lot, and agreed to pay 5 per cent. commission; the plaintiff offered it to R., the tenant, who paid the rent to the plaintiff as agent for the defendant, who did not want to buy at the time; the defendant became dissatisfied at the plaintiff's not being able to sell, and told him he was going to put the property in other agents' hand for sale, but not withdrawing it from the plaintiff's, and that his price was $3,000 net, and whoever sold it was to look for remuneration to what he could get a purchaser to pay above that sum; another agent sold to R. for $3,150, the defendant realizing $3,000: — Held, that the plaintiff was not entitled to commission in respect of the sale. Observations on reversing a finding of fact on a trial in which the evidence was not taken in shorthand. *Johnson* v. *Appleton*, 11 B. C. R. 128, 1 W. L. R. 14.

Sale of Land — *Finding Purchaser—Subsequent Sale to Another—Personal Liability of Vendor—Property Standing in Name of Another — Special Circumstances.*]—The defendant, living in New York, placed a farm in the hands of the plaintiff and S., two different real estate agents in Winnipeg, for

sale. The plaintiff found a purchaser at $12 per acre in cash, and informed the defendant by letter. The defendant replied accepting the offer, but asking the plaintiff to call on S., and arrange regarding commission so as to avoid having to pay more than one commission. The plaintiff did not communicate with S., but introduced his purchaser to the defendant's solicitor in Winnipeg. This purchaser paid the solicitor $500 on account, and was ready and willing to pay the balance on receipt of a transfer. Meantime S. also made a sale of the farm at the same price. This latter sale was carried through by the defendant, who paid S. the usual commission:—Held, that the plaintiff was also entitled to his commission, as he had done all that was necessary to earn it; and that, notwithstanding that the title to the property was, to the knowledge of the plaintiff, in the defendant's father, from whom the defendant had a power of attorney to sell and convey it, the defendant's letters, statements, and conduct throughout justified the plaintiff in looking to the defendant alone for his commission. *Bell* v. *Rokeby*, 15 Man. L. R. 327, 1 W. L. R. 124, 531.

Sale of Land—*Purchaser Found—Agreement for Lower Price—Quantum Meruit.*]—The plaintiffs, whom the defendant knew to be real estate agents, called on the defendant and ascertained from him that his house was for sale at $14,000, nothing being said about a commission. Shortly afterwards, the plaintiffs introduced a purchaser for the property, who, after inspection, authorized the plaintiffs to offer $12,500. On this offer being communicated to the defendant, he told the plaintiffs that he would not accept any less than $14,000, and that he wanted that net, which the plaintiffs understood meant clear of commission. The plaintiffs tried to induce the purchaser to buy on these terms, but he afterwards dealt with the defendant directly and bought the property for $14,000:—Held, Perdue, J., dissenting, that the plaintiffs were entitled on a quantum meruit to recover the full amount of the usual commission on the $14,000. Wolf v. Tait, 4 Man. L. R. 59, Wilkinson v. Martin, 8 C. & P. 1, and Morson v. Burnside, 31 O. R. 438, followed. *Aikins* v. *Allan*, 24 Occ. N. 154, 14 Man. L. R. 549.

Sale of Land—*Purchaser Found—Alteration of Terms without Agent's Intervention—Evidence—Credibility—Appeal.*]—The defendant had a property for sale which he had placed in the hands of several estate agents. The plaintiff, who was not known to the defendant to be a real estate agent, and who had no office as such, went to the defendant, ascertained that the property was for sale, and asked the terms, which the defendant gave him. The plaintiff tried to find a purchaser; and, at a subsequent interview, he told the defendant that he had found one. In answer to the defendant, the plaintiff gave the name of the purchaser. The defendant stated the terms as before, but said he would require a larger cash payment than the plaintiff had previously understood would be accepted. The plaintiff then said that the purchaser would take the property on these terms, and brought the purchaser to the defendant. The purchaser then proposed that, instead of $10,000 cash, he should pay $5,000 cash and $5,000 in six months—the other payments to be as agreed on—to which the defendant acceded, and the sale was carried out. There was some conflict of testimony as to whether the defendant understood that plaintiff was working for a commission on the sale, but the trial Judge, in dismissing the action, said that he did so with hesitation, and that all the witnesses had impressed him with the honesty of their belief in their statements:—Held, that the Court on appeal was in as good a position to judge of the evidence and its effect as the trial Judge, and that the plaintiff was entitled to the usual commission on the sale. Wolf v. Tait, 4 Man. L. R. 59, followed. Where there are two persons of equal credibility, and one states positively that a particular conversation took place, whilst the other positively denies it, the proper conclusion is that the words were spoken and that the person who denies it has forgotten the circumstances: Lane v. Jackson, 20 Beav. 535; King v. Stewart, 32 S. C. R. 483. *Wilkes* v. *Maxwell*, 24 Occ. N. 150, 14 Man. L. R. 599.

Sale of Land—*Purchaser not Accepted—Terms of Employment of Agent.*]—The defendant having placed his property in the hands of several real estate agents for sale, the plaintiff called upon him and asked him if it was for sale and inquired as to the price and terms. The defendant then wrote out the price and terms on a slip of paper, which he gave to the plaintiff, knowing that the plaintiff's object was to try to find a purchaser, effect a sale, and earn a commission, although nothing was said about it. The plaintiff shortly afterwards found and introduced to the defendant a purchaser for the property, ready, willing, and able to take it on the terms mentioned, but, after some negotiations, the defendant refused to carry out the sale and sold to another purchaser at a higher price:—Held, affirming the judgment of Killam, C.J., (Perdue, J., dissenting), that the plaintiff had only been authorized to find a purchaser who would be accepted by the defendant, and that, in the absence of any express contract for remuneration to the plaintiff, the only promise that could be implied from what had taken place amounted to this: "My property is for sale in the hands of several agents at the price and on the terms which I give you; I do not ask you or employ you to sell it for me; but I will allow you to try to sell it, and, if you succeed in finding a purchaser whom I shall accept, I will pay you the usual commission;" and that, as the defendant did not sell to the purchaser introduced by the plaintiff, the latter was not entitled to anything for his work. Walf v. Tait, 4 Man. L. R. 59, distinguished. *Calloway* v. *Stobart*, 24 Occ. N. 148, 14 Man. L. R. 650.

Sale of Land—Quantum — Evidence — Corroboration. *Gwartney* v. *Olcson* (N.W. T.), 2 W. L. R. 80.

Sale of Land—*Refusal of Purchaser to Complete—Quantum Meruit—Agreement.*]—After the plaintiff had procured a purchaser ready and willing to carry out the purchase of the property in question, on terms satisfactory to the defendant, the proposed purchaser discovered that the north wall of the building on the property was out of plumb and slightly overhung the adjoining lot, and called on the defendant to make good the title to the building, which formed part of the property bought. Being unable or unwilling to make good the defect in title or to make satisfactory terms

with the owner of the adjoining lot, the defendant proposed to the purchaser that the agreement of sale should be cancelled, and it was cancelled accordingly: — Held, following McKenzie v. Champion, 4 Man. L. R. 158, Wolf v. Tait, 4 Man. L. R. 59, Prickett v. Badger, 1 C. B. N. S. 296, Roberts v. Barnard, 1 Cab. & E. 336, and Fuller v. Eames, 8 Times L. R. 278, that the plaintiffs had earned and were entitled to be paid a compensation for their services in finding a purchaser, not necessarily the amount agreed on as commission, but a compensation as on a quantum meruit or by way of damages, and that in the circumstances it was competent for the trial Judge to award compensation equivalent to the amount of the commission agreed on had the sale gone through:—Held, also, following McKenzie v. Champion, that the plaintiffs were entitled to be paid notwithstanding the fact that they had not procured the purchaser to execute a binding agreement of purchase. *Brydges* v. *Clement*, 24 Occ. N. 96, 14 Man. L. R. 588.

Sale of Land—Vendor's agent — Secret commission from purchaser—Recovery from agent by vendor — Agent's commission from vendor—Knowledge of vendor. *Webb* v. *McDermott*, 3 O. W. R. 365, 644, 5 O. W. R. 566.

Sale of Mine—*Remuneration of Agent—Written Agreement for Commission — Oral Promise of Expenses and Remuneration if no Sale—Findings of Jury.*] — The defendant gave instructions in writing to the plaintiff respecting the sale of a coal mine on terms mentioned, and agreed to pay a commission of 5 per cent. on the selling price, to include all expenses. The plaintiff failed to effect a sale. He brought an action to recover expenses incurred in an endeavour to make a sale, and reasonable remuneration. The jury found that the plaintiff was entitled to compensation of $9,667.62, and also answered questions as follows:—(1) Did the defendant in the middle of 1890 verbally authorize the plaintiff to do his best to sell her mine, and if so, was any compensation mentioned at the time? (a) In view of concessions made subsequently, we believe there was. (b) A promise of fair treatment in case of no sale. (2) Were the documents signed later intended to represent all the terms? Yes, had sale been effected. (3) If the documents were not so intended, what agreement was come to? Answer to question (1) expresses our view:—Held, that judgment was properly entered for the plaintiff on these findings; that the agreement as found by the jury was not illusory; that the findings supported the judgment; and that the verdict was not one which the jury could not reasonably find. *Harris* v. *Dunsmuir*, 9 B. C. R. 303.

Sale of Mine—*Written Contract—Collateral Oral Agreement—Findings of Jury—New Trial.*]—An agent employed to sell a mine for a commission failed to effect a sale, but brought action based on an oral collateral agreement by the owner to pay "expenses" or "expenses and compensation" in case of failure. The jury found, in answer to a question by the Judge, that "we believe there was a promise of fair treatment in case of no sale:"—Held, reversing the judgment in 9 B. C. R. 303, Taschereau, C.J.C., and Killam, J., dissenting, that this finding did not establish the collateral agreement, but was, if anything, opposed to it, and, the real issue not having been passed upon, there must be a new trial. *Dunsmuir* v. *Lowenberg, Harris & Co.*, 24 Occ. N. 117, 34 S. C. R. 228.

Sale of Mineral Claim—*Commission—Introduction of Purchaser.*]—Where a broker, on the instruction of the vendor of mineral claims, introduces a purchaser, he is entitled to his commission even though the sale be effected wholly through another agent. *Osler* v. *Moore*, 8 B. C. R. 115.

Sale of Shares—Money lent—Indemnity against liability—Account—Evidence—Costs. *McConnell* v. *Erdman*, 6 O. W. R. 451.

Sale of Timber Limits—Introduction of purchaser—Failure of negotiations — Subsequent sale at reduced price. *Pardee* v. *Ferguson*, 5 O. W. R. 698, 6 O. W. R. 810.

Undisclosed Principal — *Action by Agent — Addition of Principal as Party — Building Contract — Guarantee—Breach—Representation as to Ownership—Damages.*]—A husband who was superintending for his wife the erection of a building on her property, after correspondence with contractors in which the building was referred to by them as "your building" and by him as "my building," took a guarantee from them that "your roof will remain water-proof." In the correspondence and contract the expression "your town" was also used. The wife was not mentioned. The roof proved defective. In an action by the husband and wife for damages:—Held, that the expressions employed did not necessarily imply that the husband was the owner of the roof or the building, but were used as conveniently descriptive of the matter under discussion, and that it was competent for the wife to shew that he was her agent, and to recover damages for its breach:—Held, also, that the husband, not being either a party or privy to the contract, could not recover for its breach. Lucas v. De la Cour, 1 M. & S. 249, and Humble v. Hunter, 12 Q. B. 310, distinguished. *Abbott* v. *Atlantic Refining Co.*, 22 Occ. N. 411, 4 O. L. R. 701, 1 O. W. R. 701.

Undisclosed Principal — *Action against Agent—Election — Purchase of Judgment — Equities—Notice.*]—The plaintiff sold a judgment for more than $9,000 against K. to G., who was acting as agent for Mrs. K., to whom he at once assigned the judgment, and received $1,000 from her therefor; G., by his instructions from Mrs. K., was limited to $1,000 as the purchase price of the judgment, but, as he was interested in the architect's commission which he expected to receive out of the erection of a building proposed to be erected on the land against which the judgment was registered, he agreed to pay the plaintiff $1,000 in cash and $500 when the roof of the building was completed or at the latest on the 1st January, 1903, and he also agreed to enforce the judgment against K., and pay the plaintiff half the proceeds he received; his agreement with the plaintiff was contained in two writings, one being an assignment from the plaintiff to G. of all the plaintiff's rights under the judgment for $1,000, and the other containing the additional terms, of which Mrs. K. was not aware when she bought from G.; G. failed to pay the plaintiff the additional

$500, and the plaintiff sued for it in a County Court; and, although the fact came out in evidence during the trial that G. in buying the judgment had been acting as Mrs. K.'s agent, the plaintiff took judgment against G. Subsequently the plaintiff sued G. and Mrs. K. to have the assignment set aside or to have Mrs. K. declared a trustee for the plaintiff:—Held, that the plaintiff by taking judgment against G., founded upon his promise contained in one of the documents which made up the transaction, elected to treat him as the sole principal, and that Mrs. K. bought the judgment without any knowledge of the agreement between the plaintiff and G., and so was not bound by its terms. *Semisch* v. *Guenther*, 10 B. C. R. 371.

PRINCIPAL AND SURETY.

Agent for Sale of Goods—*Surety for—Conditions of Bond—Giving Time—Discharge of Surety—Default—Notice.*]—The plaintiffs entered into an agreement in writing with O. for the sale of carriages, by the terms of which O. was required to obtain from the purchaser of each vehicle, on delivery, his note or cash in settlement, and, in all cases where notes were taken, to guarantee the payment of and indorse the notes. The defendant became surety on a bond given by O. to the plaintiffs that O. would perform the conditions of the agreement, and would pay and satisfy all notes and other securities which remained outstanding on its termination. Some of the notes taken by O. having become overdue during the course of the business, the plaintiffs drew on O. for the amounts; O. accepted but failed to pay:—Held, that, as the defendant was not to be liable until after the termination of the agreement, and as the time given had elapsed before his liability accrued, the giving of the time did not prevent the plaintiffs from looking to him as surety. If, in any case, time was given, so as clearly to discharge the surety, the amount as to which he was so discharged was severable from the rest of the transaction, and the discharge would only operate pro tanto. As, by the terms of the bond, the taking and renewal of notes was contemplated, the surety was not prejudiced by the drawing of drafts as a means of collecting the notes. As to the taking by O. of notes of a different form from that stipulated, it must be shewn that the plaintiffs, by their conduct, prevented the thing from being done, or connived at its omission, or enabled O. to do what he ought not to do, and but for such conduct on the part of the plaintiff, the omission or commission would not have happened; and the mere reception by the plaintiffs of notes taken by O. in another form than that required was not within this principle. A letter from the plaintiffs' manager to the defendant notifying him that notes indorsed by O. were not being paid when due, and that the amount due the company by O. was large and growing, was sufficient to have put the defendant upon his guard. *McLaughlin Carriage Co.* v. *Oland*, 34 N. S. Reps. 195.

Collateral Security—*Neglect of Creditor by which Security is Lost — Release of Surety.*]—Where a creditor accepted a transfer of seigniorial rents from the surety, the rents being transferred to secure the payment of a loan made to the principal debtor, interest, and premiums on a life policy, which had been assigned by the principal debtor to the creditor as security for the debt, and, through the neglect of the creditor to make payment of a premium due, the policy lapsed, the surety is entitled to be released from his obligation of suretyship for so much of the debt as the lapsed policy would have sufficed to extinguish. The principle above stated is not affected by the fact that the surety's agent, with the consent of the creditor, continued to collect the rents, or by the further fact that signification of the transfer of the rents, with the consent of both creditor and surety, was not made upon the tenants. *Wartele* v. *Trust and Loan Co. of Canada*, Q. R. 13 K. B. 329.

Discharge of Surety—*Extending Time for Payment—Promissory Notes—Renewal—Accommodation Indorser—Collateral Security—Notice.*]—T. B. L. and A. C. S. being indebted on several promissory notes to the plaintiffs, who demanded security, the defendant H. A. S., the wife of A. C. S., at his request and without knowing of the purpose for which he proposed to use it, indorsed a blank form of note, which was afterwards filled out as a note made by T. B. L. payable to H. A. S., and indorsed by her and A. C. S., and was then given to the plaintiffs. This note was afterwards renewed, H. A. S. again indorsing a blank form, A. C. S. being made payee and indorsing ahead of H. A. S.. While the plaintiffs held this latter note, they kept the several notes as security for which they held it renewed, the renewals extending beyond the date of the maturity of the note held as security. In an action on the latter note, H. A. S. pleaded that she was discharged, by reason of the plaintiffs having given time by a binding agreement to T. B. L. and A. C. S., the principal debtors, without her consent:—Held, McGuire, J., dissenting, that the renewal of the notes constituted such an agreement and that the rule invoked—that giving time to a principal debtor by a binding agreement without the surety's consent, discharges the surety—was applicable; and that H. A. S. was entitled to a dismissal of the action. Semble, that the fact that T. B. L. falsely stated to the plaintiffs, when they demanded security, that H. A. S. was indebted to him, and asked them if they would accept her indorsement, to which they consented, could not bind H. A. S., as T. B. L. had no authority from her to make the statement. 2. That if notice to the plaintiffs that H. A. S. was merely an accommodation indorser were necessary, the mere fact that she was second indorser on the first note and first indorser on the second note would be sufficient evidence of such notice. 3. The case was distinguishable from that of a person who, being asked for collateral security, brings paper founded on an actual indebtedness to himself. In that case, giving him time would in no case relieve the parties to the paper given as security. *Le Jeune* v. *Sparrow*, 1 Terr. L. R. 284.

Discharge of Surety — *Extension of Time—Promissory Note—Forged Renewal.*]—The appellant was a maker of a promissory note along with one of the other defendants, his son, for whose accommodation the note was made. When the note matured it was retired by means of a new note signed by the son, and purporting to be signed by the father.

The father's signature was in reality a forgery. The original note was given up by the plaintiff to the son, and was not produced at the trial. Secondary evidence of it was given, and judgment for the plaintiff upon it:—Held, that, assuming that the creditor knew at the time of the making of the original note that the appellant signed it as surety only, the surety was not discharged by the extending of time to the principal debtor. Irwin v. Freeman, 13 Gr. 465, followed. *McIntyre* v. *McGregor*, 21 Occ. N. 25.

Discharge of Surety—*Giving Time — Prejudice.*]—A surety, relying on the giving of time by the creditor to the principal debtor as a defence on an action for the debt, must now, under s.s. 14 of s. 39 of the King's Bench Act, 58 & 59 V. c. 6, shew that he has suffered pecuniary loss or damage as the reasonably direct and natural result of the creditor having given the extension of time. The defendant, claiming that he was entitled to be treated as a surety, proved that, relying on the representations of his co-debtor that the debt had been paid and satisfied, he had made a settlement of their partnership affairs and paid a large sum of money to him and given him a formal release, besides handing over to him a large quantity of goods:—Held, that this was not evidence to shew that the defendant had been prejudiced by the plaintiffs having given time to the co-debtor, as what the defendant had done was done on the strength of the statements made to him by his co-debtor, and not in reliance on anything the plaintiffs had done or omitted to do. *Blackwood* v. *Percival*, 22 Occ. N. 268, 331, 14 Man. L. R. 216.

Discharge of Surety—Guarantee policy—Fidelity of servant—Statements of Master upon application—Incorporation in policy—Alteration in duties of servant—Material misstatements—Ontario Insurance Act. *Hay* v. *Employers' Liability Assurance Corporation*, 6 O. W. R. 459.

Discharge of Surety—*Wrongful Acts of Principal—Failure to give Notice of—Findings of Jury—Setting Aside.*]—The defendants F. W. B. and J. A. K. were sureties on a bond given to the plaintiff association by the defendant B. for the faithful discharge of his duties as an agent of the association. Among such duties were the remittance, at least once in each month, of all moneys or securities collected for or on account of the association, such remittances to be made by bank draft, marked cheque, post office order, or by express. The evidence shewed that B. remitted moneys by his own personal cheques, instead of as directed, and on a number of occasions asked to have such cheques held over for a few days in order to enable him to provide funds to meet them:—Held, that these, and other acts of disobedience, under the terms of the agreement, would have justified the dismissal of B.; that it was the duty of the association to have notified the sureties of his derelictions of duty; and that, having failed to do so, and having continued him in their employ with knowledge that he was violating his instructions, they could not recover against the sureties for the default of B.:—Held, that findings of the jury, negativing knowledge on the part of the association of the irregularities of B., being against the weight of evidence, must be set aside with costs, and a new trial ordered. *Confederation Life Association* v. *Brown*, 35 N. S. Reps. 94.

Fidelity Guarantee—*Alteration of Duties of Principal — Imposition of Greater Responsibilities—Release of Surety.*]—A contract of suretyship is to be interpreted strictly, and its effect should be circumscribed by and limited to the particular obligations assumed by the surety; therefore the suretyship of one who gives a guarantee against the acts of another is at an end, if the duties of the latter, while apparently, on the whole, remaining the same, are changed to place on him more onerous responsibilities. In this case, the defendant D., having become surety only for the acts of the defendant T. as a simple collector of the plaintiff, his suretyship terminated when the defendant T. ceased to act as collector, to take the more important and onerous office of secretary-treasurer of a new local branch established in the territory where he had acted as collector. *Société des Artisans Canadiens-Français* v. *Trudel*, Q. R. 26 S. C. 118.

Guaranty — *Construction — Continuing Security.*]—A firm, being indebted to the plaintiffs for goods supplied, on ordering further goods received from the plaintiffs a telegram — "Let M. L. (defendant) "wire guaranty for payment of all accounts to us, and everything will be satisfactory." The defendant, without apparently having seen the telegram, but having been informed of its contents, telegraphed in reply, "Will guarantee payment of all accounts" for the firm:—Held, that the guaranty was a continuing one, and the defendant was liable for accounts incurred or to be incurred. *St. Lawrence Steel and Wire Co.* v. *Leys*, 6 O. L. R. 235. Affirmed 24, Occ. N. 126, 7 O. L. R. 72, 3 O. W. R. 80.

Guaranty—Continuing security — Extent of obligation—Fraud of agent of creditors—Foreign Companies Ordinance—Registration—Penalty—Demand. *Sawyer-Massey Co.* v. *Foster* (N.W.T.), 2 W. L. R. 197.

Guaranty—*Honesty of Agent—Notice of Default—Proofs of Loss—Proposal — Conditions—Expenses of Prosecution.*]—An action upon a guaranty policy to reimburse the plaintiff for pecuniary loss by the fraud or dishonesty of an agent of the plaintiffs which should amount to embezzlement or larceny. One condition was that on the discovery of fraud or dishonesty the employers should immediately notify the defendants:—Held, on the evidence, that the defendants got immediate notice of the fact of loss, and waived exact compliance with the condition as to notice. 2. That, within a reasonable time after discovery of default, the plaintiffs furnished their claim, with such particulars as proved the cause, nature, and extent of the loss. 3. Whether the incorporation of the proposal in the policy (as was provided for) should be construed as constituting a warranty by the plaintiffs that they would adhere to the course indicated by the answers to questions submitted to the plaintiffs, the surety should be considered as discharged by a departure from that course materially contributing to the loss insured against. The plaintiffs did not furnish reasonable verification of the statements made in the written

proposal or the compliance therewith. Therefore, the plaintiffs were not entitled to recover for pecuniary loss; but, having prosecuted their agent, as required by a condition of the policy, they were entitled to be paid the expenses so incurred. *Globe Savings and Loan Co.* v. *Employers' Liability Assurance Corporation*, 21 Occ. N. 512, 13 Man. L. R. 531.

Guaranty — Release of surety—Promissory note collateral to guaranty—Extension of time by days of grace. *McDonald* v. *Buckoltz* (Y.T.), 2 W. L. R. 10.

Guarantee Policy—*Fidelity of Manager of Loan Company — Misappropriation of Moneys—Release of Surety—Untrue Statements—Conditions of Policy—Necessity for Setting forth in Policy — Incorporation by Reference to Application—Insurance Act of Ontario, sec. 144 (1), (2)—Construction—Change in Duties of Manager.*]—Appeal by plaintiffs from judgment of MacMahon, J., 24 Occ. N. 354, 8 O. L. R. 117, 4 O. W. R. 99, dismissing action upon a guarantee policy issued by defendants in favour of plaintiff loan company to secure the fidelity of one Rowley, manager of that company. The guaranteé agreement in this case was issued upon and after the proposal or application of the employee, fortified and accompanied by the answers of the company (the employers) touching the duties of the applicant, which answers it was agreed were to be taken as the basis of the contract between the employers (the plaintiffs) and the defendants, the guarantee company. Upon these papers, statements, and representations, the contract was issued and accepted by plaintiffs. On the face of the sealed contract of insurance or guarantee it was recited: "Whereas the employer has delivered to the company certain statements and a declaration setting forth, among other things, the duties and remuneration of the employee, the moneys to be intrusted to him, and the checks to be kept upon his accounts, and has consented that such declaration, and each and every the statements therein referred to or contained shall form the basis of the contract hereinafter expressed to be made, but this stipulation is hereby limited to such of said statements as are material to this contract." This last clause was apparently the outcome of what was deemed a proper form of expression to comply with sub-sec. (2) of sec. 144: see Village of London West v. London Guarantee and Accident Co., 26 O. R. 520, in which the defendants were the company now defendants. If sub-sec. (2) of sec. 144 were alone considered, it appears to contain in gremio sufficient to indicate that the terms which go to avoid the contract need not be contained in or indorsed upon the contract "in full." It was enough if the contract "be made subject" to any stipulation as to avoiding the contract by reason of any statement inducing the entering into of the contract by the corporation. In this case the contract was made subject to the preliminary statements and declaration. Besides this, there was an express notice given on the face of the agreement (p. 2) that if any suppression or misstatement of any fact affecting the risk of the company be made at the time of the payment of the first or any subsequent premium . . . this agreement shall be void and of no effect from the beginning. The original untrue statements were made contemporaneously with the first payment of premium, and they were unquestionably material and affected the risk. *Elgin Loan and Savings Co.* v. *London Guarantee and Accident Co.*, 5 O. W. R. 349, 9 O. L. R. 569.

Judgment against Principal — *Res Judicata against Surety — Evidence—Appropriation of Payments — Scope of Liability of Surety.*]—A judgment against the principal debtor is res judicata against his surety, provided that the judgment defines and determines the responsibility of the principal debtor in the matter covered by the security. 2. In this case the judgment against the principal debtor, being based upon the fact that he had neglected to collect certain premiums, and not determining his responsibility as regards money received and not remitted to the plaintiffs, did not decide the question arising in the present action, and therefore did not sustain the allegation of res judicata as regards the surety. 3. Evidence cannot, in order to establish res judicata, be admitted to determine the nature of debts covered by the amount of a judgment, when the judgment does not determine such debts and does not particularly specify them: art. 1234, C. C. 4. The surety is not concerned in the appropriation of moneys remitted by the principal debtor to the creditor; the remitting of the money frees the surety from all responsibility. 5. In this case the surety, warranting only the fidelity of the principal debtor in the performance of his duties, will not be responsible for what the creditor has, in his own interest, tolerated and even approved in the conduct of his agent. Judgment in Q. R. 24 S. C. 88 reversed. *Morgan* v. *Western Assurance Co.*, Q. R. 13 K. B. 49.

Judicial Surety — *Appeal — Extent of Liability.*]—A judicial security guaranteeing that a party will effectively prosecute an appeal which he has taken to the Court of King's Bench from a judgment of the Superior Court, and will pay the award and all cost and damages which shall be awarded in case the judgment of the Superior Court shall be affirmed, is at an end the moment the judgment of the Superior Court has been reversed by the Court of King's Bench; and the fact that, upon an appeal of the opposite party, the Supreme Court of Canada has subsequently set aside the judgment of the Queen's Bench and restored that of the Superior Court, does not revive the obligation of the surety. *Guertin* v. *Molleur*, 21 Occ. N. 445, Q. R. 19 S. C. 571.

Mandate — *Negligence — Laches — Release of Surety — Pledge — Construction of Contract — Principal and Agent.*]—Upon the execution of a deed of obligation and hypothec, the plaintiffs became sureties for the debtor, and, for further security, the debtor assigned and delivered to the mortgagee, by way of pledge, a policy of assurance upon his life for the amount of the loan; one of the clauses of the deed provided "for further securing the repayment of the said loan, interest, accessories, and premiums of insurance on the said life policy," that the debtor and sureties, "by way of pledge à titre d'antichrèse transferred and made over unto the said lender" certain constituted rents and seigniorial dues. The deed further provided that the agent of the seigniory should remain agent until the loan should be repaid with interest and such insurance premiums as

might be disbursed by the creditor, and that the creditor should have the right to dismiss said agent should he fail to make out of the revenues of the seigniory and remit to the creditor the amount necessary for the payment of such interest and the sums disbursed for the insurance premiums. It further provided that the lender should not be responsible to the debtor and sureties for the agent's acts, the debtor and sureties assuming responsibility therefor. The judgment appealed from found, as facts, that the sureties had made a provision in the hands of the creditor for the purpose of payment of the premium out of the revenues assigned, that, for such purposes, the creditor had become the mandatary of the sureties and responsible for the due fulfilment of such mandate, and that there were sufficient funds derived from such revenues to pay a renewal premium which fell due shortly before the death of the debtor, but said premium had been omitted to be paid through some neglect or fault of the creditor in obtaining the funds therefor from the agent. In consequence of the failure of the payment of the premium the benefit of the policy was lost:—Held, affirming the judgment appealed from, Idington, J., dissenting, that the deed contemplated the payment of the premiums by the creditor out of the funds assigned, that the creditor had failed to use proper diligence in respect to the payment of the premium, and that the sureties were, therefore, entitled to be discharged pro tanto, and the property pledged released accordingly. *Wurtele* v. *Trust and Loan Co.*, 25 Occ. N. 99; *Trust and Loan Co.* v. *Wurtele*, 35 S. C. R. 663.

Release of Surety — *Assignment of Mortgage — Covenant — Discharge of Part of Land.*]—The defendant, when assigning a mortgage on lands to the plaintiffs, covenanted that the mortgagor would pay. The plaintiffs afterwards, without his consent, discharged half the lands from the mortgage on payment of half the mortgage debt:—Held, that this was such an alteration of the contract guaranteed as to release the defendant from his liability, whether the amount paid was the full value of the part released or not. *Farmers' Loan and Savings Co.* v. *Patchett*, 23 Occ. N. 285, 6 O. L. R. 255, 2 O. W. R. 702.

Release of Surety — *Rent — Rescission of Lease—Damages.*]—A third person who was given security for the payment of rent by a tenant is discharged when the lease is rescinded at the request of the landlord upon a ground other than non-payment of rent, and, the effect of the rescission operating on the day of the institution of the action for rescission, the landlord cannot claim from the surety gales of rent falling due after that date, even when these gales are included in the damages which the tenant has been ordered to pay by reason of the rescission. *Burland* v. *Valiquette*, Q. R. 24 S. C. 94.

Surety not a Third Person as against Creditor — *Defences Open — Insolvent Act, 1875—Uncontested Claim—Judgment.*]—A surety is not a third person as against the creditor secured, and cannot set up defences which the principal debtor would not be allowed to set up. Under the Insolvent Act of 1875, a claim filed in pursuance of s. 104 and not contested, is thereby proved against all concerned in the bankruptcy, and has the effect of a judgment in favour of the claimant. Such a claim has the effect of a judgment against the surety of the assignee in insolvency, without any further proof, and, besides, is only subject to be prescribed at the expiration of 30 years. The surety of a defaulting assignee sued under s. 68 by a creditor, who has filed a claim against the bankrupt, and who, by the provisions of this section, is entitled to the fruits of such litigation, will not be allowed to set up a plea that the sum secured by him (in this case $5,000) would, if he paid it, be exhausted by the privileged creditors of the bankrupt. *Kent* v. *Letourneux*, Q. R. 14 K. B. 60.

PRIORITIES.

See COMPANY — EXECUTION — FIXTURES — FRAUDULENT CONVEYANCE — INDIAN LANDS—REGISTRY LAWS.

PRIVATE PROSECUTOR.

See CRIMINAL LAW.

PRIVILEGE.

See ARREST—CONSTITUTIONAL LAW — CRIMINAL LAW—DEFAMATION — DISCOVERY — LIEN — MECHANICS' LIENS — MINES AND MINERALS—SOLICITOR—WILL.

PRIVY COUNCIL.

See APPEAL.

PRIZE-FIGHTING.

See CRIMINAL LAW.

PROBATE.

See EVIDENCE.

PROBATE COURT.

See COURTS.

PROBATE DUTY.

See WILL.

PROBATE FEES.

See WILL.

PROCEDURE.

See CRIMINAL LAW.

PROCURATION.

Death of One of Two Attorneys Named in Power—*Security for Costs — Costs of Motion.*]—Where a power of attorney to prosecute an action has been given to a firm of attorneys generally, and one of them dies before the institution thereof, the surviving member of the firm may take such action in his own name as attorney for the plaintiff. 2. Security for costs, as well as a power of attorney, having been asked by the same motion, and such security having been ordered, the costs will follow the fate of the case. *Kitts* v. *Gosselin*, Q. R. 25 S. C. 22, 6 Q. P. R. 154.

Foreign Company — *Authority of Officers Signing—Authentication.*]—A procuration furnished by a foreign company ought to be the true deed of the company, authorized by its board of directors, and ought to shew prima facie that the officer who signs it is authorized to do so; and all signatures thereto ought to be authenticated by an officer competent under art. 1220, C. C. *Trusts and Guarantee Co.* v. *Bélanger*, 7 Q. P. R. 301.

Foreign Plaintiff — *Advocate — Other Person.*] — The procuration which a foreign plaintiff must give, need not necessarily be given to an advocate, and it is sufficient if it is given to some person resident at the place where the action is brought. *Spencer* v. *Strathcona Rubber Co.*, 5 Q. P. R. 385.

Time for Demanding — *Security for Costs.*]—If the defendant does not demand from the plaintiff, a foreigner, a procuration at the same time as security for costs, he cannot do so after security has been given. *National Life Assce. Co. of Canada* v. *Malone*, 7 Q. P. R. 283.

PRODUCTION OF DOCUMENTS.

See DISCOVERY.

PROHIBITION.

Circuit Court, Quebec—*Judge.* — The Circuit Court, even when presided over by a Judge of the Superior Court, is subject to prohibition. *Robillard* v. *Blanchet*, Q. R. 19 S. C. 383.

Circuit Court, Quebec — *Powers of Superior Court—Action against Liquidator—Winding-up Act—Motion after Judgment.*]—The Circuit Court has no jurisdiction to entertain an action against the liquidator of a company in liquidation under the Dominion Winding-up Act. 2. The Superior Court, by virtue of the control which art. 50, C. P., gives it over all Courts (except the King's Bench) has jurisdiction to grant a writ of prohibition to a Circuit Court which exceeds its jurisdiction. 3. Prohibition may be directed to an inferior tribunal even after judgment has been rendered by such tribunal. *Robillard* v. *Blanchet*, 3 Q. P. R. 332.

Commissioner under Collection Act—*Examination of Debtor — Disqualification by Reason of Interest—Solicitor—Commissioner not a "Court."*]—The plaintiff, who had recovered a judgment against the defendant in the Supreme Court, initiated proceedings under the Collection Act, R. S. N. S. c. 182, for the examination of the defendant before D., a commissioner. The defendant's solicitor appeared before D., and objected to his proceeding with the examination, on the ground that, as solicitor for another creditor of the defendant, he had such an interest in the result of the examination as to disqualify him from acting. Consequently a writ of prohibition was issued from the Supreme Court to restrain D. from acting, or proceeding with the examination. On appeal from the order allowing the writ:—Held, that D. was disqualified:—Held, nevertheless, that, as a commissioner acting under the provisions of the Collection Act is not a distinct court, the writ was improperly allowed, and, that, for this reason, the appeal must prevail, but without costs. *McKay* v. *Campbell*, 36 N. S. Reps. 522.

Court of Commissioners — *Territorial Jurisdiction—Declinatory Exception — Judgment—Desistment.*]—Article 170 C. P., is not limitative, and applies to all cases analogous to those expressly mentioned in the Article. 2. In this case a writ of prohibition having been issued to quash a judgment of the Court of Commissioners of a district other than that in which the writ of prohibition was issued, a declinatory exception filed against the writ of prohibition, accompanied by a desistment from the judgment sought to be quashed, was maintained, and the action dismissed. Judgment in Q. R. 21 S. C. 437 reversed. *Gaudet* v. *Garneau*, Q. R. 12 K. B. 145.

Court of Revision — *Prohibition after Sentence—Jurisdiction.*]—A municipal court of revision, after the assessment roll has been completed by the assessor, and checked over by the assessment committee, passed, in consequence of a successful appeal to the court by the promovents, a general resolution reducing the entire assessment by 20 per cent.:—Held, with hesitation, that prohibition lay. The Court should not be chary at the present day in exercising the power of prohibition. The proceedings before the court of revision were not terminated, inasmuch as its decision necessitated the amending of the roll, and this duty imposed upon the clerk would be the act of the court by the instrumentality of its clerk. In any case prohibition will lie after sentence, when it appears on the face of the proceedings that the matters are not within the jurisdiction of the tribunal. *Hickson* v. *Wilson*, 2 Terr. L. R. 426.

Division Court—*Action on Foreign Judgment—Promissory Note—Recovery on—Cause of Action—Increased Jurisdiction—Ascertainment of Amount.*]—A party plaintiff suing in this province on a foreign judgment may sue on the foreign judgment or on the original cause of action, or may combine them both in the same action, and such a judgment

may be enforced in this jurisdiction as importing a legal obligation to pay the sum recovered by means of an action of debt as on a simple contract. A judgment debt represents a simple contract debt only, and one not ascertained by the signature of the defendant, even when recovered on a promissory note signed by the defendant; and prohibition was granted to restrain proceeding with a plaint in a Division Court on a Manitoba judgment for $232.37 recovered on such a note, where the plaintiff abandoned $32.37 and sought to recover judgment for $200. *In re McMillan* v. *Fortier*, 21 Occ. N. 501, 2 O. L. R. 231.

Division Court—*Order for Committal—Previous Order for Payment—Affidavit.*] — The plaintiff recovered judgment against the defendant in a Division Court action for a debt contracted before 61 V. c. 15 (O.), and the defendant was at the hearing ordered to pay the amount of the judgment forthwith:—Held, that the Court had jurisdiction under s.s. 5 of s. 247 of the Division Courts Act, R. S. O. 1897 c. 60, upon examination of the defendant on an after-judgment summons, to make an order for her committal without a previous order for payment based upon such an examination and default thereunder. Where it appears that the judgment debtor has been examined before the Judge, his order for committal must, on a motion for prohibition, be treated as a complete adjudication, as to that which must be made to appear to warrant the making of an order under s.-s. 5 of s. 247. Semble, that if the affidavit of the plaintiff required by s. 243 to be filed before the issue of the summons were not filed, it would not be open to the defendant, after appearing in obedience to the summons, to raise an objection to the jurisdiction on that ground; and, the defect not appearing on the face of the proceedings, prohibition would not be granted. *In re Hawkins* v. *Batzold*, 21 Occ. N. 597, 22 Occ. N. 14, 2 O. L. R. 704.

Division Court—*Transfer of Action.*]—Where an order was made by a Division Court Judge for the transfer of an action to a Division Court in another county, the order being made under the powers conferred by s. 90 of the Division Courts Act, R. S. O. 1897 c. 60, whereas, under the circumstances, it should have been made under s. 91, an order was made prohibiting the Division Court to which the transfer had been made from acting under the order of transfer; but such order of prohibition was to be without prejudice to the right to apply for an order under s. 91. *In re Frost* v. *McMillen*, 21 Occ. N. 532, 2 O. L. R. 303.

Enforcement of Judgment — *Declinatory Exception—Deposit of Desistment.* — When a defendant pleads by way of declinatory exception and simply demands the dismissal of the action, he must deposit with his exception the amount claimed if it is a sum of money, or a desistment regularly signed and authenticated if the suit, as in this case, is for a writ of prohibition against a judgment. *Garneau* v. *Gaudet*, Q. R. 21 S. C. 437.

Justice of the Peace—*Qualification — De Facto Justice—Grounds for Application —Taking before Justice.*]—The grounds alleged upon application for a writ of prohibition based upon excess of jurisdiction in the inferior Court, must have been raised before that Court. 2. A justice of the peace who exercises his functions in good faith is competent to act de facto, although he has not complied with all the formalities relating to his qualification. *Hogle* v. *Rockwell*, Q. R. 20 S. C. 309.

License Commissioners — *Deposit — Absence of—Preliminary Exception — Jurisdiction of Commissioners—Grant of License —Discretion—Matters within Jurisdiction.*]—The absence of the deposit required by law, before application for a writ of certiorari or prohibition, should be pleaded by preliminary exception. 2. License commissioners, although not among the inferior courts mentioned in arts. 59, 63, 64, and 65, C. P., have duties of a judicial character which, on proper occasion, subject them to the superintending authority of the Superior Court, and the proper remedy is a writ of prohibition. 3. The only proof required, or admissible, on a writ of prohibition against the license commissioners is such as would go to establish want or excess of jurisdiction. 4. When art. 836, R. S. Q., may be invoked, the license commissioners can no longer grant a license as a matter of discretion, but their judgment is none the less final as to whether majority oppositions, or two previous oppositions, really exist. 5. The refusal of the commissioners to re-open the enquête after both parties had formally declared their respective enquêtes closed, is not sufficient to support a writ of prohibition. 6. The refusal of the commissioners to count on the opposition signatures of duly qualified electors, for the reason that the same persons had also signed in support of the application, was a decision on an issue within their jurisdiction, and was, moreover, a proper decision. Judgment in Q. R. 19 S. C. 270 affirmed. *Kearney* v. *Desnoyers*, Q. R. 10 K. B. 436.

Statutory Board — *Jurisdiction—Summary Application—Declaration in Prohibition —Parliamentary Elections—Voters' Lists.*]—A person claiming to be entitled to be registered as an elector in a certain division, and to have had his name on the last revised list of electors for the division, applied for a prohibition to restrain the Board of Manhood Suffrage Registrars, as constituted under the Manhood Suffrage Registration Act, 63 & 64 V. c. 25 (M.), from proceeding to prepare the lists of voters for that constituency under the provisions of the Act, which they were about to do for the purpose of a bye-election then pending. On the motion coming on for hearing, it was contended that the board had no power to go on with their proceedings because, under s. 70 of the Manitoba Voters' List Act, 63 & 64 V. c. 62, the former revised lists were to be used until new lists had been prepared and revised throughout the province, and further, that, even if that was done, the board were not to prepare the whole list, but only lists supplemental to the lists prepared under the Voters' Lists Act. It was contended on behalf of the board that there was no power in the Court to interfere with a board of that kind by prohibition:—Held, (1) that a Judge should not undertake to decide difficult questions of that kind on a summary application such as was made, but that the parties should be left to declare in prohibition, which might still be done under

the Queen's Bench Act. (2) Although the board was about to prepare and revise lists of electors under the Act, it could not be assumed that they would decide or attempt to decide what lists the returning officer should use at the coming election, or would determine or attempt to determine whether the vote of the applicant should be received or not in the event of his name not being put on the list they were about to prepare; and therefore the applicant could not say that the board intended to take away any of his rights; and there was no necessity for an immediate prohibition. *In re South Winnipeg Board of Manhood Suffrage Registrars*, 21 Occ. N. 167, 13 Man. L. R. 345.

See COURTS—LANDLORD AND TENANT.

PROMISSORY NOTE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROMOTERS.

See COMPANY.

PROPERTY PASSING.

See SALE OF GOODS.

PROSECUTION.

See MANDAMUS.

PROTESTANT SCHOOL.

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PROTHONOTARY.

See BANKRUPTCY AND INSOLVENCY—COURTS —DISCONTINUANCE OF ACTION—DESISTMENT—DISTRIBUTION OF ESTATES — INTERVENTION.

PROVIDENT SOCIETY.

See MASTER AND SERVANT.

PROVINCES.

See CONSTITUTIONAL LAW—INTEREST.

PROVINCIAL LEGISLATURE.

See CONSTITUTIONAL LAW.

PROVINCIAL TREASURER.

See COMPANY—INSURANCE.

PUBLIC DOMAIN.

See CROWN.

PUBLIC HEALTH ACT.

Compulsory Vaccination — *Statutory Regulations—Exception—Conviction.*] — The health district of the city and county of St. John is not within regulation 2 of the regulations made under s. 38 of the Public Health Act, 1898, which provides for compulsory vaccination when "it shall be found by the local board of health of any health district that a case of smallpox exists in case such district be a city or town," and a conviction for refusing to attend at the office of the local board of health of the district of the city and county of St. John and to be vaccinated, contrary to the statute and regulations, is bad. *Rex* v. *Ritchie, Ex p. Jack*, 35 N. B. Reps. 581.

Contagious Disease—*Detention of Person Exposed to Infection.*]—Section 75 of the Health Act provides, that when smallpox, scarlet fever, diphtheria, cholera, or any other contagious or infectious disease dangerous to the public health, is found to exist in a municipality, the health officers shall use all possible care to prevent the spreading of the infection or contagion:—Held, that health officers were justified under this section in detaining a person who had been exposed to infection from a person suspected of having smallpox, but who in reality had measles. *Mills* v. *City of Vancouver*, 10 B. C. R. 99.

Contagious Disease — Prevention of spread—Local board of health—Converting hotel into hospital — Illegality — Malice — Reasonable and probable cause—Members of board — Corporation—Violation of statute — Conversion of goods—Confinement of person in hospital. *Ward* v. *Lowthian*, *Green* v. *Marr*, 3 O. W. R. 362, 4 O. W. R. 502.

Contagious Disease—Services of physician — Remuneration — Action to recover — Board of health — Medical health officer — Liability — Mandamus — Costs. *Bibby* v. *Davis*, 1 O. W. R. 189.

Contagious Diseases Hospital—*Acquisition of Site—Municipal Corporation—By-law—Resolution — Delegation of Powers — Local Board of Health—Public Health Act —Prohibition as to Locality of Hospital— Public Benefit—"Inhabited Dwelling"—Consent of Owner—Injunction—Status of Plaintiff—Special Damage.*]—The council of a city corporation passed a by-law, pursuant to 62 V. c. 32, providing for establishing, erecting, and furnishing a contagious diseases hospital, and for borrowing $72,000 for these purposes. Subsequently the council passed a resolution authorizing the local board of health to purchase a property in the residential part of the city and proceed to erect a contagious diseases hospital thereon, "at an amount not

to exceed $31,000 approximately," "providing the same, in the opinion of the city solicitor, can be done without incurring a law suit:"—Held, that the resolution was not illegal; it was not necessary for the corporation to proceed by by-law at this stage; the resolution did not delegate to the local board the authority to acquire property for the municipality, but only the power to negotiate for the purchase, after which the council could pass the necessary by-law for the purpose of acquiring title. 2. It is provided by s. 28 of the Public Health Act that "no land or building to be used for the purposes of this Act shall be nearer than 150 yards to an inhabited dwelling:"—Held, that this limitation applies to land to be acquired for any of the purposes of the Act as found in the Revised Statutes of 1887 and 1897. 3. Held, also, that s. 28 is a provision enacted in the public interest and for the benefit of the public generally, and therefore where there is only one inhabited dwelling within the prescribed radius, the consent of the owner and occupier of that dwelling to the erection of a hospital within such radius is not a legal answer to an action (by one who can shew special damage) to restrain the corporation from erecting such hospital. 4. To maintain the action the plaintiff must himself be within the 150 yard radius or must shew some special pecuniary or proprietary damage or some special legal injury. *Reed* v. *City of Ottawa*, 21 Occ. N. 470.

Hospital for Consumptives — *Conviction—Statute—Grouping of Sections.*]—Section 72 of the Public Health Act, R. S. O. c. 248, which prohibits, under a penalty, the establishment, without the consent of the municipality, of "any offensive trade, that is to say, the trade of blood boiling, or bone boiling, or" (setting out a number of similar trades), "or any other noxious or offensive trade, business, or manufacture, or such as may become offensive," etc., does not apply to a house or hospital for consumptive patients, for not only is it excluded under the doctrine of ejusdem generis, but also by virtue of the legislative grouping of the sections of the Act, s. 72 being under the sub-division dealing with nuisances, while infectious diseases and hospitals are dealt with in a distinct sub-division, commencing with s. 81. A conviction, therefore, for carrying on such house or hospital contrary to s. 72, was quashed. *Regina* v. *Playter*, 21 Occ. N. 285, 1 O. L. R. 390.

Infectious Disease — *Employment of Physician and Nurse—Payment—Liability of Municipality — Powers of Health Officer or Inspector.*]—Section 67 of the Public Health Act, R. S. M. 1902 c. 138, which enables the health officer to act by removing a person afflicted with any infectious or contagious disease to a separate house or by otherwise isolating him, "and by providing nurses and other assistance and necessities for him at his own cost and charge or the cost and charge of his parents or other person or persons liable for his support if able to pay for the same, otherwise at the cost and charge of the municipality," should be read and construed together with ss. 95, 101, and 102 of the Act, and by the true interpretation of all these provisions, persons performing services as nurses or furnishing necessities at the request of a health officer for a smallpox patient are entitled to be paid at once by the municipality, without proving that the parents or other persons are unable to pay for the same. Under s. 32 of the Act, an inspector appointed by the government has the same powers as a health officer, and may exercise such powers without having first suspended or superseded the local health officer. Although the Act does not distinctly provide for the employment of a physician, yet a person who is a physician, and is employed to act both as doctor and nurse for a smallpox patient, may recover at least for his services as nurse, and $15 per day was not considered excessive for the services of so skilled a nurse as a physician should be, considering also the special risk he ran:—Quære, whether the employment of a physician is not authorized by the words "providing other assistance and necessities" in s. 67. *Cameron* v. *Town of Dauphin*, 24 Occ. N. 99, 14 Man. L. R. 573.

Infectious Disease—*Property Destroyed to Prevent Spread—Compensation—Municipal Corporation.*]—The Public Health Act, R. S. N. S. c. 102, s. 32, provides that "all necessary expenses incurred by a local board in suppressing any infectious or contagious disease, shall be a charge against the municipality." In an action to recover the value of personal property destroyed, as alleged, by direction of the board of health, during an epidemic of smallpox, for the purpose of preventing the spread of the disease:—Held, that, in the absence of proof of proper authority for the destruction of the property, neither the board nor the municipality could be held liable. Per Weatherbe, J., that, assuming the property to have been destroyed by order of the board, there was no provision in the Act to render the municipality liable to make compensation for the destruction of infected property dangerous to the public health. Townshend, J., dissented. *Petipas* v. *Municipality of Pictou*, 36 N. S. Reps. 460.

Infectious Disease — *Quarantine — Expenses — Liability of Municipality.*] — One whose house is placed in quarantine by virtue of by-laws of the board of health of the province of Quebec, is obliged to pay only the ordinary expenses attending the infectious disease; and the extraordinary expenses imposed by law to prevent the spread of the disease, such as those of caretaking and those of a like nature, are to be paid by the municipality. *Corporation of South Whitton* v. *Giroux*, Q. R. 24 S. C. 361.

Local Board of Health—*Expropriation of Land for Hospital—Public Park.*]—Upon a motion to restrain a municipal corporation from using land acquired by the plaintiffs under the Public Parks Act for a park for the purpose of erecting thereon a contagious diseases hospital: — Held, that the actual or virtual expropriation of the land for the use of a hospital in perpetuity, or during the existence of the substantial building contracted for by the defendants, was not within the powers conferred by the Public Health Act on the local board of health; and that this infirmity was not overcome by the sanction of the Provincial Board of Health, or of an order in council. *Ottawa Board of Park Management* v. *City of Ottawa*, 21 Occ. N. 378.

Prosecution—*Ratepayer—Disinfection — Public Health Act.*]—A prosecution for the

infringement of by-laws of the board of health can be brought by any ratepayer, without any authorization. 2. A private disinfection of infected premises by the proprietor is not sufficient reason, under the Public Health Act, for refusing to allow the executive officer to disinfect. *Bousquet* v. *Gagnon*, Q. R. 23 S. C. 35.

Vaccination—*Municipal By-law — Unreasonablencss.*]—A by-law holding the manager or head of a business establishment liable, under pain of fine or imprisonment, for allowing an employee to frequent any manufacturing or business establishment, without furnishing a certificate shewing that he has been vaccinated, is not reasonable but oppressive, and is therefore illegal. *City of Montreal* v. *Garon*, Q. R. 23 S. C. 363.

PUBLIC INSTRUCTION ACT.

See COSTS.

PUBLIC LANDS ACT.

See DOWER.

PUBLIC LIBRARY.

See MUNICIPAL CORPORATIONS.

PUBLIC MORALS.

Action Involving Indecent Matter — *Striking Out Objectionable Causes of Action —Judgment—Form of—Dismissal of Action—Res Judicata—Costs.*] — On the trial of an action containing three different causes of action, one of which was an action for moneys had and received, another for damages for assault and false imprisonment, and a third for damages for procuring the plaintiff to enter a house of prostitution, the Judge, after reading the plaintiff's examination for discovery, came to the conclusion that the evidence disclosed an illegal contract under which the defendants were to receive a part of the moneys obtained by the plaintiff while engaged in prostitution, and that the action involved the taking of an account in respect thereof, and was of an indecent character and unfit to be dealt with, and he dismissed it out of the Court of his own motion; the formal judgment stating that "this Court doth of its own motion and without adjudicating as between the plaintiff and defendants on the matters in dispute between them, order that this action be dismissed out of this Court, with costs:"—Held, that the order dismissing the action would have precluded the plaintiff from again suing in respect of any of the causes of action included in the statement of claim, and that the plaintiff should have been allowed to prove her case in respect to those causes of action against which there was no objection; and that the respondent who supported the judgment on appeal must pay the costs of the appeal. *Guilbault* v. *Brothier*, 24 Occ. N. 342, 10 B. C. R. 449.

PUBLIC OFFICER.

See COSTS.

PUBLIC PARK.

See MUNICIPAL CORPORATIONS — PUBLIC HEALTH.

PUBLIC POLICY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES — MUNICIPAL CORPORATIONS — RAILWAY.

PUBLIC SCHOOLS.

See SCHOOLS.

PUBLIC SLANDER.

See CRIMINAL LAW.

PUBLIC USER.

See PARTICULARS—PATENT FOR INVENTION.

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PURCHASER.

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PUIS DARREIN CONTINUANCE.

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QUANTUM MERUIT.

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QUARANTINE.

See MUNICIPAL CORPORATIONS — PUBLIC HEALTH ACT.

QUIT CLAIM.

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QUO WARRANTO.

See EVIDENCE—MUNICIPAL CORPORATIONS—MUNICIPAL CONTROVERTED ELECTIONS—WRIT OF SUMMONS.

RAILWAYS AND RAILWAY COMPANIES.

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I. BONDS.

Bondholders—*Right to Vote at Annual General Meeting of Company — Interest in Arrear—Scope of Right as to Future Meetings — Number of Votes — Value of Bonds Compared with Shares—Construction of Statutes.*]—The right of bondholders of a railway company to vote exists, under s. 15 of the Act 36 V. c. 73, and it may be exercised at any time when interest is in arrear. It could not have been intended that it should be restricted to the one general annual meeting next after the interest fell into arrear, and that it was not to be exercised at another meeting although the arrear continued. The language does not drive one to that conclusion, and, in view of the end manifestly aimed at, that construction should be adopted which will secure to the bondholders a voice in the affairs of the company as long as their interest is in arrear. The language of s. 15, "all holders of bonds shall have and possess the same rights and privileges and qualifications for directors and for voting as are attached to shareholders," was very comprehensive. It implies equality with the shareholders in every respect as regards directors and voting. It did not deal with their rights, privileges, and qualifications as between the bondholders themselves, but as between them and the shareholders. And as against the latter the bondholders are given the same rights, privileges, and qualifications for directors and voting. The only just way of effecting this is by giving to each holder of a bond one vote for each portion equivalent to the amount of one share. Thus each share being for $100, each holder of a bond for $1,000 should be upon an equal footing with the holder of 10 shares. Osler and Maclaren, JJ.A., agreed in the result, except that they were of opinion that the bondholders' right of voting was confined to one vote on each bond. *Weddell* v. *Ritchie*, 5 O. W. R. 733, 10 O. L. R. 5.

Collateral Security—Injury—Judgment—Reference. *Knickerbocker Trust Co. of New York* v. *Brockville, Westport, and Sault Ste. Marie R. W. Co.*, 1 O. W. R. 311.

Holder of Attached Coupons—*Conditions — Action — Trustee for Bondholders — Parties.*]—A holder of coupons is bound by the conditions appearing upon the bonds to which the coupons were attached as to the amount payable and the manner of recovery thereof; he is therefore in the same position as the holder of the bonds before the coupons were attached, and is, like him, in the present case, subject to the condition in the mortgage which gives the trustee thereunder the sole right to recover payment of principal and interest. So any action for the recovery of principal or interest must be brought in the name of the trustee, and when a statute has been passed to ratify the contract between the company and the trustee, an action, in the name of the holder of such coupons, notwithstanding that they are made payable to bearer, is wrongly framed and will be dismissed. *Levis County R. W. Co.* v. *Fontaine*, Q. R. 13 K. B. 523.

Mortgage—*Foreclosure—Receivers.*] —A railway company issued bonds secured by mortgage of the company's property. In a suit by the mortgagee for foreclosure, receivers and managers of the property and business of the company were appointed, with liberty to operate the railway and to maintain the road and property in good and sufficient repair, either by credit or by cash out of the earnings of the road. Repairs being necessary, and the earnings being insufficient, the receivers were empowered to issue receivers' certificates, made a first charge on the company's property, and on the moneys to be realized from the sale of the company's property, in priority to the bondholders. *Sage* v. *Shore Line R. W. Co.*, 22 Occ. N. 38, 2 N. B. Eq. Reps. 321.

Recital — *Consideration—Bonus—Conditions.*]—A railway company had power to receive and take grants and donations of land and other property made to it to aid in the construction and maintenance of the railway, and any municipality was authorized to pay by way of bonus or donation any portion of the preliminary expense of the railway, or to grant to the railway company sums of money or debentures by way of bonus or donation to aid in the construction or equipment of the railway. The railway company, in consideration of a bonus by a municipality, agreed to keep for all time its head office and machine shops in the municipality:—Held, that the recital of the agreement in a bond signed by the railway company amounted to a covenant on their part to observe its terms, but that such an agreement was not justified by the statutory provisions and was not enforceable. Judgment in 32 O. R. 99, 20 Occ. N. 379, reversed. *Town of Whitby* v. *Grand Trunk R. W. Co.*, 21 Occ. N. 226, 1 O. L. R. 480.

Sale of Railway by Mortgagee — *Interest—Arrears—Foreclosure — Limitation of Actions—Jurisdiction of Court—Dominion*

Railway — 46 V. c. 24, ss. 14-16 (D.) — Dominion Railway Act, 1888.]—Bonds contained a covenant to pay half-yearly instalments of interest, evidenced by attached coupons, and payment of principal and interest secured by a mortgage of the undertaking, which also contained a covenant to pay, under seal issued by a railway company incorporated in 1873 by an Ontario statute, whose railway was declared by a Dominion statute in 1884 to be a work for the general advantage of Canada (thereupon becoming subject to the legislation of the Dominion):—Held, in foreclosure proceedings upon this mortgage, by the trustees for bondholders, that the interest being a specialty debt, and the mortgaged undertaking consisting in part of realty and in part of personalty not subject to division, the holders of coupons, whether attached to the bonds or detached therefrom, were entitled to rank for all instalments which had fallen due within twenty years, and not merely for those which had fallen due within six years. Judgment of Boyd, C., 6 O. L. R. 534, 24 Occ. N. 14, 2 O. W. R. 259, 946, affirmed:—Held, also, that, even if the case were dealt with upon the footing of the mortgage being one of reality only, there was the right to rank, for there were no subsequent incumbrancers, and there had been shortly before the action a valid acknowledgment by the railway company of liability for all the interest in question. Judgment in 24 Occ. N. 392, 8 O. L. R. 604, 3 O. W. R. 910, 4 O. W. R. 357, affirmed:—Held, also, that the railway could be sold by virtue of the provisions contained in 46 V. c. 24, ss. 14, 15 and 16 (D.), re-enacted by the Dominion Railway Act, 1888 (51 V. c. 29). *Central Ontario R. W. Co.* v. *Trusts and Guarantee Company*, [1905] A. C. 576.

Second Issue without Payment of First — *Conventional Hypothec — Specific Performance—Judgment.*]— Where a valid issue of bonds has been made by a railway company under the provisions of the Quebec Railway Act, which at the time of their issue governed the company defendant,—the validity of the bonds so issued not being affected by the bringing of the company under the legislative control of the Parliament of Canada and the Railway Act of Canada by 57 & 58 V. c. 84,—the company cannot, in view of the provisions of s. 93, s.-s. 4, of the Act above-mentioned, exercise again the bond-issuing power, unless the bonds first issued have been withdrawn and paid, or duly cancelled. 2. The obligation to grant a conventional hypothec constitutes an obligation to do an act (execution of an authentic instrument) which can only be performed by the debtor himself or some person authorized by him, and whereof the Court has no means of compelling specific performance, and the law nowhere authorizes the substitution by the Court of its own judgment for the authentic act executed by the debtor personally, or his authorized agent, which is essential to the creation and existence of a conventional hypothec. 3. The only hypothec which can result from the judgment of a Court is the judicial hypothec, which results from such judgments only as contain a condemnation to pay a specific sum of money. 4. An order to execute a conventional hypothec, unaccompanied by any alternative condemnation,—no alternative condemnation being asked in the event of failure to obey the order—would constitute a judgment not susceptible of execution, in contravention of art. 541, C. C. P. 5. Where the plaintiff asks that a property be declared hypothecated, but does not indicate or sufficiently describe the property, either in the allegations or conclusions of his declaration, the Court cannot take upon itself to ascertain and determine what specific property should be declared hypothecated. *Connolly* v. *Montreal Park and Island R. W. Co.*, Q. R. 22 S. C. 322.

II. Bridges.

Contribution to Cost and Maintenance—Liability of company—Construction of contract with city corporation—Exemption or indemnity. *City of Toronto* v. *Grand Trunk R. W. Co.*, 4 O. W. R. 304, 6 O. W. R. 632.

Diversion of Stream — *Substituted Bridge—Liability to Repair.*]—An appeal by the plaintiffs from the judgment of Street, J., 32 O. R. 154, was dismissed with costs, the Court agreeing with the reasons for judgment in the Court below. *Town of Peterborough* v. *Grand Trunk R. W. Co.*, 21 Occ. N. 110, 1 O. L. R. 144.

Overhead Bridge — *Headway Space — Brakesman Killed—Contributory Negligence.*]—Upon the proper construction of s. 192 of the Dominion Railway Act, 1888, a railway company, whether the owners or not of a bridge under which their freight cars pass, are prohibited from using higher freight cars than such as admit of an open and clear headway of 7 feet between the top of such cars and the bottom of the lower beams of any bridge which is over the railway. McLauchlin v. Grand Trunk R. W. Co., 12 O. R. 418, and Gibson v. Midland R. W. Co., 2 O. R. 658, distinguished. Contributory negligence may be a defence even to an action founded on a breach of a statutory duty. A brakesman standing on top of a car passing under a bridge was killed by striking the bridge:—Held, that, as the evidence shewed that he was standing where he was contrary to the rules of the company and warning received, he was guilty of contributory negligence, and the defendants were not liable, although it was also shewn that there was not a clear headway space of 7 feet between the top of the car and the bottom of the lower beams of the bridge, as provided for by s. 192 of the Railway Act, 51 V. c. 29 (D.) *Deyo* v. *Kingston and Pembroke R. W. Co.*, 24 Occ. N. 393, 8 O. L. R. 588, 4 O. W. R. 182.

Protection of Public — Order of Railway Committee of Privy Council—Jurisdiction — Action — Injunction — Declaration — Existence of highway—Harbour—Water lots—Jus publicum—Statutes — Crown patents—Contracts—Municipal corporation—Diversion of highway — Expropriation—Compensation—Navigable waters—Order in council—Time for commencement and completion of work — Variation of order without appeal—Suspension of judgment. *Grand Trunk R. W. Co.* v. *City of Toronto, Canadian Pacific R. W. Co.* v. *City of Toronto*, 6 O. W. R. 852.

III. Carriage of Goods.

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. *Bennett v. Grand Trunk R. W. Co.*, 21 Occ. N. 564, 2 O. L. R. 425.

Arrival at Destination—Destruction by fire in warehouse—Liability of railway company—Conditions of shipping bill. *Chandler and Massey Co. v. Grand Trunk R. W. Co.*, 2 O. W. R. 286, 407, 427, 1044.

Bill of Lading—*Delay of Trains—Condition as to.*]—When a shipper signs conditions inserted in a bill of lading, he is bound by these conditions. In this case the plaintiffs having subscribed to the condition that the defendant company would not be responsible for delay of trains, and the train by which the animals should have been shipped being two hours late, thus causing damage to the shipper, the latter could not recover. If the animals are abandoned to the company for what they will bring at a sale, the latter have a right to the return of the bill of lading before paying over the proceeds. *Lafontaine v. Grand Trunk R. W. Co.*, Q. R. 26 S. C. 455.

Claim for Non-Delivery — *Special Instructions—Acceptance by Consignees—Warehousemen—Negligence—Amendment.*] — The plaintiffs for some time prior to and after 1897, had sold iron to a rolling mills company at Sunnyside. The defendants had no station at Sunnyside, the nearest being at Swansea, a mile further west, but the rolling mills company had a siding capable of holding three or four cars. In 1897 the plaintiffs instructed the defendants to deliver all cars addressed to their order at Swansea or Sunnyside to the rolling mills company, and in October, 1899, they had a contract to sell certain quantities of different kinds of iron to the company, and shipped to them at various times up to the 2nd January, 1900, five cars, one addressed to the company and the others to themselves, at Sunnyside, which the company refused to receive:—Held, affirming the judgment of the Court of Appeal, 22 Occ. N. 176, that the rolling mills company were consignees of all the cars, and that they had the right to reject them at Swansea if not according to contract. Having exercised such right, the defendants were not liable as carriers, the transitus having come to an end at Swansea by refusal of the company to receive the iron. The Court of Appeal, while relieving the defendants from liability as carriers, held them liable as warehousemen, and ordered a reference to ascertain the damages on that head:—Held, reversing the decision, Mills, J., dissenting, that, as the action was not brought against the defendants as warehousemen, and as they could only be liable as such for gross negligence, and the question of negligence had never been raised nor tried, the action would be dismissed in toto, with reservation of the right of the plaintiffs to bring a further action should they see fit. *Frankel v. Grand Trunk R. W. Co.*, 23 Occ. N. 134, 33 S. C. R. 115, 1 O. W. R. 254, 339, 396.

Delay in Delivery — Perishable goods—Damage to goods—Connecting line—Contract—Absence of privity—Departure from customary route—Evidence—New trial. *Corby v. Grand Trunk R. W. Co.*, 6 O. W. R. 81, 492.

Delivery to Wrong Person—*Liability.*]—The plaintiff consigned to the defendants certain goods addressed to the "I. C. Company" simply. He knew that the company had not yet been incorporated; he also knew that the defendants' practice was never to deliver goods consigned "to order" without the production and indorsement of the shipping bill, but that when not consigned "to order" they did sometimes deliver the goods without the production of the shipping bill. The defendants did deliver the goods to a person carrying on business under the name of the I. C. Company, and at the ostensible office of the company:—Held, that the plaintiff was most to blame for such delivery, and that the defendants were not liable by reason of their having delivered the goods without first requiring the production of the shipping bills. There is no law here requiring carriers to take up the shipping bills before the delivery of goods. *Conley v. Canadian Pacific R. W. Co.*, 20 Occ. N. 458, 32 O. R. 258. Affirmed on ground of ratification, 1 O. L. R. 345.

Liability for Loss—*Dog—Common Carriers.*]—The defendants are, by the Railway Act, 51 V. c. 29 (D.), common carriers of animals of all kinds; and in this case were held liable for the loss of a dog which was received by them for carriage by their railway and was not delivered to the plaintiff in accordance with the contract made with him. Distinction between the English and Canadian Railway Acts pointed out. *McCormack v. Grand Trunk R. W. Co.*, 24 Occ. N. 13, 6 O. L. R. 577, 2 O. W. R. 1053.

Liability for Loss—Place of delivery—Connecting lines. *Parker v. Grand Trunk R. W. Co.*, 3 O. W. R. 651.

Loss—*Negligence—Bill of Lading—Condition Exempting from Liability — Weight of Grain—Certificate of Weighmaster—Weights and Measures Act — Indorsement of Bill — Action for Loss.*]—When it clearly appears that the loss of goods shipped by railway must have been caused by the negligence or omission of the railway company or their servants, the company are precluded by s.-s. 3 of s. 246 of the Railway Act, 1888, from relying on a condition of the bill of lading exempting them from liability for any deficiency in weight or measurement. McMillan v. Grand Trunk R. W. Co., 16 S. C. R. 543, followed. The certificate of a weighmaster under s. 9 of the Manitoba Grain Act, 1900, being only prima facie evidence of the weight of grain in a car, may be rebutted. The indorsement of a bill of lading to a bank for collection, though it passes the property in the goods, does not prevent the shipper from bringing an action in respect of the loss of the goods, if he still has an interest in them. Section 21 of the Weights and Measures Act, R. S. C. c. 104, does not apply to a contract for carrying wheat by the carload, although the number of bushels in the car had been ascertained by bag measurement. *Ferris v. Canadian Northern R. W. Co.*, 15 Man. L. R. 134, 1 W. L. R. 177.

Loss by Fire — *Negligence — Just and Reasonable Condition—Notice.*] — Although

the statute law of Canada prevents a railway company from relieving itself from liability for damage caused by fire arising from any negligence or omission of it or its servants, still such a condition, when the damage arises otherwise than from any negligence or omission of the company or its servants, is valid, and there is no law in Canada requiring that such a condition shall be just and reasonable. The goods arrived on the 21st April; notice of their arrival was given to the owner on the same day, and they were destroyed on the 26th:—Held, on the evidence, that the notice was sufficient, and that the owner had a reasonable time within which to remove them, and not having done so, the defendants were not liable. *McMorrin* v. *Canadian Pacific R. W. Co.*, 21 Occ. N. 292, 1 O. L. R. 561.

Misdelivery—New contract — Breach — Negligence. *Armstrong* v. *Michigan Central R. W. Co.*, 1 O. W. R. 714.

Shipping Bill—*Bill of Lading—Condition Requiring Insurance — Breach of—Loss of Goods — Negligence.*]—Under s. 246 of the Dominion Railway Act, a railway company is precluded from setting up a condition indorsed on a bill of lading relieving the company from liability for damage sustained to goods whilst in transit, where damage is occasioned through negligence. Consignors, by their own shipping bill, agreed to insure the goods to be shipped, the railway company being thereby subrogated to consignors' rights in case of loss, and a condition of a bill of lading given by the railway company on the shipment of goods, required the consignors to effect an insurance thereon, which in case of loss or damage, the company were to have the benefit of:—Held, affirming the judgment of Meredith, J., 5 O. L. R. 742, 23 Occ. N. 226, 2 O. W. R. 328, 472, that the contract being one for exemption from total liability, even where, as here, the damage to the goods was occasioned by negligence, the defendants were precluded, under the above section, from setting up the breach of such condition as aforesaid as a ground of relief from liability. Vogel v. Grand Trunk R. W. Co., 11 S. C. R. 612, followed. Robertson v. Grand Trunk R. W. Co., 24 S. C. R. 611, distinguished. *St. Mary's Creamery Co.* v. *Grand Trunk R. W. Co.*, 24 Occ. N. 332, 8 O. L. R. 1, 3 O. W. R. 472.

Special Contract Limiting Liability—Approval of form of contract by Board of Railway Commissioners on same day as contract made—Judicial proceeding—Fraction of day. *Buskey* v. *Canadian Pacific R. W. Co.*, 6 O. W. R. 698, 11 O. L. R. 1.

IV. Construction of Railway.

Injunction—*Interested Party — Public Corporations—Franchises—Lapse of Powers —"Railway" or "Tramway" — Agreement as to Local Territory—Invalidity — Public Policy — Work for General Advantage of Canada.*]—An agreement by a corporation to abstain from exercising franchises granted for the promotion of the convenience of the public is invalid as being contrary to public policy, and cannot be enforced by the Courts. Per Sedgewick and Killam, JJ. A company having power to construct a railway within the limits of a municipality has not such an interest in the municipal highways as would entitle it to an injunction prohibiting another railway company from constructing a tramway upon such highways with the permission of the municipality under the provisions of art. 479 of the Quebec Municipal Code. The municipality has power, under the provisions of the Municipal Code, to authorize the construction of a tramway by an existing corporation, notwithstanding that such corporation has allowed its powers as to the construction of new lines to lapse by non-user within the time limited in its charter. Per Girouard and Davies, JJ. A railway company which has allowed its powers as to construction to lapse by non-user within the time limited in its charter, and which does not own a railway line within the limits of a municipality where such powers were granted, has no interest sufficient to maintain an injunction prohibiting the construction therein of another railway or tramway. Where a company subject to the Dominion Railway Act, with power to construct railways and tramways, has allowed its power as to the construction of new lines to lapse by non-user within the time limited, it is not competent for it to enter into an agreement with a municipality for the construction of a tramway within the municipal limits under the provisions of art. 479 of the Quebec Municipal Code. *Montreal Park and Island R. W. Co.* v. *Chateauguay and Northern R. W. Co.*, 24 Occ. N. 302, 35 S. C. R. 48.

Receiver—*Authority to Construct Portion of Line.*]—The Court will not grant to the receiver and manager of a railway, authority to proceed with the construction of a small portion of the incomplete part of the line of the railway, where it is questionable whether such construction will be of any real benefit to the undertaking, and in the face of the opposition of bondholders whose interest is largely in excess of those desiring it, and in the face of a judgment directing a sale of the road. *Ritchie* v. *Central Ontario R. W. Co.*, 24 Occ. N. 340, 7 O. L. R. 727, 3 O. W. R. 609.

Time for Construction—*Interpretation of Statutes—Lapse of Powers—Rival Company —Forfeiture—Waiver — Contract — Public Policy.*]—Where a time limit for the completion of a work is enacted by a section of a statute, and by an amending Act the term of years prescribed for the completion of the work is extended, by a section which expressly replaces the section of the original Act, the term fixed by the substituted section runs from the coming into force of the original Act, and not of the amending Act. 2. The lapse of a railway company's construction powers does not divest it of interest to prevent similar construction by a rival company, if it had once utilized its own powers of construction and still remained in the use of this constructed work or any part of it. 3. Forfeiture of franchise powers by a railway company, for non-completion within the time prescribed, is a prerogative of the Crown, which may be waived, and so long as it has not been enforced, it cannot be invoked by any individual or other company similarly incorporated. 4. A railway which has been declared by a Dominion statute to be a work for the general advantage of Canada, is subject to s. 89 of the Railway Act of Canada, and if not finished and put in operation within 7 years from the passing of the Act giving

it construction powers, the powers cease and are null and void as respects the uncompleted portion of the line. 5. The above section applies to tramways as well as to railways. 6. A contract between two railway companies, by which they mutually undertake not to construct lines on each other's territory, is not invalid as being contrary to public policy. *Montreal Park and Island R. W. Co.* v. *Chateauguay and Northern R. W. Co.*, Q. R. 13 K. B. 256.

V. CROSSINGS.

Absence of Protection — *Negligence.*]—Where the railway traffic at the crossing of a highway was very great, and there was no gate, guardian, lamp, or other protection for the public, although the railway company had been notified of the dangerous condition of the crossing, the company was held responsible, under s. 288 of the Railway Act of Canada, for a collision of an engine with a vehicle crossing the track, which caused the death of the plaintiff's son, and which occurred without any fault on his part. *Girouard* v. *Canadian Pacific R. W. Co.*, Q. R. 19 S. C. 529.

Approaches — *Repair.*]—Where a railway severs a farm and the company have constructed a farm crossing, no duty is cast upon them, in the absence of an express agreement, to keep in repair the approaches thereto within the farm. *Palmer* v. *Michigan Central R. W. Co.*, 23 Occ. N. 265, 6 O. L. R. 90.

Compensation to Municipality—*Terminus "at or near" Point Named.*]—Authority to a company to build a railway empowers them to cross every highway between the termini without permission of the municipal authorities being necessary and without liability to compensate the municipalities for the portions of the highways taken for the road. A charter authorized the construction of a railway from Vaudreuil to a point at or near Ottawa, passing through the counties of Vaudreuil, Prescott, and Russell:—Held, that, if it were necessary, the railway could pass through Carleton county, though it was not named:—Held, also, that in this Act the words "at or near the city of Ottawa" meant "in or near" said city. Judgment of the Court of Appeal, 4 O. L. R. 56, 22 Occ. N. 224, affirming the judgment at the trial, 2 O. L. R. 336, affirmed. *Montreal and Ottawa R. W. Co.* v. *City of Ottawa, Canada Atlantic R. W. Co.* v. *City of Ottawa*, 23 Occ. N. 209, 33 S. C. R. 376.

Dangerous Crossing—*Failure to Give Warning—Negligence — Contributory Negligence.*]—A siding of the defendants' line of railway, which was not used by the defendants more than two or three times a week, crossed a narrow arched-in lane or alleyway, held on the evidence to be a highway, very close to the face of the walls. The plaintiff's servant had driven the plaintiff's horse and waggon across the siding and through the alleyway to a warehouse close by, there being no engine or cars on the siding. The waggon was within a short time loaded with boxes, and the plaintiff's servant then returned through the alleyway, the servant walking beside the waggon in order to steady the load. Just as the horse came out of the alleyway it was struck by a passing engine and severely injured. The whistle of the engine had not been sounded, nor the bell rung. The plaintiff's servant did not stop the horse at the mouth of the alleyway or look or listen for trains:—Held, that, assuming but not deciding that the duty to sound the whistle or ring the bell did not apply in the case of engines using a siding, it was nevertheless incumbent upon the defendants to give some warning before crossing the lane, especially in view of the very dangerous nature of the crossing, and that not having done so they were guilty of negligence and prima facie liable in damages:—Held, also, that in all the circumstances it could not be said that there was not some evidence to support the finding of the Judge at the trial (the case having been tried without a jury) that the plaintiff's servant had not acted unreasonably and was therefore not guilty of contributory negligence. *Smith* v. *Niagara and St. Catharines R. W. Co.*, 25 Occ. N. 34, 9 O. L. R. 158, 4 O. W. R. 526.

Destruction of, by Train—Negligence of engine-driver — Evidence — Trespass — Fences — Damages. *Eggleston* v. *Canadian Pacific R. W. Co., Duggan* v. *Canadian Pacific R. W. Co.*, (N.W.T.), 1 W. L. R. 356, 576.

Farm Crossing—*Approaches — Repair.*]—Held, affirming the judgment of Street, J., 23 Occ. N. 265, 6 O. L. R. 90, that the accident to the plaintiff having arisen on his own property and from his own default in not remedying the defect in the approach, and in not giving notice to the company that any such defect existed, he could not recover. Semble, that a distinction exists between the approach to an overhead bridge on a public highway and the approach on private lands to a farm crossing over the line of rail. While the presumption will be, in the case of the former, that the approach is part of the bridge and to be kept in repair by the railway company, in the case of the latter, in the absence of original compensation as to the crossing, and of express agreement, while it is for the company to maintain the crossing over its limits, it is for the owner to maintain the approach within the limits. *Palmer* v. *Michigan Central R. W. Co.*, 24 Occ. N. 85, 7 O. L. R. 87, 3 O. W. R. 89.

Farm Crossing—*Compensation in Lieu of.*]—When the value of a piece of land enclosed by a line of railway is so small as to be disproportionate to the cost of a farm crossing; and is of no utility to the farm from which it is so separated, the Court has the power and the discretion to grant to the proprietor a pecuniary compensation in lieu of a crossing. *Martin* v. *Maine Central R. W. Co.*, Q. R. 19 S. C. 561.

Farm Crossings — *Duty to Provide — Statute—Retroactivity.*]—Before the Dominion Railway Act of 1888 there was no statutable obligation upon a railway company to provide and maintain a farm crossing where the railway severed a farm, and s. 191 of that Act, providing that every company shall make crossings for persons across whose lands the railway is carried, is not retrospective. Vezina v. The Queen, 17 S. C. R. 1, and Quay v. The Queen, ib. 30, in effect overrule Canada Southern R. W. Co. v. Clouse,

13 S. C. R. 139, and approve Brown v. Toronto and Nipissing R. W. Co., 26 C. P. 206. *Ontario Lands and Oil Co.* v. *Canada Southern R. W. Co.*, 21 Occ. N. 188, 1 O. L. R. 215.

Farm Crossings — *Duty to Provide — Statutes — Railway Act of Canada — Jurisdiction of Provincial Legislatures.*]—An owner whose lands adjoin a railway subject to the Railway Act of Canada, upon one side only, is not entitled to have a crossing over such railway under the provisions of that Act; and the special statutes in respect to the Grand Trunk Railway of Canada do not impose any greater liability in respect to crossings than the Railway Act of Canada. The Provincial Legislatures in Canada have no jurisdiction to make regulations in respect to crossings or the structural condition of the roadbed of a railway subject to the provisions of the Railway Act of Canada. Canadian Pacific R. W. Co. v. Corporation of Parish of Notre Dame de Bonsecours, [1899] A. C. 367, followed. *Therrien* v. *Grand Trunk R. W. Co.*, 20 Occ. N. 431, 30 S. C. R. 485.

Leave to Make — *Railway Committee of Privy Council—Private Bridge—Approaches to—Compensation—Injunction.*] — Leave granted by the Railway Committee of the Privy Council to a railway company to cross a public road upon which are the approaches of a bridge belonging to a private person, does not deprive this private person of his recourse for compensation, and, in default of a previous offer of compensation, he may by writ of injunction prevent the company from building their line upon these approaches. *Jones* v. *Atlantic and North-West R. W. Co.*, Q. R. 12 K. B. 392.

Liability of Municipal Corporation to Contribute to Maintenance of Gates at Crossings—Dominion railway—Constitutional law. *Grand Trunk R. W. Co.* v. *City of Toronto*, 4 O. W. R. 450.

Negligence — *Contributory Negligence—Excessive Speed.*]—Where all the usual signals and warnings were given by the railway company, and the proximate and determining cause of the accident of which the plaintiff complained was the imprudence and recklessness of her deceased husband and his brother, the plaintiff was held not entitled to recover. It was unnecessary to decide whether s. 259 of the Railway Act prohibiting a rate of speed, through a thickly peopled portion of a city, exceeding six miles an hour, applies to highway crossings, because, in the opinion of the Court of Review, the accident would have happened even if the rate of speed had been less than six miles an hour. *Tanguay* v. *Grand Trunk R. W. Co.*, Q. R. 20 S. C. 90.

Obligation to Provide — *Dominion Railway Act—Midland Railway Company—Ontario Statutes.*]—The plaintiff's father in 1882 conveyed part of his farm to the Midland Railway Company, who constructed their railway so as to sever the farm, but did not agree to make a farm crossing. In 1900 the father conveyed to the plaintiff all the farm not previously conveyed to the railway company:—Held, that the plaintiff could not compel the defendants who had acquired the Midland Railway in 1893, to provide a farm crossing, either by virtue of the Dominion Railway Act or of Ontario legislation applicable to the railway before 1893. Review of the statutes affecting the Midland Railway Company. Ontario Lands and Oil Co. v. Canada Southern R. W. Co., 1 O. L. R. 215, 21 Occ. N. 188, followed. *Carew* v. *Grand Trunk R. W. Co.*, 23 Occ. N. 226, 5 O. L. R. 653, 2 O. W. R. 313.

Obligation to Provide—*Owner of Farm—Date of Acquisition—Jurisdiction of Magistrate's Court.*]—In an action for a farm crossing, it is sufficient if the plaintiff be shewn to be the actual bonâ fide owner, and in possession as such, of the land crossed by the railway, although his title is not registered; and the fact that the land was purchased and cleared by him, long subsequent to the building of the railway, is no bar to his right of action. 2. The district magistrate's court has no jurisdiction to order the construction of a farm crossing, even when the cost thereof is alleged to be less than $50, because such order would involve also the future maintenance of the crossing, would create a servitude, and would be interfering with future rights. *Bolduc* v. *Canadian Pacific R. W. Co.*, Q. R. 23 S. C. 238.

Omission to Ring Bell or Sound Whistle—*Contributory Negligence.*] — The word "highway" in s. 256 of the Railway Act, 1888, requiring a bell to be rung or a whistle sounded by a railway locomotive engine on approaching a crossing over a highway, means a public highway, which is so as of right. Semble, that the question whether there is a public highway at any point is one which a County Court is precluded by s. 59 (d) of the County Courts Act, R. S. M. c. 33, from trying. 2. Where a trail or way over a railway track is used by the public by invitation or license of the railway company, a person crossing the track upon the same is bound to observe reasonable precautions to avoid injury by trains; and where the evidence shews that he has not done so, he cannot recover from the company for such injuries without proving that they were immediately caused by the negligence of the company's servants only. Quære, whether the failure of the person in charge of a locomotive to ring a bell or sound a whistle or observe other precautions on approaching such a crossing constitutes actionable negligence. Cotton v. Wood, 8 C. B. N. S. 568, and Weir v. Canadian Pacific R. W. Co., 16 A. R. 100, followed. *Royle* v. *Canadian Northern R. W. Co.*, 23 Occ. N. 25, 14 Man. L. R. 275.

Railway Committee—*Appeal to Council — Injunction—Notice of Intention to Lay Crossing—Costs.*]—Motion for an injunction restraining the defendants from laying a crossing over the track of the plaintiffs. The defendants had obtained from the Railway Committee of the Privy Council an order permitting them to cross the plaintiffs' track. Pending an appeal by the plaintiffs from the order to the full Cabinet, the defendants proceeded to lay the crossing, and the plaintiffs applied for an injunction:—Held, that defendants were not exceeding the terms of the order, which was binding on the Court till reversed on appeal to a competent authority, and therefore an injunction could not be granted. Before laying a crossing, notice should be given of the time at which it is intended to commence the work. Failure by

a company to give such notice constitutes good cause for depriving them of the costs of successfully resisting a motion for an injunction. *Canadian Pacific R. W. Co. v. Vancouver, Westminster, and Yukon R. W. Co.*, 24 Occ. N. 161, 10 B. C. R. 228.

Right to Cross Streets—*Expropriation or Compensation—Extension of Municipality—Toll Road.*]—Railway companies incorporated by the Dominion Parliament, which have complied with the Railway Act and obtained the approval of the Railway Committee, have, in the construction of their lines of railway, the right to cross over the highways of a city without taking expropriation proceedings under the Railway Act, or without making any compensation to the city therefor. Where under the powers conferred by 51 V. c. 53, s. 9 (O.), for extending the limits of the city of Ottawa, the city acquired, at an agreed price, part of the road of a toll road company within such extended limits, such part thereupon ceased to have its previous character of a toll road, and became the same as the other public streets of the city. *Canada Atlantic R. W. Co. v. City of Ottawa. Montreal and Ottawa R. W. Co. v. City of Ottawa*, 21 Occ. N. 523, 2 O. L. R. 336.

Speed of Trains—*Crowded Districts — Fencing — Statutory Requirements—Negligence—Injury to Person Crossing Track.*]—By s. 250 of the Railway Act, 1888, as amended by 55 & 56 V. c. 27, s. 8, "no locomotive or railway engine shall pass in or through any thickly peopled portion of any city, town, or village, at a speed greater than six miles an hour, unless the track is fenced in the manner prescribed by this Act." Besides the usual railway fences the only fencing required is that provided for by 55 & 56 V. c. 27, s. 6, which is substituted for s. 197 of the Railway Act, 1888, namely: "At every public road crossing at rail level of the railway, the fence on both sides of the crossing and on both sides of the track shall be turned in to the cattle guards, so as to allow of the safe passage of trains." The plaintiff was injured and his wife was killed by a train passing through a thickly peopled portion of the town of Forest, at a speed of at least twenty miles an hour, and on the trial the jury found that such speed was excessive for that place and constituted negligence on the part of the company:—Held, reversing the judgment of the Court of Appeal, 5 O. L. R. 313, 23 Occ. N. 136, Girouard, J., dissenting, that the company, having complied with the statutory provisions as to fencing, were not liable. *McKay v. Grand Trunk R. W. Co.*, 24 Occ. N. 49; *S. C., sub. nom. Grand Trunk R. W. Co. v. McKay*, 34 S. C. R. 81.

Streets of Town — *Speed of Trains — Guards and Barriers.*]—A railway company whose railway crosses the streets of a town, not only must not allow its trains to go faster than the speed allowed by the Railway Act, but besides, in order to escape liability for accidents, must put guards and barriers at the places where the railway crosses the streets. *Girard v. Quebec and St. John R. W. Co.*, Q. R. 25 S. C. 245.

Tracks of Another Company—Application to Railway Committee of Privy Council—Notice—Omission to state lands to be occupied—Order of Committee—Application for rehearing—Waiver of want of notice — Order of Board of Railway Commissioners —Appeal to Privy Council—Restoration of order of Committee. *Canadian Pacific R. W. Co. v. Bay of Quinte R. W. Co.*, 3 O. W. R. 542, 668.

VI. Expropriation of Land.

Abandonment — Costs. *Re Oliver and Bay of Quinte R. W. Co.*, 6 O. L. R. 543, 2 O. W. R. 953.

Agreement with Owner—*Possession — Compensation — Damages — Arbitration — Action—Municipal Corporation.*]—In carrying out the agreement provided for in 63 V. c. 77 (O.), the purchasing agents of a town corporation agreed with the plaintiff for the purchase of and possession by a railway company of the portion of the plaintiff's land required by the company, but without fixing the price. The company, having, pursuant to s. 131 of the Railway Act, 51 V. c. 29 (D.), deposited a plan, profile, and book of reference of the land in the county registry office, which were approved by the Railway Committee of the Privy Council, entered and completed the work. The purchase money not having been agreed upon or paid, the plaintiff brought an action against the town corporation and railway company for damages to the land and for interference with his business:—Held, that the defendants the town corporation were not liable, and that the plaintiff's remedy against the railway company was by arbitration proceedings under the Railway Act, and not by action. Per Falconbridge, C.J., at the trial:—Expected increased profits from enlargement of plaintiff's buildings and plant are too speculative and uncertain to form a true measure of damage. *Todd v. Town of Meaford*, 23 Occ. N. 323, 6 O. L. R. 469, 2 O. W. R. 12, 779.

Appointment of Arbitrator—"*Opposite Party*"—*Notice — Evidence.*]—The railway company having served on both the owner of the land and the mortgagee the notice and certificate prescribed by ss. 146 and 147 of the Railway Act, 51 V. (D.) c. 29, the owner refused the sum offered, and notified the company of the name of her arbitrator, but the mortgagee gave no such notice:—Held, that under s. 150 of the Act, the company were entitled to apply to have a sole arbitrator appointed, as the mortgagee should be treated as an "opposite party" within the meaning of that section. After giving notice to the company of the name of her arbitrator, the owner sold and conveyed the property to another person. The land had been brought under the Real Property Act, and on the certificate of title issued to the purchaser there was indorsed a memorandum of the deposit in the Land Titles office of the Minister's certificate and the plan and book of reference:—Held, that the purchaser must be deemed, under s. 145 of the Act, to have had notice of the expropriation proceedings, and was bound by them. Evidence in support of an application under s. 150 of the Act may be by affidavit. *In re Canadian Pacific R. W. Co. and Batter*, 20 Occ. N. 317, 13 Man. L. R. 200.

Arbitration and Award—*Appeal from Award — Forum — Petition — Modifying*

Award.]—In an expropriation matter, pursuant to the Railway Act of Canada, a single Judge of the Superior Court has jurisdiction to hear an appeal from the award, in spite of the fact that such appeal is taken not by way of an action but by way of a simple petition, and that even in the absence of special rules of practice to that effect, seeing that such rules of practice are not necessary to give him jurisdiction. Thus it follows that such appeal may be taken without an action and by means of a petition. 2. The appeal in such case comes on as a case of original jurisdiction upon all questions of law or of fact and upon the evidence taken before the arbitrators. 3. The Judge cannot modify the award except when it is clear that it is the result of a gross error upon the part of the arbitrators in law or in appreciation of the facts. *Neilson* v. *Quebec Bridge Co.*, Q. R. 21 S. C. 329.

Award — *Appeal — Evidence — Reasons for Award—Value of Lands Taken—Injury to Other Lands.*]—1. Written reasons for an award of compensation for land expropriated under the Railway Act of Canada are admissible as evidence upon appeal therefrom. 2. The Court upon the appeal is to review the judgment of the arbitrators as it would that of a subordinate Court. 3. In this case the principle adopted by the arbitrators was approved, but a mistake in the acreage was corrected, and also a mistake in the amount settled as the original cost of the land, which increased the amount of the award from $2,856 to $5,681. 4. To estimate the injury to the portion of the claimants' lands not taken, the original price paid by them for the whole property was taken, interest thereon from the time of purchase to the date of the award added, and the value of the portion left after the severance, according to the evidence, deducted from the total. 5. It makes no difference as to the principle upon which compensation is to be awarded for lands injuriously affected that such lands have or have not been laid out in building lots; and therefore evidence of the condition of the real estate market in the locality is of much importance. *In re Brennan and Ottawa Electric R. W. Co.*, 21 Occ. N. 208.

Award—*Extension of Time for Making.*]—Arbitrators appointed to ascertain the compensation to be paid for lands expropriated under the Railway Act of Canada had, at their first meeting, fixed the 6th July, 1897, as the day for making their award. On the 29th June, 1897, after the claimant had closed his case, they adjourned till the 8th July, without having formally extended the time for making their award. At the time of the adjournment the solicitors for the parties were present and made no objection:—Held, reversing the judgment in Q. R. 16 S. C. 105, and restoring that in Q. R. 14 S. C. 409, that the adjournment itself was a sufficient extension of the time for making the award. *In re Wynnes and Montreal Park and Island R. W. Co.*, Q. R. 9 Q. B. 483.

Award of Compensation — *Appeal — Damages—New Evidence—Discretion—Costs —Injurious Affection.*]—On an appeal from an award of arbitrators, under the Railway Act of Canada, so far as the appreciation of damages is concerned no new evidence can be adduced, and no objection based upon the admission of illegal evidence, or the exclusion of legal evidence, can be considered, unless the illegalities complained of appear of record. 2. The award cannot be explained or varied by extrinsic evidence of the intention of the party making it. Error of law or fact on the part of the arbitrators, or excess of jurisdiction, must appear on the face of the award, or from the evidence or documents of record. 3. The Court will not interfere with the discretion of the arbitrators as to the amount of the award, unless it be as a check upon possible fraud, accidental error, or gross incompetence. 4. The award of costs by the arbitrators does not invalidate the award, where it simply follows the rule established by the Railway Act itself, for in such case the party has no grievance. 5. The award of a block sum is valid, the law not requiring the arbitrators to distinguish between the amount awarded for value of land taken, and that awarded for damages to other lands. *Pontiac Pacific Junction R. W. Co.* v. *Sisters of Charity of Ottawa*, Q. R. 20 S. C. 567.

Breach of Contract—*Interim Injunction.* —Where a petitioner for an injunction shews that his rights under the terms of a contract made by him with the respondents, and under a servitude granted by them over the property acquired, are violated by them, and another railway company under agreement with them, an interlocutory order of injunction will be granted to restrain the respondents from the performance of any acts in violation of the contract and servitude. 2. Where a railway company, by expropriation proceeding, obtain land for one object and make use of it for another, causing additional damage to the expropriated party, particularly when the railway company have declared that they so expropriated for the former object in order to save the greater damage resulting from the other object, the expropriated party is entitled to an interlocutory order of injunction, irrespective of his right to recover damages, the object of the law being that all damages must be paid before expropriation. *Hampson* v. *Chateauguay and Northern R. W. Co.*, 6 Q. P. R. 283.

Compensation — *Set-off — Increased Value.*]—If, by reason of advantages, however problematical or uncertain, the value of a parcel of land (part of which has been expropriated for the construction of a railway) has been increased by reason of the railway, the arbitrators may take into consideration such increase in value as a set-off to the damages resulting from the expropriation of a part. *Chateauguay and Northern R. W. Co.* v. *Trenholme*, Q. R. 11 K. B. 45.

Entry without Expropriation—*Trespass — Injunction — Resolution of County Council—Town within County.*]—By the defendants' Act of incorporation (60 V. c. 82, N. S.) the lands required by them for track or station or like purposes "shall be a county charge and be payable by the county through which the line of railway passes, subject however, to resolution of the municipal council of the said county authorizing the acquisition of said lands." The proposed line lay wholly within the county of A. A town, B., within the county, was incorporated in 1897, after the defendants' Act was passed, and lay in the proposed course of the railway.

On the 23rd October, 1900, the county council passed a resolution that "a free right of way and lands necessary for railway purposes from V. B. to M., in the county of A., be granted" to the defendants, "said right of way to be paid for on the completion of said line of railway." In 1902, at the instance of the council of the town of B., an Act was passed, 2 Edw. VII. c. 62 (N.S.), authorizing the town to expropriate the necessary lands, and providing for entry thereon upon payment or tender of the compensation awarded by arbitrators. The Nova Scotia Railway Act, R. S. N. S. c. 99, provides (s. 164) that where the charter makes the cost of the right of way a charge upon any municipality, it shall not be necessary for the company to expropriate, and there is no provision authorizing the company to enter before the municipality has expropriated:—Held, that the plaintiff was entitled to have the defendants enjoined as trespassers from entering upon his lands in the town of B. until such lands had been expropriated and the compensation paid. *Calder* v. *Middleton and Victoria Beach R. W. Co.*, 23 Occ. N. 18.

Immediate Possession — Security — Compensation and costs — Quantum. *Re Davies and James Bay R. W. Co.*, 6 O. W. R. 388.

Notice — *Withdrawal after Possession—New Notice—Increase in Compensation Money—Arbitrator—Costs.*] — A railway company, having given notice of requiring certain land for their railway, and having taken possession of it, cannot abandon their notice and give a new notice for the same land. Canadian Pacific R. W. Co. v. Little Seminary of Ste. Thérèse, 16 S. C. R. 606, applied. Where the company named in their new notice a larger sum of compensation money than in their original one, and a different arbitrator:—Held, upon a motion by the land owner to compel the company to proceed with the arbitration, that, although the new notice was ineffective, and the arbitration could proceed only under the original notice, the appointment of the new arbitrator should be confirmed (the land owner not objecting), and the company should be allowed to increase their offer, but not so as to prejudice the owner as to anything that might have occurred before the new notice, and the offer of the increased sum might be taken into consideration upon the question of costs. *In re Haskill and Grand Trunk R. W. Co.*, 24 Occ. N. 232, 7 O. L. R. 429, 3 O. W. R. 377.

Notice of Expropriation—Easement—Railway Act — "Lands"—Amendment. *Re James Bay R. W. Co. and Worrell*, 6 O. W. R. 512.

Orders in Council — Board of railway commissioners — Railway Act — Rights of placer miners—Open mines—Deposit of waste — Licenses — Renewal — Plan of line—Omission to file — Injunction — Compensation — Jurisdiction of Territorial Court—Remedy—Arbitration. *Day* v. *Klondike Mines R. W. Co.* (Y.T.), 2 W. L. R. 205.

Statute — *Construction — Tramway for Transportation of Materials.*] — The place where materials are found referred to in s. 114 of the Railway Act means the spot where the stone, gravel, earth, sand, or water required for the construction or maintenance of the railway are naturally situated, and not any other place to which they have been subsequently transported. Per Taschereau and Girouard, JJ.:—The provisions of s. 114 confer upon railway companies a servitude consisting merely in the right of passage, and do not confer any right to expropriate lands required for laying the tracks of a tramway for the transportation of materials to be used for the purposes of construction. *Quebec Bridge Co.* v. *Roy*, 23 Occ. N. 39, 32 S. C. R. 572.

Warrant for Immediate Possession —Notice to bare trustee—Necessity for notice to beneficial owners. *Re James Bay R. W. Co. and Worrell*, 6 O. W. R. 473, 10 O. L. R. 740.

VII. Fences.

Absence of Fence—*Liability to Strangers —Owner of Land Adjoining Railway.*]—Section 179 of the Railway Act of Canada, 51 V. c. 29, obliging railway companies to erect fences on both sides of their railway, is imperative and in the public interest, and the responsibility which it imposes subsists in regard to an animal belonging to a third person which, being lawfully upon a neighbouring lot, is killed by reason of the absence of such fence, in spite of the fact that the company have omitted to erect such fence upon the request of the owner of the neighbouring land. *Quebec Central R. W. Co.* v. *Pellerin*, Q. R. 12 K. B. 152.

Cattle on Track—*Running at Large — By-law of Municipality — Crown Lands.*] — The Act respecting railways, 53 V. c. 28, s. 2 (D.), enacts that if, in consequence of the omission or neglect of a railway company to erect, complete, and maintain a fence, "any animal gets upon the railway from an adjoining place where under the circumstances it might properly be, then the company shall be liable to the owner of every such animal for all damages in respect of it caused by any of the company's trains or engines." The plaintiff's cattle running at large in a municipality, under one of the by-laws of which they were permitted so to do, got upon Crown lands, and from the Crown lands on to the railway, and were killed on the track by one of the defendants' trains:—Held, Meredith, J., dissenting, that by virtue of the by-law permitting running at large, the cattle were properly on the Crown lands, and hence the defendants were liable under the above enactment. Such a by-law affects all unenclosed lands, and under it cattle may properly depasture and ramble over all open lands, wastes, or commons, even if owned by the Crown, if no objection is taken thereto and no barrier or fences be erected against them. Judgment of Britton, J., 2 O. W. R. 479, varied. *Fensom* v. *Canadian Pacific R. W. Co.*, 24 Occ. N. 87, 391, 7 O. L. R. 254, 8 O. L. R. 688, 3 O. W. R. 227, 4 O. W. R. 373.

Culvert—*Negligence—Cattle on Track.*]—A railway company are under no obligation to erect and maintain a fence on each side of a culvert across a watercourse. Where cattle went through a culvert into a field and thence to the highway and straying on to the railway track were killed, the company were held, not liable to their owner; Taschereau, J., dissenting. Judgment of Court of Appeal,

1 O. L. R. 127, 21 Occ. N. 110, affirming the decision at the trial, 31 O. R. 672, 20 Occ. N. 278, reversed. *James* v. *Grand Trunk R. W. Co.*, 22 Occ. N. 2, 31 S. C. R. 420.

Defective Fencing—*Cattle—Highway—Negligence.*]—The plaintiff was the owner of a field, bounded on the one side by the main line of the defendants' railway, and on the other side by a switch thereof, and abutting on a highway, which was crossed by both tracks. Owing to a defect in the fence between the switch and the field, the plaintiff's cow escaped from the field on to the switch, which she crossed, and, going over the land of a private owner, which was not fenced off from the switch, and then along a lane, she got on to the highway, and then proceeding along the highway she got to the main line, whence by reason of a defective cattle guard she got on to the track and was killed by a passing train: — Held, that the defendants were liable therefor. James v. Grand Trunk R. W. Co., 31 S. C. R. 420, distinguished. *Davidson* v. *Grand Trunk R. W. Co.*, 23 Occ. N. 185, 5 O. L. R. 574, 2 O. W. R. 185.

Duty to Maintain—*Opening in Fence—Cattle.*] — As the law obliges railway companies to maintain fences on both sides of the track in a good condition, it follows that they are responsible for damage caused to an animal in consequence of their having in one of such fences left an opening of such a size as to permit of an animal getting through, and that even where such opening is at a spot where there is a ditch used for the purpose of draining the lands on each side of the track. *Huot* v. *Quebec R. W., Light, and Power Co.*, Q. R. 21 S. C. 427.

Injury to Horse.]—The defendants maintained along their line of railway, through a farming country, a barbed wire boundary fence, without any pole, board, or other capping connecting the posts; the plaintiff's horse, picketed in his field adjoining, became frightened from some cause unexplained and ran into the fence and received injuries on account of which it had to be killed:—Held, that the fence was not inherently dangerous, and therefore the company were not liable. The test is whether the fence is dangerous to ordinary stock under ordinary conditions and not whether it is dangerous to a bolting horse. *Plath* v. *Grand Forks and Kettle River Valley R. W. Co.*, 24 Occ. N. 258, 10 B. C. R. 299.

Negligence—*Damages — Remoteness.*] — Under s.-s. 3 of s. 194 of the Railway Act (53 V. c. 28, s. 2), a railway company is not liable in damages for the death of an animal which, having got on the track through a defective fence, is frightened by a train and then runs into a barbed wire in another part of the fence and is so cut by the barbs that it dies. The damage to the animal cannot be said to be "caused by any of the company's trains or engines," unless the animal is actually struck by the train or engine. Dicta of the Judges in James v. Grand Trunk R. W. Co., 1 O. L. R. 127, 31 S. C. R. 420, and decision in Winspear v. Accident Insurance Co., 6 Q. B. D. 42, followed. *McKellar* v. *Canadian Pacific R. W. Co.*, 24 Occ. N. 152, 14 Man. L. R. 614.

Negligence—Excessive speed in city—Unfenced track—Findings of jury—Contributory negligence of child—Inference from facts—Rule 817. *Potvin* v. *Canadian Pacific R. W. Co.*, 4 O. W. R. 511.

Negligence—*Failure to Fence—Contributory Negligence.*]—A street ran to the north and to the south from the defendants' tracks in the city of Hamilton, but did not cross them. With the tacit acquiescence of the defendants, however, foot passengers were in the habit of crossing the tracks from one part of the street to the other, and for convenience in doing so part of the fence between the tracks and each part of the street had been removed. A boy of nine, intending to cross from one part of the street to the other, walked through the opening in the fence to one of the tracks. While he was standing and playing upon this track waiting for a train on another track to pass, he was struck by a train running at a speed of about forty miles an hour and was killed:—Held, that there was a clear neglect of a statutory duty by the defendants in permitting the tracks to remain unfenced, and at the same time running at such a high rate of speed; that it was for the jury to say whether, upon all the facts, the deceased had displayed such reasonable care as was to have been expected from one of his tender years, and that their verdict in favour of the child's father could not be interfered with. *Tabb* v. *Grand Trunk R. W. Co.*, 24 Occ. N. 304, 8 O. L. R. 203, 3 O. W. R. 885.

"Negligence or Wilful Act or Omission of Owner" — "Improved or settled, and inclosed"—Railway Act, 3 Edw. VII. c. 58, ss. 199, 237 (D.). *Phair* v. *Canadian Northern R. W. Co.*, 6 O. W. R. 137.

Railway Act, 1903, s. 199 (3)—"*Improved or Settled, and Inclosed.*]—1. Under s. 199 of the Railway Act, 1903, a railway company is required to erect and maintain fences suitable and sufficient to prevent cattle from getting on the railway from adjoining land which is cultivated and settled on, although not inclosed. 2. The words "not improved or settled, and inclosed," in s.-s. 3 of that section, describing lands in respect of which the company is not required to fence, should either be constructed to mean "not improved and not inclosed, or not settled and not inclosed," or should be read with the comma put after the word "improved," instead of after the word "settled," thus, "not improved, or settled and inclosed," so that, either way, the obligation to fence exists as to land that is either (1) improved, or (2) settled and inclosed. *Dreger* v. *Canadian Northern R. W. Co.*, 15 Man. L. R. 386, 1 W. L. R. 126.

VIII. Injury to Persons.

Brakesman—*Death—Negligence—Defects in Equipment of Train — Pleading.*] — The plaintiff's claim was for damages for the death of his son, an infant, alleged to have been occasioned by the negligence of the defendants, on one of whose freight trains he was working as a brakesman at the time of the accident which resulted in his death. The alleged negligence consisted in the absence of air brakes and bell signal cords from the equipment of the train:—Held, that, although the Railway Act in force at the time of the accident required only passenger trains to be

equipped with bell signal cords and air brakes, it was still a question depending upon evidence whether the absence of these appliances on freight trains was negligence for the purposes of such an action. The statement of claim should allege that the defendants were aware or should have been aware of the defects. It is not necessary to allege that the deceased was ignorant of the defects. *Makarsky* v. *Canadian Pacific R. W. Co.*, 15 Man. L. R. 53.

Brakesman — Negligence of fellow-servants—Turning switch in face of approaching train—Derailment of train—Contributory negligence—Speed of train—Damages—Quantum. *Stewart* v. *Père Marquette R. W. Co.*, 6 O. W. R. 724.

Conductor — *Negligence — Proximate Cause—Imprudence of Person Injured—Display of Wrong Signal—Case for Jury—New Trial.*]—A railway train was approaching a station in London, and the conductor jumped off before it reached it, intending to cross a track between his train and the station, contrary to the rule forbidding employees to get off a train in motion. A light engine was at the time coming towards him on the track he wished to cross, which struck and killed him. The light engine was moving reversely, and shewed a red light at the end nearest the conductor, which would indicate that it was either stationary or going away from him. In an action by the conductor's widow she was nonsuited at the trial, and a new trial was granted by the Court of Appeal, 3 O. W. R. 892:—Held, reversing the judgment of the Court of Appeal, Davies and Killam, JJ., dissenting, that, as the light engine had been allowed to pass a semaphore beyond the station, on the assumption, which was justified, that it would pass before the train came to a stop at the station, and as, if the deceased had not, contrary to rule, left the train while in motion, he could not have come into contact with the engine, the plaintiff was not entitled to recover. Per Davies and Killam, JJ., dissenting, that the act of the deceased in getting off the train when he did was not the proximate cause of the accident, and the plaintiff was entitled to have the opinion of the jury as to whether or not deceased was misled by the red light. *Birkett* v. *Grand Trunk R. W. Co.*, 25 Occ. N. 1; *Grand Trunk R. W. Co.* v. *Birkett*, 35 S. C. R. 296.

Death—*Negligence — Defective Engine — Dangerous Crossing—Undue Speed—"Train of Cars" — Crown Railway — Discretion of Minister — Precautionary Measures against Accident.*]—The husband of the suppliant was killed by being struck by the tender of an engine while he was on a level crossing over the Intercolonial Railway tracks in the city of Halifax. The evidence shewed that the crossing was a dangerous one, and that no special provision has been made for the protection of the public:—Held, that the accident was attributable to the negligence of officers and servants of the Crown employed on the railway, both in using a defective engine and in maintaining too high a rate of speed under the circumstances. 2. An engine and tender do not constitute a "train of cars" within the meaning of s. 29 of the Government Railway Act, R. S. C. c. 38. Hollinger v. Canadian Pacific R. W. Co., 21 O. R. 705, not followed. 3. Where the Minister of Railways, or the Crown's officer under him whose duty it is to decide as to the matter, comes, in his discretion, to the conclusion not to employ a watchman or to set up gates at any level crossing over the Intercolonial Railway, it is not for the Court to say that the Minister or the officer was guilty of negligence because the facts shew that the crossing in question was a very dangerous one. *Harris* v. *The King*, 24 Occ. N. 388.

Death—Negligence — Display of wrong signal—Contributory negligence—More than one possible conclusion from facts not in dispute—Case for jury—Nonsuit—New trial. *Birkett* v. *Grand Trunk R. W. Co.*, 3 O. W. R. 892.

Negligence—*Braking Apparatus—Notice of Defects—Benefit Society—Contract Indemnifying Employer.*]—The "sander" and sand-valves of a railway locomotive, which may be used in connection with the brakes in stopping a train, do not constitute part of the "apparatus and arrangements" for applying the brakes to the wheel required by s. 243 of the Railway Act of 1888. Failure to remedy defects in the sand-valves, upon notice thereof given at the repair shops in conformity with the company's rules, is merely the negligence attributable to the company itself; therefore, the company may validly contract with its employees so as to exonerate itself from liability for such negligence, and such a contract is a good answer to an action under art. 1056 of the Civil Code of Lower Canada. The Queen v. Grenier, 30 S. C. R. 42, followed. Girouard, J., dissented on the ground that the negligence found by the jury was negligence of both the company and its employees. Judgment in Q. R. 12 K. B. 1, affirming judgment in review, Q. R. 21 S. C. 346, reversed. *Grand Trunk R. W. Co.* v. *Miller*, 24 Occ. N. 77, 34 S. C. R. 45.

Negligence—Conflicting evidence — Findings of jury—Excessive damages—Reduction—New trial. *Hockley* v. *Grand Trunk R. W. Co.*, *Davis* v. *Grand Trunk R. W. Co.*, 5 O. W. R. 572.

Negligence—*Excessive Speed—Fencing—Railway Act—Evidence—Reasonable Inferences.*]—The provisions of 55 & 56 V. c. 27, s. 6, amending s. 197 of the Railway Act, 1888, and requiring, at every public road crossing at road level of the railway, the fences on both sides of the crossing and of the track to be turned into the cattle guards, apply to all public road crossings, and not to those in townships only, as is the case of the fencing prescribed by s. 194 of the Railway Act, 1888. Grand Trunk R. W. Co. v. McKay, 34 S. C. R. 81, followed. Three persons were near a public road crossing when a freight train passed, after which they attempted to pass over the track, and were struck by a passenger train coming from the direction opposite to that of the freight train, and killed. The passenger train was running at the rate of 45 miles an hour, and it was snowing slightly at the time. On the trial of actions under Lord Campbell's Act against the railway company, the jury found that the death of the three persons was due to negligence "in violating the statute by running at an excessive rate of speed," and that deceased were not guilty of contributory negligence. A verdict for the plaintiff in each case was maintained by the Court of Appeal:—Held,

that the defendants were liable: that the deceased had a right to cross the track, and there was no evidence of want of care on their part, and the same could not be presumed; and, though there may not have been precise proof that the negligence of the company was the direct cause of the accident, the jury could reasonably infer it from the facts proved; and their finding was justified. McArthur v. Dominion Cartridge Co., [1905] A. C. 72, followed. Wakelin v. London and South Western R. W. Co., 12 App. Cas. 41, distinguished:—Held, also, that the fact of deceased starting to cross the track two seconds before being struck by the engine was not proof of want of care, that owing to the snowstorm and the escaping steam and noise of the freight train they might well have failed to see the headlight, or hear the approach of the passenger train if they had looked and listened. Judgment of the Court of Appeal affirmed. *Hainer* v. *Grand Trunk R. W. Co.*, 25 Occ. N. 93; *Grand Trunk R. W. Co.* v. *Hainer*, 36 S. C. R. 180.

Negligence—*Failure to Look for Train—Contributory Negligence—Case for Jury.*]—The plaintiff was injured by being struck by the engine of a train of the defendants while crossing their track at a level highway crossing. Had he looked, he could have seen the approach of the train, but he did not look. There was some evidence that the usual statutory signals of the approach of the train were not given. The plaintiff sought to recover damages for his injuries:—Held, not a case which could be withdrawn from the jury. The defence that the plaintiff should have looked out for the train was one of contributory negligence, and must be left to the jury. Morrow v. Canadian Pacific R. W. Co., 21 A. R. 149, and Vallée v. Grand Trunk R. W. Co., 1 O. L. R. 224, followed. *Sims* v. *Grand Trunk R. W. Co.*, 10 O. L. R. 330, 5 O. W. R. 664.

Negligence—Failure to look for train—Efficient cause of accident—Nonsuit—Contributory negligence. *Wright* v. *Grand Trunk R. W. Co.*, 5 O. W. R. 802.

Negligence—Speed of train—Failure to give statutory warning—Fences—Thickly populated part of town—Contributory negligence—Findings of jury—New trial. *Andreas* v. *Canadian Pacific R. W. Co.* (N.W.T.), 2 W. L. R. 249.

Negligence—*Warning of Approach of Train—Failure to Give—Reasonable Excuse for Omission to Look for Train before Crossing—Question for Jury—Nonsuit Set Aside—New Trial.*]—Plaintiff was driving in a southerly direction, at night, along a road called the Luzon road, which crosses defendants' line at a right angle. The carriage in which he was driving was struck at the crossing by an express train of defendants' from the east. Plaintiff was thrown out and injured, and his carriage was damaged. Evidence shewed that the plaintiff neither saw nor heard the train approaching until he found himself actually crossing the track, immediately before he was struck, when it was too late to avoid it. He said that the night was so dark that he could not even see the fences at the side of the road, and that he mistook his position in consequence, and supposed that he was still some 400 feet away from the railway track when he found himself upon it. It seemed plain, however, that he must have seen the train had he been at all on the alert. There was some evidence that the cover of the carriage in which he was sitting was up, and this would have prevented his seeing the train. Wakelin v. London and South Western R. W. Co., 12 App. Cas. 41, and Vallée v. Grand Trunk R. W. Co., 1 O. L. R. 224, considered:—Held, that where the railway company fails to give the statutory warning of the approach of a train, and an accident happens, plaintiff is entitled to have the opinion of the jury upon any reasonable excuse given for the omission to look out for the approach of the train, and the Judge cannot himself pass upon the sufficiency of the excuse. The excuses offered by plaintiff in the present case for his omission to see the approach of the train in time to avoid the accident, should not, in accordance with the authorities, have been withdrawn from the jury. Nonsuit set aside and new trial ordered. *Champagne* v. *Grand Trunk R. W. Co.*, 5 O. W. R. 218, 9 O. L. R. 589.

Negligence—Workmen in grain elevator—Tracks in elevator—Shunting engine—Warning—Findings of jury—New trial. *Mott* v. *Grand Trunk R. W. Co.*, 5 O. W. R. 42.

Passenger—*Alighting from Moving Car—Negligence—Contributory Negligence—Findings of Jury—Damages.*]—A railway company which has undertaken to carry a passenger to a station on its line must stop its train at that station long enough to give the passenger a reasonable opportunity of getting off. If the train stops, and the passenger, after making reasonable efforts to do so, is unable to get off before it starts again, and jumps off and is injured, the company is liable in damages; provided, however, that, when the passenger jumps off, the train is not moving at such a rate of speed as to make the danger of jumping obvious to a person of reasonable intelligence. The fact of a passenger getting off a train while it is in motion is not in itself evidence of negligence. In every case it is a question to be decided by the jury whether the passenger acted as a reasonable man would do under the circumstances. Where a train scheduled to stop at a named station, did not, on arriving there, stop a sufficient length of time to enable the passengers to get off, and a passenger in attempting to do so, after the train had started, stumbled and fell and was injured, and it was found by the jury on the evidence that he acted as a reasonable man would do under the circumstances, the Court refused to interfere with their finding, or to reduce the damages awarded, $1,000. *Keith* v. *Ottawa and New York R. W. Co.*, 1 O. W. R. 104, 749, 22 Occ. N. 114, 3 O. L. R. 265, 23 Occ. N. 85, 5 O. L. R. 116.

Passenger — *Mere Licensee — Duty of Company—Negligence.*]—N. had a contract with the defendants to repair a bridge, and, while riding on the locomotive of the company's coal train on his way to the work, he was killed by reason of the train falling through the bridge. The engine driver in charge of the train (there being no conductor) had no authority to take passengers, and had instructions not to allow persons to travel on the engine without permission from some competent authority, but the company's officers and servants and other persons authorized by the manager and master mechanic used to

ride on the coal train. A few days before the accident N. and the defendants' manager had gone down to the bridge on the engine of a coal train and returned the same way the same day. In an action by N.'s representatives to recover damages from the company for his death, the jury found that the company had undertaken to carry N. as a passenger:—Held, that there was no evidence to support such a finding, and that N. was a "mere licensee." The relation of common carrier and passenger does not exist when a person travels on the locomotive of a coal train without the permission of some officer who has authority to give such permission, and, if injured, such a person has no right to action unless injured through the dolus as distinguished from the culpa of the carrier. *Nightingale* v. *Union Colliery Co. of British Columbia*, 23 Occ. N. 206, 9 B. C. R. 453.

Passenger in Sleeping Berth—*Negligence.*]—The plaintiff was a passenger by a night train on the defendants' railway. After retiring to the berth assigned to her—an upper one—she endeavoured to make some change in the manner in which the berth was made up. She next tried to reach the other end of the berth from the inside, but, just as she leaned to the inside of the car, there was a violent lurch and jerk which threw her into the middle of the passage way, on her back, inflicting severe injuries:—Held, that there was evidence of negligence to go to the jury; and a nonsuit was set aside, and a new trial directed. *Smith* v. *Canadian Pacific R. W. Co.*, 34 N. S. Reps. 22. Reversed and nonsuit restored; *S. C.*, 21 Occ. N. 427, 31 S. C. R. 367.

Person Crossing Track — *Highway Crossing—Neglect to Give Statutory Warning —Contributory Negligence.*]—Persons lawfully using a highway are entitled to assume that the statutory warning will be given by a train crossing the highway, and are not guilty of contributory negligence because while driving a restive horse they approach, in the absence of warning, so close to the crossing as to be unable to control the horse when the train crosses, and are injured, even though they probably, by looking or listening, would have learned of the approach of the train in time to stop far enough away to be in safety. The question of contributory negligence in such a case is for the jury to determine. Morrow v. Canadian Pacific R. W. Co., 21 A. R. 149, followed. *Vallee* v. *Grand Trunk R. W. Co.*, 21 Occ. N. 109, 1 O. L. R. 224.

Person Crossing Track — Negligence —Contributory negligence—Findings of jury. *Lennox* v. *Grand Trunk R. W. Co.*, 1 O. W. R. 771.

Person Crossing Track — Negligence —Operating train on line of other company —Subsequent amalgamation — Name — Revivor — Damages — Reduction on appeal. *Brewer* v. *Lake Erie and Detroit River R. W. Co.*, 2 O. W. R. 125.

Person Crossing Track — Negligence —Proximate cause — Right to lay tracks. *Bonnville* v. *Grand Trunk R. W. Co.*, 1 O. W. R. 304.

Person Crossing Track — Negligence —Train running reversely — Speed in city—Statutes — Warning — Contributory negligence—Jury. *Moyer* v. *Grand Trunk R. W. Co.*, 2 O. W. R. 83.

Person Crossing Track — Negligence of servants — Non-repair of highway. *Holden* v. *Township of Yarmouth*, 5 O. L. R. 579, 1 O. W. R. 557, 2 O. W. R. 130.

Person Crossing Track — *Speed—Contributory Negligence—Damages — Remoteness —Succession — Debts of.*]—When a railway train approaches a station at the ordinary speed (twelve miles an hour) of a train about to stop at a station—in a place where the Railway Committee has not ordered a barrier to be placed and which is not shewn to be a populous part of a city, town, or village—and when all the warnings required by law have been given, the railway company are not responsible for an accident happening from the engine striking a vehicle driven in an imprudent manner and at an immoderate speed; and so even where freight cars placed upon a switch have prevented the approach of the train from being seen, the company having the right to use their switch in that way. 2. Even if the company were liable, the plaintiffs could not recover damages for the loss of the labour and society of their mother, aged 76, who was killed in the accident, or for the nervous shock sustained by one of the plaintiffs owing to her mother's death, such damages being problematical, indirect, and remote; nor could the plaintiffs—having accepted the succession of their mother—recover as damages the funeral expenses of their mother and the price of their own mourning garments, they having in paying such expenses but discharged debts properly due by the succession, which would be presumed to be more profitable than onerous, as the plaintiffs had accepted it. *Filiatrault* v. *Canadian Pacific R. W. Co.*, Q. R. 18 S. C. 491.

Person Crossing Track—Speed of train in town—Fences—Warnings—Statutory provisions—Jury. *McKay* v. *Grand Trunk R. W. Co.*, 5 O. L. R. 313, 2 O W. R. 57.

Person Crossing under Railway Bridge—*Height — Injury to Person—Railway Acts — Volens.*] — The plaintiff was driving a load of hay on a public highway within the limits of a village, sitting on top of his load. A railway, at a point within the village, was carried over the highway by an iron bridge, and the plaintiff, while driving along the highway under the bridge, was struck on the head by the girders and knocked off the load and injured. The bridge was built in 1856 at a height greater than that required by s. 185 of the Railway Act, 51 V. c. 29, but the municipality and their predecessors, owners of the road, subsequently so raised its level as to leave less than the statutory space between the road and the bridge:—Held, that the section must be construed as compelling the railway company to construct their bridges in the first place so as to leave the required space below them to the highway and to maintain them at, at least, that height from the original surface of the highway, and not as obliging them to conform from time to time to new conditions created by the persons having control of the highway. Gray v. Danbury, 54 Conn. 574, specially referred to. Quære, whether the plaintiff could have succeeded in any

event against the railway company, he having deliberately incurred the risk of the squeeze, which he foresaw, instead of stopping his horses and putting himself into a place free from danger, as he might easily have done. *Carson* v. *Village of Weston*, 21 Occ. N. 145, 1 O. L. R. 15.

Person Lawfully in Station Yard — *Proximate Cause—Negligence — Contributory Negligence.*]—The plaintiff was walking between the rails of the defendants' tracks in a station yard, and was run down and injured by a reversed engine and tender:—Held, that, even if the defendants were guilty of negligence in not giving notice that the engine and tender were in motion, as there was a space between the tracks in the yard where the plaintiff would have been safe, he was guilty of negligence in walking between the rails, and could not recover. Callendar v. Carleton Iron Co., 9 Times L. R. 646, 10 Times L. R. 366, followed. *Phillips* v. *Grand Trunk R. W. Co.*, 21 Occ. N. 161, 1 O. L. R. 28.

Person Loading Car—Train running into car — Negligence — Appliances—Evidence—Misdirection—Res ipsa loquitur—Evidence as to cause. *Mecnie* v. *Tilsonburg, Lake Erie, and Pacific R. W. Co.*, 5 O. W. R. 69, 6 O. W. R. 286, 955.

Precautions—*Negligence.*] — From the moment that a railway company, by itself or its servants, has taken all possible and reasonable precautions, it is thereby relieved from all responsibility which might rest upon it in consequence of accidents happening under such circumstances as are mentioned in the report of this case. *Villeneuve* v. *Canadian Pacific R. W. Co.*, Q. R. 21 S. C. 422.

Servant — *Limitation of Actions —"By Reason of the Railway"—Amendment—Vested Right.*]—The provisions of the Railway Act, 1888, s. 287 (as to limitations of actions for damages or injury sustained by reason of the railway) apply to actions founded on the commission of acts, not to those founded on the omission of acts, which it was the company's duty to perform. Kelly v. Ottawa R. W. Co., 3 A. R. 616, McWillie v. North Shore R. W. Co., 17 S. C. R. 571, and Zimmer v. Grand Trunk R. W. Co., 19 A. R. 693, considered. If, in an action against a railway company, an amendment of the statement of claim is asked for, it should not be allowed if s. 287 applies, and the amendment sets up a new cause of action. *Findlay* v. *Canadian Pacific R. W. Co.*, 21 Occ. N. 461, 5 Terr. L. R. 143.

Servant — *Overhead Bridge—Car of Another Company — "Used on the Railway.*]—When a car of a foreign railway company forms part of a train of a Canadian railway company, it is "used" by the latter company within the meaning of s. 192 of the Railway Act, 51 V. c. 29 (D), so as to make that company liable in damages for the death of a brakesman caused by the car being so high as not to leave the prescribed headway between it and an overhead bridge. *Atcheson* v. *Grand Trunk R. W. Co.*, 21 Occ. N. 108, 1 O. L. R. 168.

Yardsman — Negligence — Contributory negligence—Shunting cars — Failure to look—Functions of Judge and Jury—Nonsuit. *London and Western Trusts Co.* v. *Pere Marquette R. W. Co.*, 6 O. W. R. 321, 329.

IX. Injury to Property.

Animal Crossing Track — Highway—Neglect to give warning — Contributory negligence — Findings of Judge — Appeal to Divisional Court. *Smith* v. *Niagara, St. Catharines, and Toronto R. W. Co.*, 4 O. W. R. 526.

Damage to Property Adjoining Railway — *Negligence — Evidence — Provincial Statutes Respecting Setting out Fire — Intra Vires—Application to Canadian Pacific Railway Company.*]—In an action brought by the owner of a lot of woodland adjoining the defendants' line of railway to recover damages alleged to have been caused by a fire negligently started by the defendants' servants, and allowed to extend to the plaintiff's land, it appeared in evidence that N., a section foreman of the defendants' railway, set fires to burn up some piles of sleepers and rubbish on the railway line. The weather had been very dry for a long time, and forest fires were burning all over the country. Witnesses on behalf of the plaintiff testified that they saw fire on the railway line at this time, and traced its course through the fence to the plaintiff's land. N. swore that the fires which he started were all burnt out before the fire was seen on the plaintiff's property, and other evidence was given to the same effect. The jury found that the fire spread from the fire set by N., and that N. negligently and unreasonably allowed it to extend. A verdict was entered for the plaintiff for $500:—Held, that there was sufficient evidence to justify the verdict. Per Tuck, C.J., and McLeod, J., that 48 V. c. 11 and 60 V. c. 9 (to prevent the destruction of forests and other property by fire) are not ultra vires of the local legislature. Per McLeod, J., that the defendants, having brought on their land a dangerous element, not naturally there, did so at their peril, and, if it caused injury, they were liable, though no negligence was proved. The provision of the statutes that a person starting a fire, except for certain purposes specified, between the 1st May and the 1st December is guilty of negligence, applied to the defendants, and they were, therefor, liable under the Acts as well as at common law. *Grant* v. *Canadian Pacific R. W. Co.*, 36 N. B. Reps. 528.

Destruction of Property — Verdict against company—Fire insurance—Credit for insurance moneys. *Stratford* v. *Toronto, Hamilton, and Buffalo R. W. Co.*, 6 O. W. R. 698.

Fire—*Sparks from Engine—Evidence — Verdict.*]—See *Jackson* v. *Grand Trunk R. W. Co.*, 22 Occ. N. 12, 249, 2 O. L. R. 689, 32 S. C. R. 245.

Fire—*Sparks from Engine—Negligence—Statutory Powers—Costs.*]—A railway company authorized by statute to carry on its railway undertaking in the place and by the means adopted is not responsible in damages for injury not caused by negligence, but by the ordinary and normal use of its railway: or, in other words, by the proper execution of the power conferred by the statute. Geldis v. Proprietors of Bann Reservoir, 3 App.

Cas. 430, 438, and Hammersmith R. W. Co. v. Brand, L. R. 4 H. L. 215, followed. The previous state of the common law imposing liability cannot render inoperative the positive enactment of a statute. Neither the Civil Code of Lower Canada, art. 356, nor the Dominion Railway Act, ss. 92, 288, on their true construction, contemplates the liability of a railway company acting within its statutory powers. So held, where the respondent had suffered damage caused by sparks escaping from one of the appellants locomotive engines while employed in the ordinary use of its railway. Judgment in 20 Occ. N. 441, Q. R. 9 Q. B. 551, reversed. Appeal allowed, appellants to pay respondent's costs in accordance with the terms on which special leave to appeal was granted. *Canadian Pacific R. W. Co.* v. *Roy*, [1902] A. C. 220.

Fire — *Sparks from Engine—Negligence, Absence of—Liability.*]—Action for damage for injury to trees caused by fire arising from sparks from a locomotive engine belonging to the defendant company:—Held, following Roy v. Canadian Pacific R. W. Co., Q. R. 9 Q. B. 551, 20 Occ. N. 441, that, where injury is occasioned by sparks from an engine, the railway company is responsible in damages for the same, without proof of direct negligence in the operation of the road. *Henley* v. *Canadian Pacific R. W. Co.*, 21 Occ. N. 394.

Right to Compensation—Operation of railway—Alterations in street—Interference with access—Injury from smoke, etc. *Re Macdonald and Toronto, Hamilton, and Buffalo R. W. Co.*, 2 O. W. R. 721, 723.

X. LANDS.

Agreement to Purchase—Requisitions on title—Application by vendor under Vendors and Purchasers Act—Railway company obtaining leave to pay purchase money into Court under Railway Act—Costs. *Re Rousseaux and Toronto, Hamilton, and Buffalo R. W. Co.*, 3 O. W. R. 824.

Award — Valuation — Interest of arbitrator—Extension of time for making award—Provisions of award—Letter by landowner to arbitrators—Compensation — Amount — Reducing on appeal. *Re Canadian Pacific R. W. Co. and Du Caillaud*, 3 O. W. R. 33.

Deed — *Construction — Fencing—Boundaries — Estoppel — Registry Laws — Riparian Rights — Prescription — Tenant by Sufferance — Damages — Emphyteusis — Alienation — Parties.*]—The plaintiffs, a railway company, purchased land from P. bounded by a non-navigable river, as "selected and laid out" for their permanent way. Stakes were planted to shew the side lines, and the railway fencing was placed here and there above the water line, although the company could not have had the quantity of land conveyed unless they took possession to the edge of the river. P. remained in possession of the strip between the fence and the water's edge and of the bed of the stream ad medium, and, after the registration of the deed to the company, sold the rest of his property, including water rights, to the defendant's grantor, describing the property sold as "including that part of the river which is not included in the right of way," etc. The company never operated their line of railway, but leased it for 999 years to another company, by whom it was operated:—Held, that the description in the deed to the railway company included, ex jure naturæ, the river ad medium, as an incident of the grant. 2. That the possession by the vendor and his assigns of the strip and the bed of the river ad medium, was not the possession animo domini required for the acquisitive prescription of ten years under art. 2251, C. C., but merely an occupation as tenant by sufferance. 3. That the failure of the vendor to deliver the full quantity of land sold and the company's abstention from troubling him in his possession, could not be construed as conduct placing a different construction upon the deed. 4. That the terms of the description in the conveyance to the defendant's grantor, were a limitation equivalent to an express reservation of the part previously conveyed to the company, the defendant having also notice through the registration of the deed to the company. 5. That the acquisitive prescription of thirty years under art. 2242, C. C., could not run in favour of the vendor. 6. That the lease to the company which held and operated the railway amounted to an emphyteutic lease assigning the domaine utile and all the company's right in respect of the railway, reserving, however, the domaine direct, and consequently the lessor company had the right of action au petitoire, although the lessees would have the right of action for damages, and might be added as plaintiffs if there were any valid claim for damages. *Massawippi Valley R. W. Co.*, v. *Reed*, 33 S. C. R. 457.

Injury — Subsidence — Remedy — Action — Damages — Mandatory order — Continuing damages — Compensation — Stay of proceedings. *Hanley* v. *Toronto, Hamilton, and Buffalo R. W. Co.*, 6 O. W. R. 841, 11 O. L. R. 91.

Right of Way — Agreement with land owner — Construction — Trespass. *Matheson* v. *Grand Trunk R. W. Co.*, 3 O. W. R. 213.

Right of Way over Lands Occupied by another Railway—Order of Railway Committee—Expropriation — Notice — Defects in—Injunction. *Grand Trunk R. W. Co.* v. *Lindsay, Bobcaygeon, and Pontypool R. W. Co.*, 3 O. W. R. 54.

Subsidy — *Grant — Construction of Statute—Mines and Minerals — Reservation — Dominion Lands Act.*]—Held, that the appellant railway company, being entitled under 53 V. c. 4, (D.), and an order in council made in pursuance thereof, to grants of Dominion lands as a subsidy in aid of the construction of their railway, were entitled to them without any reservation by the Crown of mines and minerals except gold and silver. The Dominion Lands Act, 1886, and the Regulations of 1889 thereunder, which prescribe a reservation to that effect, do not apply. They relate only to the sale of Dominion lands and to the settlement, use, and occupation thereof. The grants in question were not by way of sale. Judgments in 8 Ex. C. 83, 33 S. C. R. 673, reversed. *Calgary and Edmonton R. W. Co.* v. *The King*, [1904] A. C. 765.

XI. Lease of Railway.

Passenger Train Service — *Contract with Government—Breach by Lessee—Waiver —Damages—Mandatory Injunction.*] — By an agreement the plaintiffs were to lease their line of railway to the defendants, upon the condition, inter alia, that the defendants would run a passenger train each way each day between stations A. and B. The lease was not executed, but the defendants went into possession of and operated the line. The plaintiffs alleged in their bill that at the time of the agreement, as was known to the defendants, they were under contract with the Government of New Brunswick to run a passenger train each way each day between A. and B.:—Held, that no case was made out for relief by mandatory injunction, which will only be granted where necessary for the prevention of serious damage, and that the question raised was merely one of pecuniary damages between the plaintiffs and defendants, for which the defendants were well able to account to the plaintiffs, and which by the lease the plaintiffs had agreed to accept in event of their liability, if any, to the Government, and that it did not appear that such liability had arisen. *Tobique Valley R. W. Co.* v. *Canadian Pacific R. W. Co.*, 21 Occ. N. 148, 2 N. B. Eq. Reps. 195.

XII. Passengers.

Death—Action by widow—Evidence—Res gestæ — Statements of deceased and of defendants' agent—Discrediting witness. *Henry* v. *Grand Trunk R. W. Co.*, 4 O. W. R. 23.

Expulsion of Passenger — *Indian — Passenger Rates—Special Contract—Custom —Withdrawal of Privilege—Absence of Notice—Accommodation — Jury — Damages.*]— A passenger holding a second class ticket on a railway cannot be compelled to travel in a smoking car. He is entitled to the accommodation usually furnished such passengers. Judgment of Britton, J., 3 O. W. R. 705, affirmed. Garrow and Osler, JJ.A., dissenting as to the conclusions of fact. *Jones* v. *Grand Trunk R. W. Co.*, 5 O. W. R. 611, 9 O. L. R. 723.

Free Pass—*Conditions — Construction— Liability for Negligence — Misdirection — Damages — New Trial.*]—See *Central Vermont R. W. Co.* v. *Franchère*, 35 S. C. R. 68.

Gratuitous Passenger—*Gross Negligence —Action—Limitation Clause—"By Reason of the Railway"—Release—Invalidity.*]—Defendants furnished plaintiff with an unconditional free pass upon their railway. Plaintiff, while a passenger on defendants' railway received injuries, the result of a head-on collision between two cars of the defendants, managed by the defendants' servants:—Held, there was prima facie evidence of negligence and plaintiff was entitled to recover. 2. The action was not barred under the limitation clause of the General Railway Act, R. S. O. 1897, c. 207, s. 42 which was incorporated in the defendants' special Act, although the action was brought later than six months after the accident occurred, because the action was based on the breach of the common law duty of the defendants, and not on injury sustained by reason of their railway. 3 R. S. O. 1897, c. 207, s. 42 (1) "may prove that the same was done in pursuance of and by authority of this Act and the special Act," mean only that "may prove that the damage or injury resulted by reason of the railway" as in the earlier part of same section. *Ryckman* v. *Hamilton, Grimsby and Beamsville Electric R. W. Co.*, 6 O. W. R. 271, 10 O. L. R. 419.

Injury to Passenger — Action — Limitation clause—"By reason of the railway"—"Works or operations of the company." *Sayers* v. *British Columbia Electric R. W. Co.*, (B. C.), 2 W. L. R. 152.

Injury to Passenger—*Evidence for Jury — Negligence — Railway Mail Clerk — Contractor — Principal and Agent — Master and Servant — Independent Contractor — Respondeat Superior — Misfeasance and Nonfeasance.*] — The action for damages for injury caused by negligence of a common carrier of passengers is in tort. A duty is imposed by law upon a common carrier of passengers to carry them safely and securely so that no damage or injury shall happen to them by the negligence or default of the carrier. A breach of this duty is one for which an action lies which is founded on the common law and requires not the aid of contract to support it. Corporations are liable for negligence whether they derive any ultimate pecuniary benefit or not from the performance of the duty imposed on them. If the passenger be carried in performance of a contract, it is immaterial whether he himself negotiated the contract or paid the fare, or whether any fare was paid, or if paid whether it went into the pocket of the defendants. The C. & E. R. Co. were the owners of a line of railway between the city of Calgary and the town of Edmonton, but owned no rolling stock and employed no staff for the operation of the road. They entered into an agreement with the C. P. R. Co., the defendants, "for the regulation and interchange of traffic and the working of traffic over the railways of the said companies, and for the division and apportionment of tolls, rates, and charges, and generally in relation to the management and working of the railways" of the two companies, whereby the defendant company agreed to operate the railway line on behalf of the C. & E. R. Co. "with a staff and organization appointed by the C. P. R. Co. (the defendants), and to provide a service of such efficiency and speed and operate the property of the C. & E. R. Co. as agents for and on account of the C. & E. R. Co., as may be required or directed by that company or its officer." The contract also provided that the defendant company should not be required to maintain the road "below a point of efficiency necessary to the safe and proper handling of such train service, as may be required for the proper operation of the railway." All the expenses of operating the road were to be paid in the first instance by the defendant company, but were to be charged against the C. & E. R. Co., under a special clause in the agreement for the apportionment of the tolls and receipts. The rolling stock used in operating the road bore the name of the defendant company. The officials employed in operating it wore caps indicating that they were servants of the defendant company. The defendant company sold tickets entitling the holder to travel over the C. & E. line and issued a "time bill" giving the time tables of the western division of the defendant

company, in which the line between Calgary and Edmonton was referred to as the "Edmonton section," and this time bill was indorsed with the names of the leading officials of the defendant company. The plaintiff was a railway mail clerk in the employ of the government of Canada, whose duty it was to handle and attend to the government mail matter being carried on the C. & E. line between Calgary and Edmonton. This mail matter and the plaintiff were both carried under a contract between the Postmaster-General of Canada and the C. & E. Co., and the C. & E. Co. received from the government of Canada the moneys paid for carrying the mail matter, and no part of such money was received by the defendant company. While being carried on a train on the C. & E. line towards Edmonton, the plaintiff was injured by the derailment of the train, which fell into a ravine, and he brought action for damages against the defendants:—Held, that the plaintiff being lawfully in the mail car with the knowledge and consent of the defendants, and a passenger under the charge and care of the defendants, of which there was evidence to go to the jury, a duty was imposed upon the defendants to carry him safely and securely, so that by their negligence or default no injury should happen to him; that for a breach of this duty an action would lie independently of any contract; and that the question whether or not the defendant company received a reward for carrying the plaintiff did not affect the rights of the parties:—Held, also, against the contention that the defendant company were merely agents for the C. & E. Co., and that the officials and workmen operating the road were the servants, not of the defendants, but of the C. & E. Co., and that the latter company, if any one, were responsible; that there was evidence to shew that the officials and workmen were the servants of the defendant company, and that the defendant company were not merely agents but were independent contractors:—Held, also, against the contention that the defendants were the agents of the C. & E. Co. in operating the road, and were, therefore, liable only for a misfeasance but not for a nonfeasance; that the omission to take proper care in respect to the condition of the bridge, and the track, and the running a train over the track and bridge while in an unsafe condition, would be a misfeasance and not a nonfeasance, and that, therefore, even if the defendants were merely agents of the C. & E. Co., they would still be liable. *Kenny* v. *Canadian Pacific R. W. Co.*, 5 Terr. L. R. 420.

Injury to Passenger—*Negligence—Overcrowding Train — Proximate Cause.*] — The plaintiff, when travelling by an excursion train belonging to the defendants' system, was constrained, by reason of the overcrowding of the cars, to resort to the platform outside one of the cars, and for better protection sat down on the second step of the outside platform, and while so sitting was thrust out by a swerve of the train, which made the persons standing on the platform press up against him suddenly. This caused him to lose his balance, and one of his legs protruding was struck by some fixture on the track and he sustained injuries:—Held, that the defendants were liable. *Burriss* v. *Pere Marquette R. W. Co.*, 25 Occ. N. 13, 9 O. L. R. 259, 4 O. W. R. 510.

Luggage—Destruction—Contract or tort—Carriage of Chinamen — Joint contract — Action by one—Damages—Personal effects and household goods. *Chan Dy Chea* v. *Alberta Railway and Irrigation Co.* (N.W.T.), 1 W. L. R. 371.

Negligence—Action—Subsequent death of plaintiff—Continuation of action by executors—New action by executors—Evidence as to cause of death — Damages — Apportionment. *Speers* v. *Grand Trunk R. W. Co.*, *Craig* v. *Grand Trunk R. W. Co.*, 3 O. W. R. 69, 4 O. W. R. 490.

Negligence — *Invitation to Jump off Moving Train.*]—If there is a platform at a railway station, the railway company are bound to bring the passenger car of a train stopping there up to the platform to permit passengers to step down on it in alighting, or to provide some other safe means for passengers to alight, and the omission to do so will, if damage result, render the company liable, and there is no duty imposed by the law upon a passenger to disclose to an officer of the company who offered to assist her to alight at an improper and dangerous place, anything in her condition which rendered special care necessary. *Guay* v. *Canadian Northern R. W. Co.*, 24 Occ. N. 277, 15 Man. L. R. 275.

Negligence—*Assault on Passenger—Duty of Conductor—Damages—Reduction — New Trial.*]—The plaintiff, a passenger on a railway train, was assaulted shortly after beginning his trip by an intoxicated fellow-passenger. He complained to the conductor, who promised to get a policeman at the next station, but failed to do so. The assailant having become more quiet, the plaintiff did not anticipate a further attack, but was assaulted a second time, which was also reported to the conductor, who took no action, and a third assault having been made, the plaintiff left the train and completed his journey on the following day. In an action against the railway company the plaintiff obtained a verdict for $3,500, which was sustained by the Court of Appeal:—Held, affirming the judgment of the Court of Appeal, 5 O. L. R. 334, 23 Occ. N. 65, that the defendants were liable; that it was the duty of the conductor, on being informed of the first assault, to take precautions to prevent a renewal, and his failure to do so gave the plaintiff a right of action. Pounder v. North Eastern R. W. Co., [1892] 1 Q. B. 385, dissented from. Held, also, that, as the plaintiff did not anticipate the second assault, the conductor could not be assumed to have foreseen it, and the jury having evidently given damages for that as well as the third, the amount recovered should be reduced to $1,000, and a new trial had if this sum were not accepted. *Blain* v. *Canadian Pacific R. W. Co.*, 5 O. L. R. 334, 2 O. W. R. 76, 24 Occ. N. 49; *S. C., sub nom. Canadian Pacific R. W. Co.* v. *Blain*, 34 S. C. R. 75.

Negligence—*Defective Bridge — Gratuitous Passenger.*]—In the absence of evidence of gross negligence, a carrier is not liable for injuries sustained by a gratuitous passenger. Moffatt v. Bateman, L. R. 3 C. P. 115, followed. Harris v. Perry, [1903] 2 K. B. 219, distinguished. Although a railway company may have failed to properly maintain a bridge under their control so as to ensure the safety

of persons travelling upon their trains, the mere fact of such omission of duty does not constitute evidence of the gross negligence necessary to maintain an action in damages for the death of a gratuitous passenger. Judgment in 9 B. C. R. 453 affirmed. *Nightingale v. Union Colliery Co. of British Columbia*, 35 S. C. R. 65.

Negligence—*Ejection of Drunken Passenger—Fatal Injuries Act—Damages—Remoteness.*]—The deceased was a passenger on the defendants' train from Detroit to Buffalo. Between Detroit and Bridgburg he drank heavily, and when near Bridgburg began to annoy passengers, and the conductor compelled him to leave the train at the latter station. This was 700 feet from the northerly end of the international railway bridge over the Niagara river, and the deceased, who was not given into the charge of the station agent or any other person, being intoxicated, strayed after the train, on which his luggage remained, and fell over the bridge and was drowned. There would have been no difficulty in taking care of the deceased and preventing him interfering with the passengers. Bridgburg was only 5 minutes distant from the city of Black Rock and only 20 minutes from Buffalo:—Held, that the defendants were not liable for damages, as they were not obliged to carry him to Buffalo, nor to place him in charge of any one at Bridgburg. Judgment in 24 Occ. N. 293, 7 O. L. R. 690, 3 O. W. R. 788, reversed. *Delahanty v. Michigan Central R. W. Co.*, 6 O. W. R. 252, 10 O. L. R. 388.

Negligence — *Invitation to Jump off Moving Train.*] — In February, 1902, the plaintiff and her husband travelled by the defendants' line from Winnipeg to Eustace; when the train stopped at Eustace, the baggage car was at the station platform. The rear passenger car, in which the plaintiff travelled, was some distance from the end of the platform. When the train stopped the plaintiff and her companions went to the front platform of the car; her companions jumped down; when they were off, the defendants' conductor in charge of the train, who was standing on the ground, put up his hand to assist the plaintiff to get off; she took his hand and jumped down from the lowest step of the car to the ground; the distance was too great for her to step down. The ground sloped downwards away from the track and was slippery from ice on it. The train began to move either as she jumped or just before or just after. Immediately after jumping down, the plaintiff, who was pregnant, felt great pain; for several days she was confined to her bed; and on the 16th February, 1902, had a miscarriage. The trial Judge found that her sufferings from the time of her journey till the miscarriage on the 16th February, and the miscarriage itself, and her suffering, were the result of her being obliged to jump down as she did in order to leave the train at her journey's end. It was contended for the defendants that they were not compellable to have a platform at so unimportant a station as Eustace:—Held, that, as they had one there, they were bound to bring their passenger cars up to it to permit a passenger to step down on it in alighting. The conductor's act was an invitation to the plaintiff to get off when she did; she was justified in assuming that there was no safer or better way of getting off. There was a platform at which the plaintiff could have descended in safety. Instead of that, she was invited by the defendants' servant to alight at a place which was patently not safe. Judgment for the plaintiff for $200 damages and costs. *Gway v. Canadian Northern R. W. Co.*, 24 Occ. N. 277.

Negligence—Overcrowding train—Proximate cause. *Burriss v. Pere Marquette R. W. Co.*, 4 O. W. R. 510.

Negligence of Servant of Pullman Car Company—Liability of both companies. *Decue v. Wabash R. R. Co.*, 3 O. W. R. 102.

Return Ticket—*Condition of Identification—Neglect to Comply With—Removal from Train.*]—The plaintiff purchased an excursion ticket from Indian Head to Toronto and return, one of the conditions (which he signed) being that he should identify himself to an agent in Toronto before he set out on his return journey and obtain the agent's signature. On production of his ticket at Toronto, he secured his sleeping berth, had his luggage checked, was admitted to the train, and started on his return journey, but neglected to identify himself, and was put off the train by the conductor after he had refused to pay his fare, although he offered to identify himself to the conductor. In an action for damages:—Held, that he could not recover. *Taylor v. Grand Trunk R. W. Co.*, 22 Occ. N. 361, 4 O. L. R. 357, 2 O. W. R. 447.

XIII. Service of Process.

Place of Service.] — Held, that in an action against the Canadian Pacific Railway Company, service of process against the company must be effected at the company's office in Vancouver appointed pursuant to 44 V. c. 1, s. 9, following a former unreported decision in 1891 of Hansen v. Canadian Pacific R. W. Co., and refusing to hear subsequent decisions of the Privy Council which counsel alleged in effect overruled such decision. *Jordan v. McMillan*, 21 Occ. N. 192, 8 B. C. R. 27.

Place of Service—*Special Act—General Rules—Conflict.*] — The defendants having, pursuant to s. 9 of sched. A. of "An Act respecting the Canadian Pacific Railway," 44 V. c. 1 (D.), appointed their office at Regina as the place where service of process might be made on them in respect of any cause of action arising within the North-West Territories, a service of process effected on a station agent of the defendants, pursuant to Rule 14 (3) of the Judicature Ordinance, was held bad, because s. 9 was special legislation, and Rule 14 (3), quoad the defendants, was overridden by it. *Lamont v. Canadian Pacific R. W. Co.*, 21 Occ. N. 262, 5 Terr. L. R. 60.

XIV. Other Cases.

Branch Lines—*Canadian Pacific Railway Company's Charter—Contract—Limitation of Time—"Lay Out," "Construct," "Acquire" —"Territory of Dominion" — Railway Act, 1903.*]—The charter of the Canadian Pacific Railway Company, 44 V. c. 1 (D.), and schedules thereto appended, imposes limitations neither as to time nor point of departure in

respect of the construction of branch lines; they may be constructed from any point of the main line of the Canadian Pacific Railway between Callender station and the Pacific seaboard, subject merely to the existing regulations as to approval of location, plans, etc., and without the necessity for any further legislation. On a reference concerning an application to the Board of Railway Commissioners for Canada for the approval of deviations from plans of a proposed branch line, under s. 43 of the Railway Act, 1903, it is competent for objections as to the expiration or limitation of time to be taken by the Board, of its own motion, or by any interested party. *In re Canadian Pacific Railway — Sudbury Branch*, 36 S. C. R. 42.

Contract—Breach—Controllable freight—Supply of cars. *Michigan Central R. R. Co. v. Lake Erie and Detroit River R. W. Co.*, 5 O. W. R. 608.

Contract—*Physician—Services to Persons Injured in Accident—Authority of Servant of Company.*]—Where a person has been injured by a railway accident, the highest official of the company on the ground has authority to bind the company for the cost of such medical services and attendance as may be immediately requisite. And where the facts were reported by such official to the company immediately, and no disavowal or counter order was sent to the physician engaged until 7 weeks later, the company were held responsible to the physician engaged for the value of his medical attendance and services during this period. *Gaudreau v. Canada Atlantic R. W. Co.*, Q. R. 24 S. C. 337.

Ditches and Drains—*Increase of Servitude—Railway under Dominion Jurisdiction—Blocking Outlet of Drain—Damages—Railway Commission.*]—Lands of railways under the jurisdiction of the Parliament of Canada are subject, in the province of Quebec, to art. 501 of the Civil Code; and especially are the lands of the Grand Trunk Railway Company bound to receive the flow of water from the higher adjoining lands. A ditch de ligne between higher lands of two proprietors, necessitated by the ordinary needs of good husbandry, is not an addition to the servitude for the flow of water although this ditch receives the water from the lands of the two proprietors, and brings it to the boundary of the lower land of the railway. If the railway company block this ditch at its entrance upon their lands, they will be liable in damages and will be ordered to remove the obstruction and receive the waters brought by the ditch. Where the company have constructed a ditch on each side of their road without sufficient fall so that the water remains stagnant in them, making the adjoining lands wet and injuring the crops on them, the company will be liable in damages to the adjoining owners and will be ordered to pay them. The Railway Commission of Canada alone, and not the Superior Court, has power to order the railway company to construct the necessary works to carry away the water it is bound to receive and to give greater fall to its ditches. The first part of s. 196 of the Dominion Railway Act (3 Edw. VII. c. 58) does not apply to railways actually built at the time of the passing of this Act, and the second part only applies to the Railway Commission. *Langlois v. Grand Trunk R. W. Co.*, Q. R. 26 S. C. 511.

Fire Caused by Sparks from Engine—*Liability in Absence of Negligence.*]—The respondent brought suit for damages caused by a fire originating from sparks escaping from a locomotive engine of the company appellant, while the engine was employed in the ordinary use of its railway. The question of negligence on the part of the company was specially withdrawn from the consideration of the tribunal on the present appeal:—Held, reversing the judgment in Q. R. 9 Q. B. 551, that a railway company authorized by statute to carry on its railway undertaking in the place and by the means adopted, is not responsible in damages for injury not carried by negligence, but by the ordinary and normal use of its railway. *Canadian Pacific R. W. Co. v. Roy*, Q. R. 12 K. B. 543, [1902] A. C. 220.

Liability of Municipal Corporation to Contribute to Maintenance of Gates at Crossings—Dominion railway—Constitutional law. *Grand Trunk R. W. Co. v. City of Toronto*, 6 O. W. R. 27.

Loan of Money to Railway Company—Bill of exchange—Irregular acceptance—Ratification—Liability—Officer of company—Accepting bill—Personal liability—Statute of limitations. *Nickle v. Kingston and Pembroke R. W. Co.*, 6 O. W. R. 51.

Motion to Restrain Pending Action — *Grounds for Refusal.*] — In proceedings taken to confirm a scheme of arrangement, filed by a railway company under the provisions of s. 285 of the Railway Act, 1903, an application was made on behalf of the railway company for an order to restrain further proceedings in an action against such company begun in the Superior Court for the District of Montreal, by certain creditors, before the filing of the scheme of arrangement, but which had not proceeded to judgment:—Held, that, as there were real and substantial issues to be tried out between the parties in the action pending in the Superior Court, the same ought to be allowed to proceed pending the maturing of the scheme of arrangement. In re Cambrian Railway Company's Scheme, L. R. 3 Ch. 280 n. 1, referred to. *In re Atlantic and Lake Superior R. W. Co.*, 25 Occ. N. 83, 9 Ex. C. A. 283.

Provincial Incorporation — *Legislative Authority of Dominion—Branch Lines—Warrant of Possession.*] — The railway company was incorporated in 1896, by the Provincial Legislature, one of the powers given it being to build branch lines, and on 13th June, 1898, by an Act of the Dominion Parliament its objects were declared to be works for the general advantage of Canada and thereafter to be subject to the legislative authority of the Dominion Parliament and to the provisions of the Railway Act:—Held, on an application for a warrant of possession, that the company's power to acquire land for branch lines after 13th June, 1898, must be exercised in accordance with the Dominion Railway Act. *In re Columbia and Western R. W. Co.*, 8 B. C. R. 415.

Railway Act, 1903, ss. 285, 286 — Application to confirm scheme — Enrollment where no objections made. See *In re Great Northern R. W. Co. of Canada*, 9 Ex. C. R. 337.

Railway Act, 1903, s. 285—*Petitioners not in Possession of Railway—Application to Confirm.*] — Where the petitioners for the confirmation of a scheme of arrangement, filed under the provisions of the Railway Act, 1903, s. 285, are not in possession of the railway which they seek to mortgage as security for the issue of new bonds, the application to confirm will be refused. *In re Atlantic and Lake Superior R. W. Co.*, 25 Occ. N. 145, 9 Ex. C. R. 413.

Right to Ferry Passengers and Cargo—*Statute—Restrictions.*]—The Dominion statute incorporating the Algoma Central and Hudson Bay Railway Company authorizes them, for the purpose of their undertaking, to acquire and run steam and other vessels for cargo and passengers upon any navigable waters which their railway may connect with: —Held, that under the very large and general words of this clause the railway company were not bound to restrict the passengers and cargo transported by their vessels to persons and goods intended to be carried on their railway line. *Perry* v. *Clergue*, 23 Occ. N. 91, 5 O. L. R. 357, 2 O. W. R. 89.

Sale under Execution—*Description in Advertisement—Sale en Bloc—Franchises and Privileges of Railway.*]—The designation, in a notice of sale published by the sheriff, of a railway by its name, by its terminals, and by the numbers of the lots which it traverses, as appears in the registry office, is sufficient, more especially when the execution creditor has obtained an order by virtue of art. 754, C. P. C., that the property advertised may be sold en bloc. The franchises and privileges of a railway company (apart from those which appertain to it as a corporation), and which, are necessary for the operation of the road, are a necessary part of the railway property, and exigible. *Bégin* v. *Levis County R. W. Co.*, Q. R. 27 S. C. 180.

Seizure under Execution—*Description—Rescizure.*]—A railway was seized and sold by sheriff's sale to the present opposant. It was described as fifty feet in width, but the greater part of the line was actually sixty-six feet wide. The present plaintiff now caused the line to be seized again, but stated exceptions from the seizure, which exceptions really included the entire road, less the surplus width: — Held, that the seizure was irregular and illegal, the adjudication by the sheriff being of a specific object, fenced at the time of the sale, and known as consisting of the property so enclosed. The error as to the width was immaterial unless it were to give a ground of action by the defendant to have the sale set aside. Moreover, a railway can only be seized as an entirety, which had not been done in the present case. *Carter* v. *Montreal and Sorel R. W. Co.*, Q. R. 23 S. C. 3.

Seizure under Execution—*Opposition to Sale—Question as to Ownership — Depreciation — Appointment of Receiver.*] — Article 1823 of the Civil Code, which treats of the appointment of receivers, is not restricted, but simply enumerative, and therefore the Court may exercise its discretion in the matter. Railway companies incorporated by the provincial legislatures are subject to the ordinary law as to the appointment of receivers, and, therefore, it follows that if a seizure of a railway has been made under a judgment, and there are oppositions which prevent the sale of it, the provisions of art. 713, C. P. C., apply. Several oppositions to a sale in this case having been filed, the right of ownership and the right of possession of the railway being brought in question, and the depreciation likely to ensue by its not being operated being shewn by the petition and the affidavits in support thereof, all these facts constituted good reasons for the appointment by the Court of a receiver of the railway property. *Bégin* v. *Levis County R. W. Co.*, Q. R. 27 S. C. 61.

Siding—Construction of—Cutting down or through highway—Right of municipality to enjoin — Leave of railway commissioners — Necessity for. *Township of Innisfil* v. *Grand Trunk R. W. Co.*, 6 O. W. R. 69.

Statutory Obligation — *Enforcement by Municipality—Prohibition against Removal of "Workshops"—Breach—Damages.*]—Upon a motion made by the plaintiffs, pursuant to leave given in the judgment reported in 1 O. L. R. 480, 21 Occ. N. 226, for leave to amend by claiming a remedy against the defendants by virtue of the prohibition contained in s. 37 of 45 V. c. 67 (O.), providing that "the workshops now existing at the town of Whitby, on the Whitby section, shall not be removed by the consolidated company (the Midland Railway Company of Canada) without the consent of the council of the corporation of the said town:" — Held, that this section imposed an obligation upon the Midland Railway Company of Canada for the benefit of the plaintiffs, who were entitled to maintain an action thereon in their own name; and by virtue of 56 V. c. 47 (D.), amalgamating the Midland Company with the defendants, and cl. 3 of the agreement in the schedule to that Act, the plaintiffs could maintain an action against the defendants for damages for any breach of the obligation committed by the Midland Company before the amalgamation or by the defendants since amalgamation; and the paintiffs should be allowed to amend and to have judgment for such damages as they were entitled to: —Held, also, that "the workshops now existing" meant the buildings used as workshops; and damages could not be assessed on the basis of the prohibition being against the shutting down of or reducing the extent of the work carried on in the workshops. *Town of Whitby* v. *Grand Trunk R. W. Co.*, 22 Occ. N. 173, 3 O. L. R. 536, 1 O. W. R. 292.

Subway—*Municipal Corporation—Order of Railway Committee of Privy Council — "Person Interested"—Rule of Court.*]—The municipal corporation of a city was one of the movers in an application to the Railway Committee of the Privy Council for an order authorizing the construction of a subway under a railway, by which one of the city streets was made to connect with a country road, the works being adjacent to the city street but not within the city limits:—Held, that the city corporation was interested, within the meaning of the term as used in s. 188 of the Railway Act, which provides that the Railway Committee may apportion the costs of such works as those in question between the railway company and "any person interested therein." 2. On an application to make an order of the Railway Committee of the Privy Council a rule of Court, the Court will not go into the merits of the order, or

consider objections to the procedure followed by the Railway Committee. Semble, that while the Railway Committee of the Privy Council has jurisdiction in such a case to impose upon the party interested an obligation to bear part of the expenses, it has no jurisdiction to compel a party other than the railway company to execute the works. *In re Grand Trunk R. W. Co. and City of Kingston*, 24 Occ. N. 1, 8 Ex. C. R. 349.

Undertaking for General Advantage of Canada—*Junction or Crossing—Provincial Railway—Connection by Means of Independent Branch—Railway Act—Construction.*]—The Canadian Pacific Railway, the Great Northern Railway, the railway owned by the Quebec Railway, Lighting, and Motor Power Company, all three being railways which are undertakings for the general advantage of Canada and under the control of Parliament, and the Quebec and Lake St. John Railway, the latter being an undertaking purely provincial and under the control of the Quebec Legislature, all four enter the city of Quebec; and the harbour commission of Quebec, which is under the control of parliament, in order to facilitate these four railways in obtaining access to the pier Louise, constructed upon their own property a branch line of about 300 feet, which in no way entered into the system of these four railways, but by means of which the trains of the Quebec and Lake St. John Railway could pass upon the Canadian Pacific Railway and vice versa:—Held, that that did not constitute on the part of the Quebec and Lake St. John Railway a junction with the Canadian Pacific Railway, nor a crossing in the sense of s. 306 of the Railway Act of Canada, 1888, so as to render the Quebec and Lake St. John Railway an undertaking for the general advantage of Canada and to place it under the control of Parliament: the junction or crossing spoken of in s. 306 must be a physical connection, immediate and without intermediary. 2. The general declaration of s. 306 is insufficient to render railways not mentioned in it in express and specific terms, undertakings for the general advantage of Canada. 3. Reading together ss. 306 and 177 of the same Act, s. 306 must be interpreted as applying solely to a branch line of railway which by reason of a junction becomes part of the system of one of the railways enumerated in the section, and consequently a branch line of one of the railways, *Garneau* v. *Quebec and Lake St. John R. W. Co.*, Q. R. 12 K. B. 205.

Unsecured Creditor not Assenting to Scheme — *Objection to Confirmation of Scheme.*]—An unsecured creditor who does not assent to a scheme of arrangement filed under s. 285 of the Railway Act, 1903, is not bound thereby.—It is, however, a good objection to such a scheme that it purports in terms to discharge the claim of such a creditor. By a scheme of arrangement between an insolvent railway company and its creditors, it was proposed to cancel certain outstanding bonds and to issue new debentures in lieu thereof against property that was at the time in the possession of the trustees for the bondholders of another railway company. Part of such new debentures were to be issued upon the insolvent company acquiring the control of certain claims, bonds, and liens against the railway; and part upon a good title to the railway being secured and vested in the trustees for the new debenture holders. The other railway company, the trustees for whose bondholders were in possession of the railway, objected to the scheme of arrangement. Their rights therein had not been determined or foreclosed:—Held, that the railway company were entitled to be heard in opposition to the scheme, and that the latter was open to objection in so far as it purported to give authority to issue a part of the new debentures upon acquiring the control of such claims, bonds, and liens, and without any proceedings to foreclose or acquire the rights of such railway company in the railway. No scheme of arrangement under the Railway Act, 1903, ought to be confirmed, if it appears or is shewn that all creditors of the same class are not to receive equal treatment. *In re Baie des Chaleurs R. W. Co.*, 25 Occ. N. 86, 139, 9 Ex. C. R. 386.

RAILWAY BONDS.

See PLEDGE.

RAILWAY COMMISSIONERS.

See RAILWAY.

RAILWAY COMMITTEE OF THE PRIVY COUNCIL.

See RAILWAY.

RAPE.

See CRIMINAL LAW.

RATES.

See ASSESSMENT AND TAXES.

RATIFICATION.

See COMPANY—FRAUD—INFANT—JUDGMENT—MUNICIPAL CORPORATIONS—TRIAL.

REAL PROPERTY ACT.

Application to File Second Caveat While First One in Force.]—The plaintiff held a tax deed made by the defendants of a quarter section of land within the territorial limits of the defendants' municipality. The defendants claimed title under a vesting certificate issued by themselves to themselves, in pursuance of a tax sale held subsequent to that through which the plaintiff claimed, and applied for the issue of a certificate of title in their favour. The plaintiff filed a

caveat setting up title under his tax deed:—Held, that the plaintiff's application for leave to file a new caveat, in order to set up a recently acquired title, must be refused with costs. Section 140 appeared to be only intended to deal with what may or may not be done after a caveat shall have lapsed or been withdrawn or discharged. The first words of the section, "after a caveat shall have elapsed or been withdrawn or discharged, it shall not be lawful," etc., control the whole section. In no case is the same party to be allowed to have in force more than one caveat at one time, and when his first caveat lapses he is not entitled as of right to file another, but may be given leave by a Judge to do so. The power of a Judge to order the filing of a new caveat arises only after the first one has lapsed or been withdrawn or discharged. As the first caveat was still in force there was no power to entertain the application. *Alloway* v. *Rural Municipality of St. Andrews*, 24 Occ. N. 248.

REAL PROPERTY ACT, MANITOBA.

Caveator Out of Jurisdiction—*Security for Costs.*]—In May, 1893, the caveatee executed a mortgage to the caveator, which was registered in the proper land titles office. The caveatee afterwards applied for a certificate of title under the Real Property Act of the land mortgaged and other lands, and the caveator was served with notice of the application. He thereupon filed a caveat and a petition asking that his mortgage might be declared to be a subsisting security on the land mortgaged for the sum secured, interest, and costs. The caveator was resident out of the jurisdiction, and prima facie the caveatee was entitled to security for costs; he took out a præcipe order, and the caveator applied to set it aside:—Held, that it must be assumed that the district registrar had good reason for causing the notice of the application to be served on the caveator, and it could not be said that it was the caveatee who had compelled the caveator to come into Court to litigate. The caveator was the actor in the proceedings in Court, and, as he resided out of the jurisdiction, he was subject to the general rule as to security for costs: *Apollinaris Co.* v. *Wilson*, 31 Ch. D. 632. *In re Lang and Smith*, 22 Occ. N. 212.

Petition of Caveator—*Objections to Tax Sale—Statement of—Amendment.*]—The caveator filed a petition under schedule L, Rule 1, of the Real Property Act, 1 & 2 Edw. VII. c. 43, to prevent the caveatees, tax sale purchasers, from getting a certificate of title applied for by them; and, after setting out the nature of her title by grant from the Crown, alleged that the caveatees claimed title to the same land under certain alleged sales of same for taxes, and that the said tax sales and all proceedings connected therewith under which the caveatees claimed title were illegal, null, and void, and that the caveatees were not at the time of their application the owners of the land:—Held, without deciding whether it is necessary in such a petition to go further than to set forth fully the title of the caveator, that, as the petitioner had set out the claim of the caveatees and the nature of it, it should also have shewn in what particulars the title of the caveatees was defective or invalid, and what facts were relied on to have the tax sales declared void, and prima facie to displace the adverse claims of the tax purchasers. An order giving leave to the petitioner, within a limited time, and upon payment of the costs, to amend the petition as she might be advised and to bring it on for further hearing before the Referee, and that in default the petition should be dismissed with costs, was affirmed with costs. *Iredale* v. *McIntyre*, 22 Occ. N. 330, 14 Man. L. R. 199.

REAL PROPERTY ACT, N.W.T.

Transfer — *Executions — Priorities.*] — While the Territories Real Property Act was in force, a title stood as follows: 5th July, 1887, certificate of ownership to Canadian Pacific Railway Company; 12th July, 1887, transfer, J. S. to L. H. R., filed and entered in day book; 31st March, 1888, transfer, Canadian Pacific Railway Company to J. S. registered, and certificate of ownership issued to J. S.; 5th February, 1891, 14th April, 1891, 13th January, 1893, executions, King and others v. J. S., lodged by sheriff. On 19th January, 1893, L. H. R. applied to the registrar to issue her a certificate of ownership upon her transfer of 12th July, 1887. The registrar was ready to do so, but proposed to mark the certificate as being subject to the several above mentioned executions. On a reference by the registrar under s. 114:—Held, that in view of ss. 34 and 65, the registrar had no right, where the land had been brought under the Act, to receive a transfer for registration executed by a person other than the certificated owner, and that therefore the filing of the transfer, prior to the lodgment of the executions, was ineffective, and that therefore the registrar's view was correct. *In re Rivers*, 15 Occ. N. 118, 1 Terr. L. R. 464.

REAL PROPERTY LIMITATION ACT.

See LIMITATION OF ACTIONS—MORTGAGE.

REAL REPRESENTATIVE.

See DEVOLUTION OF ESTATES ACT.

REASONABLE AND PROBABLE CAUSE.

See MALICIOUS PROSECUTION.

RECEIPT.

See INSURANCE.

RECEIVER.

Action by Annuitant for Arrears—*Abandonment of Land by Donee—Long Vacation—Harvest—Collection of Rents.*]—Pending an action by an annuitant to recover the

arrears of his life annuity, stipulated for in a donation inter vivos to his son, the donor has a right, on the abandonment of the land by the defendant, after the action has been commenced and during the long vacation, to obtain the appointment of a receiver to take care of the property, get in the harvest, and receive the rents. Art. 1823 is not limitative. *Hainse* v. *Pilote*, Q. R. 27 S. C. 71.

Equitable Execution—Interest of debtor under will—Restraint on anticipation—Arrears of income—Contingent interest—Dependence on will of another—Creditors' rights. *Adams* v. *Cox*, 4 O. W. R. 15.

Equitable Execution — *Claim against Crown—Voluntary Payment.*]—Held, reversing the decision of Meredith, C.J., 19 P. R. 227, 20 Occ. N. 380, that payment of the money in question in this case was to be made by the Crown to the judgment debtor purely out of bounty, and was not enforceable by any Court, and was not to be made in pursuance of any contract; and therefore the money could not be reached by the judgment creditor by means of a receiving order. Willcock v. Terrell, 3 Ex. D. 323, distinguished. *Stewart* v. *Jones*, 21 Occ. N. 141, 1 O. L. R. 34.

Equitable Execution — *Judgment for Alimony—"Creditor"—Pension.*]—The plaintiff, the wife of a retired member of the Toronto police force, and entitled to interim alimony under an order theretofore made, applied to be appointed receiver of moneys to which the defendant, her husband, would become entitled as a pension, under the rules of the Police Benefit Fund (a friendly society incorporated under R. S. O. 1897 c. 211), on application by him before the Benefit Fund committee, which application, however, he had not yet made:—Held, that the plaintiff was not entitled to succeed, for, whereas arrears of pension constitute a debt which may be attached by garnishee proceedings, unearned pension cannot be reached either by that procedure or by the appointment of a receiver. Semble, that the plaintiff was a "creditor" within the meaning of s. 12 of R. S. O. c. 211, and on that ground also her application must fail. *Slemin* v. *Slemin*, 24 Occ. N. 57, 7 O. L. R. 67, 2 O. W. R. 1176.

Equitable Execution—*Judicature Act, s. 58, s.-s. 9—Property to be Reached—Book Debts—Shares in Foreign Company—Insurance Policy.*]—The provision in s. 58, s.-s. 9, of the Judicature Act, R. S. O. 1897 c. 51, that a receiver may be appointed in all cases in which it shall appear to be just or convenient that such order should be made, was intended merely to expressly confer upon all the Courts that jurisdiction which, under the designation of equitable execution, had, before the fusion of law and equity, been exercised by the Court of Chancery alone:—Held, that a judgment creditor was not entitled to have a receiver appointed to receive all debts due to the judgment debtor, to receive and sell certain shares of stock in a foreign company said to be owned by the debtor, and to receive the interest of the debtor in a certain policy of insurance on the life of another, assigned to the debtor. *In re Asselin and Cleghorn*, 23 Occ. N. 288, 6 O. L. R. 170, 2 O. W. R. 712.

Equitable Execution—*Judicature Act—Trustees—Rents.*]—The Judicature Act, s. 58, s.-s. 9, does not give jurisdiction to appoint a receiver in cases where prior to that Act no Court had such jurisdiction. And, in order to justify the making of an order for the appointment of a receiver at the instance of a judgment creditor, the circumstances of the case must be such as would have enabled the Court of Chancery to make such an order before the Judicature Act. Where the plaintiffs were judgment creditors of the defendant, and were also the trustees entitled to receive the rents and other property in respect of which they asked that they should be appointed receivers, to which the defendant was beneficially entitled:—Held, that there was no impediment in the way of their receiving such rents and other property, and their motion for an order appointing them receivers was unnecessary. *O'Donnell* v. *Faulkner*, 21 Occ. N. 75, 1 O. L. R. 21.

Equitable Execution—Rents of mortgaged lands. *Imperial Bank of Canada* v. *Twyford* (N.W.T.), 1 W. L. R. 157.

Equitable Execution—*Return of Nulla Bona.*]—A receiver for the purpose of giving a judgment creditor equitable relief will not be appointed until the judgment creditor has exhausted his legal (as distinguished from equitable) remedies. *Davidge* v. *Kirby*, 10 B. C. R. 231.

Management of Hotel—Liability for loss—Wilful default. *Plisson* v. *Diemert* (N. W. T.), 1 W. L. R. 359.

See COMPANY—LIQUOR LICENSE ACT—RAILWAY—VENDOR AND PURCHASER.

RECEIVER-GENERAL.

See CROWN.

RECEIVING STOLEN GOODS.

See CRIMINAL LAW.

RECOGNIZANCE.

See APPEAL—CRIMINAL LAW—MUNICIPAL ELECTIONS.

RECORD OF ACQUITTAL.

See MALICIOUS PROCEDURE.

RECORDER.

See MUNICIPAL CORPORATIONS.

RECOUNT.

See PARLIAMENTARY ELECTIONS.

RECOVERY OF LAND.

See EJECTMENT.

RECTIFICATION.

See ACCOUNT—CONTRACT.

REDEMPTION.

See ASSESSMENT AND TAXES—MORTGAGE—TRUSTS AND TRUSTEES.

REFEREES AND REFERENCES.

Accounts—*Warrant to Proceed—Dismissal of Bill.*]—It is not a ground for dismissal of the bill in a suit that the plaintiff fails to take out a warrant to proceed in a reference in the suit to take accounts between the parties. On the failure of the plaintiff to take out the warrant the defendant is entitled to do so. *Gallagher* v. *City of Moncton*, 22 Occ. N. 169, 2 N. B. Eq. Reps. 309.

Drainage Referee—*Official Referee — Reference—Statutes.*]—The Drainage Referee is not an official referee, and an action cannot be referred to him for trial unless he is agreed upon by the parties as a special referee. Provisions of the Judicature, Arbitration, and Drainage Acts, discussed. Decision of a Divisional Court, 22 Occ. N. 255, 4 O. L. R. 97, reversed. *McClure* v. *Township of Brooke, Bryce* v. *Township of Brooke*, 23 Occ. N. 40, 5 O. L. R. 59, 1 O. W. R. 274, 324, 835.

Jurisdiction of Master—Remuneration and costs of trustee-plaintiff—Debt due to estate—Set-off—Solicitor's lien. *Thorne* v. *Parsons*, 6 O. W. R. 377.

Quebec Superior Court—*Practice as to Appointment of Referee—Powers of—Rights of parties—Liability for costs.*]—While a Judge can suo motu, in the cases provided for in art. 410, C. P. C., refer a case to a referee, he should, nevertheless, first afford the parties an opportunity to agree upon a practicien, and he cannot name the person who is to act, in such manner, at all events, as to impose upon both parties, even though neither of them should desire them, the services of the person so named and the obligation of paying for such services, and such judgment cannot be invoked by the person so named as imposing upon the parties to the suit the obligation of proceeding before him, or of paying for services by him performed, without any proceeding being by them or either of them taken before him, merely because it has not been appealed from. Moreover the judgment making such reference and appointment is a judgment rendered in the interest of the parties, and it is for them to avail themselves of it; and, therefore, save in case of acquiescence of the parties, such referee cannot act until served with the judgment and a requisition calling upon him to be sworn, or in some equivalent manner required to act by one of the parties, nor until he has given notice to the parties of his intention to proceed and of the time when and place where he will proceed. The judgment appointing a referee, although it may become chose jugée as to the parties to the action, cannot bind the latter in favour of such referee, and until they have signified an intention to avail themselves of it, such judgment confers no rights on the referee and no obligations on the parties to the action. The taxation of the bill of the referee by the Court, against the will and in spite of the objections of the parties, has only the effect of fixing the amount thereof and does not render the parties liable. *Germano* v. *Musca*, Q. R. 26 S. C. 525.

Referee's Fees—*When Payable.*]—A referee having entered upon a reference is not entitled to payment of his fees from day to day as a condition of proceeding with the reference: — Semble, where special circumstances shew a probability that the fees of a referee will not be paid, the Court will require that his fees be secured to him before ordering the reference to be proceeded with. *Gallagher* v. *City of Moncton*, 21 Occ. N. 485, 2 N. B. Eq. Reps. 269.

Report—*Confirmation—Notice of Filing—Non-appearance—Rules 573, 694, 769.*]—Rules 694 and 769, requiring notice of filing a Master's report as a condition of its becoming absolute, are governed by Rule 573; and, therefore, notice of filing a Master's report need not be served upon a defendant who has not entered an appearance in the action; and where there is no defendant upon whom notice of filing need be served, the report becomes absolute upon the expiration of fourteen days from the filing. *Toronto General Trusts Corporation* v. *Craig*, 21 Occ. N. 502, 2 O. L. R. 238.

Report—*Order—Evidence before Referee—Illegibility—Intituling—Notice of Hearing.*]—A motion to confirm the report of a referee on an application for the appointment of a guardian, was refused where the order of reference was not attached to the report, and the evidence before the referee was in lead pencil and difficult to read, and was not intituled in the matter, and it appeared that notice of the hearing before the referee was not given to the relatives. *In re Turner*, 21 Occ. N. 510, 2 N. B. Eq. Reps. 318.

Report on Sale — *No Sale for Want of Bidders—Confirmation.*]—A report on sale, though only a report that there was no sale for want of bidders, is a report that may be appealed from, and requires confirmation. And an order made by a local Judge (without consent) confirming such a report four days after it was made, and granting foreclosure in default of payment, was held bad. *Robert* v. *Caughell*, 23 Occ. N. 395, 6 O. L. R. 381, 2 O. W. R. 799, 939, 971.

Scope of—Mortgage action — Reference back to readjust accounts—Change in computation of interest—Jurisdiction of Master to fix a new day for redemption. *Imperial Trusts Co.* v. *New York Security Co.*, 5 O. W. R. 641.

Stay—Judgment on special case—Appeal—Rule 829—Terms of special case. *City of Toronto* v. *Toronto R. W. Co.*, 5 O. W. R. 415.

Stay of Reference Pending Appeal—*Ruling of Master in Ordinary—Appeal from—Forum.*]—A judgment directed the Master in Ordinary to make partition of lands; ordered that the parties should execute and deliver all necessary conveyances, to be settled by the Master, and should give possession to each other in accordance therewith; and directed the Master to ascertain the plaintiff's damages for ouster, mesne profits, and waste. The defendants appealed from the judgment to the Court of Appeal, and gave the security provided for by Rule 826:—Held, that the reference was stayed pending the appeal. Construction and application of Rules 827 and 829. The ruling of the Master that the reference was not stayed was a ruling upon a question of practice, and therefore came within the exception in s. 75 (2) of the Judicature Act, R. S. O. 1897 c. 51; and an appeal from his ruling lay to a Judge in Court. *Monro* v. *Toronto R. W. Co.*, 23 Occ. N. 12, 5 O. L. R. 15, 1 O. W. R. 25, 316, 813, 2 O. W. R. 207.

Taxation of Bill—*Illness of Referee—Proof of—Change of Referee—Use of Depositions already Taken.*] — Where a deputy-registrar before whom a reference had been made to tax a solicitor's bill of costs fell ill after the evidence and argument was all in, but before judgment had been given, and being ill for nearly a year and not able to attend to his duties, an application was made by the client to change the reference to one of the taxing officers at Toronto. The solicitor opposed the change:—Held, the matter should be referred to the deputy clerk of the Crown. *Re Solicitor*, 6 O. W. R. 422, 10 O. L. R. 393.

Yukon Court—*Nullity — Boundaries of Mining Locations.*] — In an action in the Yukon Territory in which the question in issue was as to the true boundary between a creek and a hill claim, a reference to ascertain the boundary was ordered on the application of the plaintiff; the referee adopted a line run by a surveyor named Gibbons under instructions from the Gold Commissioner (after the location of the plaintiff's claim) for the purpose of establishing an official boundary between the hill and creek claims, which cut off part of the plaintiff's claim. On motion to the Court the report was confirmed and judgment entered accordingly:—Held, on appeal, per Walkem, J., that the Gibbons line was a nullity, and, as the Court below adopted it and based its judgment upon it that judgment must be set aside. 2. The reference was a nullity, as it involved the determination of a mixed question of law and fact, and was not a matter of "practice and procedure," but of jurisdiction; and it was beyond the power of the Court to order the reference even by consent. Per Irving, J., following *Williams* v. *Faulkner*, 8 B. C. R. 197, that the Yukon Court has no power to make an order of reference, and, as the whole proceedings before the referee were founded on a mistaken idea of the jurisdiction to refer, the doctrine of extra cursum curiæ did not apply. *Stevenson* v. *Parks*, 10 B. C. R. 387.

Yukon Law—*Order of Reference—Jurisdiction of Court to Make.*]—The power to make an order of reference in an action is a matter of jurisdiction and not merely a question of "procedure and practice," within the meaning of s. 3 of the Judicature Ordinance, N. W. T., and therefore the Yukon Court had no power under this section to make an order of reference. *Williams* v. *Faulkner*, *Raymond* v. *Faulkner*, 22 Occ. N. 40, 8 B. C. R. 197.

See MORTGAGE—PARTITION—STAY OF PROCEEDINGS—TRUSTS AND TRUSTEES.

REFERENDUM.

See CONSTITUTIONAL LAW—LIQUOR ACT OF ONTARIO—MANDAMUS.

REFORMATION OF CONTRACT.

See CONTRACT — PATENT FOR INVENTION — PLEADING.

REFORMATION OF DEED.

See DEED.

REFORMATION OF LEASE.

See LANDLORD AND TENANT.

REFORMATION OF MORTGAGE.

See MORTGAGE.

REGISTRATION.

See BILLS OF SALE AND CHATTEL MORTGAGES —COPYRIGHT — REGISTRY LAWS — SALE OF GOODS—TRADE MARK.

REGISTRY LAWS.

Amendment of Registered Plan — *Petition to County Court Judge—Jurisdiction of Judge of Another County—Local Courts Act—Evidence on Petition—Affidavits—Merits—Order Refusing to Re-open—Appeal.*] — A petition under s. 110 of the Registry Act, R. S. O. 1897 c. 136, for an order amending a plan of land in a town by closing part of a street allowance, was presented to the Judge of the County Court of Perth, in which county the land lay:—Held, that the Judge of another County Court had jurisdiction, upon the request of the Judge of the County Court of Perth, to hear and adjudicate upon the petition. To hear such a petition is one of the judicial duties to be performed by the Judge of the County Court in any case where application is made to him instead of to a Judge of the High Court; and he has jurisdiction by virtue of ss. 16 and 18 of the Local Courts Act, R. S. O. 1897 c. 54. 2. Although the application to amend the plan is by petition, and is therefore interlocutory in form, the order to be made finally and conclusively

settles the rights of the parties concerned; and the evidence upon the application, if the facts are in dispute, should, in the absence of agreement, be given viva voce. The Judge properly refused to receive affidavits in answer to the oral testimony of witnesses given in support of the petition. 3. Upon the merits the order of the Judge amending the plan was justified, the portion of the street in question never having been opened or used as a highway, and the lands abutting on both sides being owned by the petitioner. 4. No appeal lay to the Court of Appeal from a subsequent order of the Judge refusing to open the proceedings and receive further evidence. *In re McDonald and Town of Listowel*, 24 Occ. N. 8, 6 O. L. R. 556, 2 O. W. R. 1000.

Certificate of Allowance of Petition under Partition Act—*Lien of Execution Creditor — Expiry of Writ — Notice — Bona Fide Purchaser for Value — Priorities.*]—At the date of the filing by the plaintiff of a petition for partition the defendant company had in the hands of the sheriff a writ of execution against the lands of the defendant L., who was entitled to an undivided interest in the lands sought to be partitioned, and their lien by virtue thereof was still in existence at the date of the allowance of the petition (to which they were made parties) and the registration of a certificate thereof, but their writ, not having been renewed, expired before the date of a conveyance by the defendant L. to the defendant G., a bona fide purchaser for value:—Held, that the company's lien was not preserved by the proceedings taken before the conveyance to G., who was not, therefore, affected with notice of the lien. The company were bound to keep alive the lien which they had at law, at least until there was some act or declaration of the Court recognizing their claim as an existing one against the lands. *Macdonell v. Best*, 23 Occ. N. 262, 6 O. L. R. 18, 2 O. W. R. 459.

Easement — *Artificial Waterway—Parol Permission — User — Subsequent Unregistered Grant — Notice — Prescription.*] — In 1871 the defendants' predecessor in title, with the permission (not in writing) of plaintiff's predecessor in title, laid pipes under the land of the latter for the purpose of conveying water from a spring to the lands of the defendants. These pipes continued there and in use up to the time this action was brought in July, 1903. In 1878 the plaintiff's predecessor in title, by an instrument under seal, purported to grant and convey to the defendants' predecessor the right to convey the water in pipes "in such manner and under such circumstances as the same are now:" and at the time of the conveyance to the defendants in 1879 their predecessor purported to grant to the defendants the same right. The plaintiff, who was a son of his predecessor in title, in 1887 became the owner of the lands through which the pipes were laid, by virtue of a conveyance to him, registered before the registration of the instruments of 1878 and 1879. The plaintiff knew of the existence of the pipes under ground, and the use that was being made of them. He believed that they could not have been placed there without his father's permission, but he was not aware of the instruments of 1878 and 1879 or their nature:—Held, that the plaintiff was entitled to rely upon his conveyance, the registration of which without notice of the defendants' interest or claim rendered it void as against him; and there had not been a sufficient lapse of time since to give the defendants a right under the statute or by prescription. *Harrington v. Spring Creek Cheese Manufacturing Co.*, 24 Occ. N. 209, 7 O. L. R. 319, 3 O. W. R. 26.

Foreign Company—*Owner of Lands — Right to Registration.*]—A company duly incorporated in a foreign country, have a right, though not licensed to do business in British Columbia, to be registered as the owners of lands acquired by them. Judgment of Begbie, C.J., 2 B. C. 8, reversed. *Ex p. New Vancouver Coal Mining and Land Co.*, 9 B. C. R. 571.

Gift of Land — *Prior Sale — Non-registration — Notice — Gift Burdened with Debts.*]—A universal donee of property charged with the debts of the donor cannot evict the prior purchaser for value of one of the immovables comprised in the gift, in spite of the fact that the sale has not been registered, while the gift has, for the donee has succeeded to the obligation of warranty of his donor. 2. Article 2085, C. C., is not applicable to a donee of an immovable in such a manner that his knowledge of an unregistered right belonging to a third person cannot be set up against him, but it is otherwise when the burdens upon the gift equal the value of the thing given, for in that case the pretended gift is in fact a sale. 3. The mere knowledge of a purchaser for value that the immovable which he has acquired was previously sold by his grantor to a third person, whose title has not been registered, does not constitute a fraud sufficient to effect the validity of the duly registered title of such purchaser: Mathieu, J., diss. *Barbe v. Barbe*, Q. R. 20 S. C. 119.

Imperfect Registration — *Notice — Subsequent Purchaser.*]—The defendant took a mortgage from M. J. M. and had it registered in the office of the registrar of deeds at Sydney. M. J. M. subsequently conveyed the same lands by deed to the plaintiff, who had no actual notice of the mortgage. The mortgage, although spread on the books of the registrar, was not proved in accordance with the provisions of R. S. N. S. 1900 c. 137, the attempted proof falling short of the statutory requirements. The trial Judge held the registration to be inoperative, and the defendant appealed:—Held, dismissing the appeal, that the formalities prescribed by the statute are for the benefit of the public and must be complied with. Unless complied with, the registrar ought not to record the instrument. *Burchell v. Bigelow*, 24 Occ. N. 257.

Land Registry Act, B. C. — *Debentures—Charge—No Description of Land.*]—A company issued debentures which created a charge upon all its property without describing the property:—Held, that the debentures were capable of registration under the Land Registry Act. *In re Land Registry Act*, 24 Occ. N. 259, 10 B. C. R. 370.

Land Registry Act, B. C. — *Registered Plan — Unregistered Plan—Description of Land by Reference to Plan — Boundaries —*

Mistake.]—The owner of a district lot registered in 1885 a plan of it drawn to scale, but not shewing the subdivisions, and afterwards had another plan made from a survey, which differed from the registered one; from an inspection of the ground and the unregistered plan, one Kilby, who was unaware of the registered plan, bought in 1889, lot 16, and registered his deed, which did not refer to the plan. On the 11th July, 1889, the defendant bought from the same vendor lot 15. In 1890 the plaintiff bought from Kilby lot 16, the deed shewing the purchase to be according to the registered plan, but before purchase she inspected the property and saw the fence which Kilby and the defendant considered the boundary between lots 15 and 16 according to the unregistered plan. Lot 16 according to the registered plan overlapped lot 15 according to the unregistered plan:—Held, in an action for possession by the owner of lot 16, that both the plaintiff and defendant must be deemed to be holders of their respective parcels according to the registered plan and to have registered their conveyances in conformity with the Land Registry Act. 2. It is not open to a person who accepts and registers a conveyance of land according to a registered plan to afterwards object, in an action respecting the title to the same land, to the validity of that plan. *Fowler v. Henry*, 24 Occ. N. 159, 10 B. C. R. 212.

Land Registry Act, B. C. — Mortgage —House built partly on lot not included — Rights of mortgagee — Purchaser for value —Notice — Registered title. *Canadian Birkbeck Investment and Savings Co.* v. *Ryder* (B.C.), 2 W. L. R. 158.

Land Titles Act (N. W. T.) — Fees of registrar — Registration of injunction order after caveat. *Re Saskatchewan Land and Homestead Co.* (N.W.T.), 2 W. L. R. 416.

Land Titles Act (N. W. T.)—Mortgages — Priorities — Production of certificate of title. *Re Greenshields Co.* (N.W.T.) 2 W. L. R. 421.

Land Titles Act (N. W. T.) — Transferee for value without notice of fraud of transferors — Injunction — Equities — Priority. *Hooper* v. *Smith* (N.W.T.), 2 W. L. R. 194.

New Brunswick Registry Act—*Competing Purchasers—Unregistered Deed—Subsequent Registered Mortgage — Notice — Priorities.*]—A part of a lot of land was sold to the plaintiff by M. by deed, which the plaintiff neglected to register. Subsequently M. mortgaged by registered conveyance the remainder of the lot to S. The description in the mortgage of the land followed the original description of the whole lot, but "excepted the portion sold and conveyed by the said" M. to C. (the plaintiff.) Subsequently M. sold and conveyed by registered deed, for valuable consideration, the whole lot of land to the defendant, who had notice of the mortgage, but not of its contents. By 57 V. c. 20, s. 29, an unregistered conveyance shall be fraudulent and void against the subsequent purchaser for valuable consideration whose conveyance is previously registered. By s. 69 the registration of any instrument under the Act shall constitute notice of the instrument to all persons claiming any interest in the lands subsequent to such registration:—Held, that by the Act the registration of the mortgage constituted actual notice of its contents to the defendant, whose title therefore should be postponed to the plaintiff's. *Carroll* v. *Rogers*, 21 Occ. N. 96, 2 N. B. Eq. Reps. 159.

North-West Territories Land Titles Act — *Description — Uncertainty — Exceptions.*]—A deed in which the land is described as a certain parcel of land "saving and reserving nevertheless thereout and therefrom any lots or blocks that may heretofore have been deeded to others," is, unless supplemented by conclusive evidence of the full extent of the exceptions, too uncertain to justify the Registrar in acting on it on an application to bring the land under the Land Titles Act, 1894. *In re Lillis*, 20 Occ. N. 190, 4 Terr. L. R. 300.

North-West Territories Land Titles Act — *Earlier Registration Laws — Duty of Registrar — Estoppel.*]—The registrar in issuing certificates of ownership is bound to take notice of instruments registered or filed, previously to the issue of the patent, under the provisions of the Registration of Titles Ordinance, or the Territories Real Property Act. It was the intention of the Territories Real Property Act and the Land Titles Act, 1894, to recognize and continue, as creating vested interests, the proper effect of all instruments registered or filed under previous legislation in that behalf. Where an agreement for the sale of land by the Canadian Pacific Railway Company was registered under the Registration of Titles Ordinance, and subsequent instruments, purporting to be executed by the purchaser under the agreement, and persons claiming under him, were also registered or filed under that Ordinance or the Territories Real Property Act; the Registrar, on an application by the company for a certificate of ownership upon a patent subsequently issued to the company, was directed to issue the certificate of ownership to the company indorsed with memoranda of the agreement and other instruments. Where, on a similar application a transfer was filed under the Territories Real Property Act, purporting to be executed by the purchaser under an agreement (recited, but not registered or filed) for sale by the Canadian Pacific Railway Company, and, after the Registrar's reference, a quit claim deed from the transferee to the company was produced, the Registrar was directed to issue a clear certificate of ownership to the company. Where, on a similar application, it appeared that an agreement purporting to be executed by the purchaser under an agreement (recited, but not registered or filed) for sale by the company, was registered, and also other instruments purporting to be executed by persons claiming under the purchaser, the Judge, to whom the reference was made, was advised to cause notice to be given, to all persons appearing to be interested, of the time and place when the questions submitted by the Registrar would be investigated. If such parties failed to appear, or having appeared failed to establish the existence of the agreement, the Registrar should be directed to issue a clear certificate of ownership to the company. If the existence of the agreement was properly proved, the proof should be filed with the Registrar, and he should be directed

to issue a certificate of ownership to the company, indorsed with memoranda shewing the interests apparently created by the agreement and other instruments. Title by estoppel discussed. *In re Canadian Pacific R. W. Co.*, 4 Terr. L. R. 227.

Real Property Act (Man.) — *Caveat—New Title — Second Caveat—Trial.*]—1. The words "a caveat" in s. 127 of the Real Property Act, R. S. M. 1902 c. 148, in view of s.s. (m) of s. 8 of the Interpretation Act, R. S. M. 1902 c. 89, cannot be construed to mean "only one caveat," and if the caveator, after filing his caveat and taking proceedings under it for the trial of an issue, pending such trial acquires a new title or estate in the land in question, he may file a new caveat thereon without getting a Judge's order for leave to do so. 2. The provisions of s. 140 of the Act only apply to a second caveat "in relation to the same matter," that is, the same estate or interest on which the first caveat was based. Frost v. Driver, 10 Man. L. R. 209, distinguished. 3. When such a second caveat is properly filed, the trial of the issue under the first caveat should be postponed to enable proceedings to be taken upon such new caveat, so that the trial of the issues under both caveats may take place at the same time, and, if convenient, the issues might be consolidated. *Alloway* v. *Rural Municipality of St. Andrews*, 15 Man. L. R. 188, 1 W. L. R. 407.

Real Property Act (N. W. T.) — *Mortgage — Omission of Registrar to Enter Memorial of — Subsequent Mortgagee—Payment of Prior Mortgage — Subrogation — Laches—Assurance Fund — Costs — Distribution.*]—On the 26th September, 1899, one G. applied to the plaintiff for a loan of $500, and executed a mortgage to him of the lands in question, of which he was the owner. The plaintiff's advocates made search in the Land Titles office on the 14th October, and, ascertaining that the only incumbrance on the register was a mortgage to one P., registered the plaintiff's mortgage and a discharge of the other, which had been obtained on their undertaking to pay the amount due, and the registrar indorsed memorials accordingly on the certificate of title, on receipt of which certificate the plaintiff's advocates paid the amount due to P., and advanced the balance to G. No other memorial appeared on the certificate at the time of the advance, nor were the plaintiff's advocates aware of any other incumbrances, but there had in fact been filed with the registrar a mortgage from G. to the defendant B. for $2,000, which had been entered in the day book only. Subsequently on an application under the Territories Real Property Act, on behalf of the defendant B., by way of a summons to the registrar and the plaintiff to shew cause, it was held that the $2,000 mortgage to B. had been registered within the meaning of the Act at the time of filing, and had priority over the plaintiff's mortgage, and an order was made to amend the memorials on the certificate accordingly. Then, default having been made by G. in payment of the mortgage to the defendant B., the lands were offered for sale, and a foreclosure order obtained on the 15th September, 1900, notice of application therefor having been duly served on the plaintiff:—Held, that the plaintiff was entitled as against the defendant B. to be subrogated to the rights of P. in respect of the mortgage held by him and paid by the plaintiff, and to a first mortgage upon the lands in question for the amount thereof with interest; so held against the contention of the defendants that the question of the plaintiff's priority was res judicata either by the amending order or the foreclosure order. Brown v. McLean, 18 O. R. 533, and Abell v. Morrison, 19 O. R. 669, followed. Laches discussed. Held, also, that the indorsement on the certificate of title of the plaintiff's mortgage was equivalent to a certificate that there were no prior incumbrances affecting the land other than those appearing on the certificate, and that the plaintiff was entitled to be paid out of the assurance fund the balance of his claim, with interest, under s. 108 of the Territories Real Property Act. It is unnecessary for the plaintiff, in order to recover against the assurance fund, to shew that he has been deprived of any land or any interest therein by the mistake or omission of the registrar, it being sufficient if loss or damage is shewn. Nor is it necessary for the plaintiff to shew that he has been barred from all other remedies before proceeding under s. 10; it is enough that his principal remedy has been barred. Section 108 discussed. And held, in a subsequent judgment as to costs, that the plaintiff and the registrar were both entitled to tax as against the defendant B. the costs of the issue as to the right of subrogation, and the plaintiff against the registrar the other costs of the action. *Morris* v. *Beatley*, 2 Terr. L. R. 253.

Registrar's Certificate — *Substitution, How Registered.*] — Erroneous conclusions which the registrar, in his certificate, expresses with regard to registered documents, cannot prejudice those whose rights are regularly registered. 2. A substitution is sufficiently registered by the registration of the wills which have created it, of the declaration of the death of the testators, and of the immovables transmitted by the wills. *Pelletier* v. *Michaud*, Q. R. 20 S. C. 413.

Registry Act (Ont.) — *Registered Plan—Sale of Lots According to—Building — Projection on Adjoining Lot — Possession — Title — Mortgage — Construction — Short Forms Act—General Words.*]—After building a house on certain land, the owner thereof had a plan prepared and registered in June, 1872, covering, amongst other lands, those subsequently known as lots 3 and 4. The boundary line between these two lots was so run that, while the main part of the house stood upon lot 3, a small portion extended over part of lot 4. According to this plan subsequent sales were made. In 1872 lot 3 was conveyed to one person and lot 4 to another person—all parties acting upon the assumption that the house was wholly upon lot 3, the deeds describing the lands as lots 3 and 4 according to the registered plan, and these descriptions being carried down through all subsequent conveyances and mortgages of the respective properties. The ownership and possession of the two properties remained distinct until 1883, and from that time until 1896 both were owned and possessed by one person, subject to mortgages. This person in 1892 mortgaged lot 3 to the defendant, who in 1896 foreclosed and obtained possession. In 1893 the same person mortgaged lot 4 to one M., and through foreclosure proceedings and a subsequent mortgage to

himself the plaintiff claimed title. The legal estates in both properties had throughout been in different mortgagees. The action was to enforce by foreclosure the plaintiff's mortgage upon lot 4, and the defence was in respect of the part covered by the defendant's house:—Held, that the defendant had acquired no title by possession to the strip of land in dispute; and that the provisions of the Registry Act precluded him from setting up title to any part of lot 4 as laid down upon the registered plan. Semble, that, but for the provisions of the Registry Act, the strip might have passed to the defendant by the mortgage to him of lot 3 in 1892, which was made pursuant to the Short Forms Act, under the "general words" implied in such mortgages. McNish v. Munro, 25 C. P. 290, Hill v. Broadbent, 25 A. R. 159, and Winfield v. Fowlie, 14 O. R. 102, considered. *Fraser* v. *Matchmor*, 25 Occ. N. 17, 8 O. L. R. 613, 4 O. W. R. 290.

Renewal of Registration—*Act of Sale —Irregularities — Hypothec.*]—A notice of renewal of the registration of an act of sale, which does not give the date of the original registration, which gives the wrong number of such registration as well as of the register and the volume, and which confuses the names of the vendor and the purchaser, giving that of the vendor for the purchaser and vice versa, is informal and irregular and is not sufficient to preserve the hypothec created by the sale. *Giard* v. *Lachance*, Q. R. 21 S. C. 103.

Territories Real Property Act—*Unregistered Transfer — Execution — Priority —Cloud on Title — Sheriff — Parties — Costs.*]—The Territories Real Property Act has not altered the law that a writ of execution binds only the beneficial interest of the execution debtor; and therefore a transferee (whose transfer is unregistered) from the certificated owner is entitled to have an execution, filed subsequently to the making of the unregistered transfer, declared to be a cloud upon his title; so likewise is entitled a person who, though he has received no actual transfer, is entitled to one under an enforceable agreement. To such an action the sheriff, against whom an injunction is asked to restrain proceedings upon the execution, is a proper party. Where in such an action the sheriff joined in, and set up, the same defences as the execution creditor, he, as well as the execution creditor, was ordered to pay the costs. *Wilkie* v. *Jellett*, 2 Terr. L. R. 133, 15 Occ. N. 315. Affirmed 26 S. C. R. 282, 16 Occ. N. 269.

REJOINDER.

See PLEADING.

RELATOR.

See MUNICIPAL ELECTIONS.

RELEASE.

Claim for Damages — Absolute release —Restriction to subject matter of discussion —Fraud — Equitable relief—Failure to notify solicitor. *Begg* v. *Toronto R. W. Co.*, 6 O. W. R. 239.

Master and Servant — *Injury to Servant and Consequent Death—Action under Lord Campbell's Act — Status of Supposed Widow —Evidence of Marriage — Right of Action as Administratrix — Letters Issued Pendente Lite — Release of Claim — Improvidence — Invalidity — Retention of Money Paid to Obtain Release — Bar — Payment into Court—Assessment of Damages—Mother of Deceased — New Trial.*]—Appeal by defendants and cross-appeal by plaintiff from judgment of a Divisional Court (8 O. L. R. 499, 3 O. W. R. 921), reversing judgment of Idington, J. (7 O. L. R. 747, 3 O. W. R. 510), and directing a new trial as to the plaintiff's right as widow and administratrix to recover damages for the death of John Doyle, a workman in the employment of defendants, who was caught in the machinery of the workshop while at work painting, and died from injuries received. The Court below held that a release given by the plaintiff should not be held binding on her, and the defendants' appeal was mainly against that part of the decision, and as to whether the action was maintainable, the money paid to plaintiff not having been returned:—Held, that the evidence fully sustained the findings of the jury as to the cause of the accident and the defendants' negligence. On the cross-appeal, the judgment of the Divisional Court holding that the plaintiff was not entitled to recover any damages on behalf of the mother of the deceased was held right. Held, the conclusion unanimously arrived at by the Judges of the Divisional Court that the release was procured under circumstances that rendered it invalid as a bar to plaintiff's claim should stand. It was said that the plaintiff, while repudiating the release, had not restored or offered to restore the money paid to or for her as the consideration for her executing it. And it was argued that on that account the plaintiff was not in a position to attack the transaction. Hewson v. Macdonald, 32 C. P. 407, relied on. Held, the circumstances were entirely different, and the bringing of an action is in itself a declaration of intention to disaffirm and rescind. Up to that time the plaintiff may keep open the question whether he or she will affirm or disaffirm the transaction, subject of course to being held bound by delay if in the meantime third parties have acquired interests dependent on the transaction, or the position of the defendant has been altered to his prejudice. See Clough v. London and North-Western R. W. Co., L. R. 7 Ex. 26, . . . It was, therefore, a question of fact whether the party defrauded had after discovery of the fraud elected not to avoid the transaction; and, unless the other party could shew that either by unequivocal acts or express words there had been an election not to avoid the transaction, the question of its invalidity was open for trial. Neither as a matter of pleading nor of substance was she treated as debarred, by reason of not having restored or offered to restore the money, from impeaching the transaction. And there has been no finding that she elected not to disaffirm it. The release having been declared invalid, for satisfactory reasons, she ought not now to be deprived of the benefit of that finding merely because before action she had not returned or offered to return the

money. But it has not been found that an actual premeditated fraud was practised on the plaintiff, in which case there would be no obligation to restore money paid in pursuance of it. Held, the plaintiff, having been relieved by the Divisional Court as respects the release, should have been required to return or otherwise make good the money paid to or on her account. If the judgment in her favour had remained, it would have been proper to reduce it by the amount so paid. But, as the judgment for damages no longer stands, she should now be allowed to bring the amount into Court ready to be paid to the defendants in the event of her failing to obtain a verdict for damages on the trial directed by the Divisional Court. Any amendments to the pleadings necessary to set forth the plaintiff's willingness to make good the money paid by the defendants should be made. Subject to these directions, the appeal was dismissed with costs. The cross-appeal also dismissed with costs. *Doyle* v. *Diamond Flint Glass Co.*, 6 O. W. R. 207, 10 O. L. R. 567.

Pledge of Bonds—Agreement for release—Judgment — Satisfaction — Terms. *Toronto General Trusts Corporation* v. *Central Ontario R. W. Co.*, 5 O. W. R. 544.

See Bills of Exchange and Promissory Notes—Crown — Dower—Execution—Executors and Administrators — Master and Servant — Insurance — Mortgage—Principal and Agent — Principal and Surety—Ship—Stay of Proceedings — Street Railways — Will.

RELIGIOUS COMMUNITY.

See Schools.

RELIGIOUS ORDER.

Expulsion of Member — Insanity — False imprisonment—Compensation for services — Findings of Jury. *Archer* v. *Society of Sacred Heart of Jesus*, 2 O. W. R. 847.

RENT.

See Landlord and Tenant.

RENTS AND PROFITS.

See Title to Land.

REPLEVIN.

Affidavit — *Bond — Misnomer — Sureties — Justification — Summons.*]—An application to set aside a writ of replevin on the following grounds: (a) the affidavit upon which the writ issued was sworn before the issue of the writ of summons in the action; (b) the replevin bond was executed before the issue of the writ of summons; (c) there was a misnomer of the defendant in the affidavit, writ, and other proceedings; and (d) there was but one surety in the replevin bond; was dismissed. Such an application was properly made by summons under R. 458 of the Judicature Ordinance (C. O. 1898 c. 21). An affidavit of justification on a replevin bond is not necessary. *Marcy* v. *Pierce* (No. 1), 4 Terr. L. R. 186.

Affidavit for — *Insufficiency of — Exception to the Form.*]—The insufficiency or irregularity of an affidavit preliminary to the issue of a writ of saisie-revendication, does not constitute such an irregularity as will enable the service upon the defendant to be set aside, and be the basis of an exception to the form. *Albert* v. *Gravel*, 7 Q. P. R. 12.

Christian Name of Defendant—*Initials — Bond — Number of Sureties.*] — A writ of replevin, in which the defendant is described by the initial letter only of his christian name, is bad, and will be set aside upon application to a Judge in Chambers. The writ will be likewise set aside where the replevin bond has been executed by one surety only. Semble, that a replevin bond that does not follow the form prescribed by the statute is bad. *Hubbard* v. *Young*, 34 N. B. Reps. 641.

Delivery of Goods to Husband of Plaintiff — *Third Party — Garantie.*]—In an action brought by a married woman, separate as to property, for revendication of movables, the defendant may, by way of dilatory exception, demand that the husband of the plaintiff be brought in en garantie, he having, as alleged, received such movables before the institution of the action. *Hotte* v. *Rochon*, 6 Q. P. R. 361.

Distress for Rent under an Illegal Lease — *In pari delicto, &c.*] — Replevin will lie to recover goods distrained for rent in arrear under an illegal lease. The maxim, In pari delicto potior est conditio possidentis, is applicable only when the possession results from the act of the parties, and not when it results from some incident attached to a legal instrument: per Tuck, C.J., Barker and McLeod, JJ. (Hanington and VanWart, JJ., dissenting). Per Hanington, J.: An illegal contract is valid as between the parties thereto for all purposes that can be accomplished without the aid of the Court; therefore that person must fail who is first compelled to set a Court in motion in order to obtain such aid. Per Van Wart, J.: The Court ought not to assist any of the parties to an illegal transaction; therefore, in the above case, the parties should be restored to the position in which the writ of replevin found them; that is, an order should be made to restore the goods replevied to him out of whose possession they were taken by the process of the Court. *Gallagher* v. *McQueen*, 35 N. B. Reps. 198.

Goods in Custody of Law—*Distress for Taxes—Legality of Assessment—Jurisdiction.*]—A writ of replevin brought to try the legality of an assessment for taxes, and the execution issued thereon, both of which were alleged to be void for want of jurisdiction,

will not be set aside on a summary application, on the ground that at the time the goods were replevied they were in the custody of the law, unless the proof is satisfactory that all the conditions necessary to give jurisdiction have been fulfilled. *Macmonagle* v. *Campbell*, 35 N. B. Reps. 625.

Land Scrip — *Dominion Lands Act* — *— Assignment — Contract — Illegality.*] — Under an order of the Governor in council, prohibiting the Commissioner from recognizing or accepting assignments of land scrips and from delivering them to assignees, made pursuant to s.-s. (i) of s. 90 of the Dominion Lands Act, R. S. C. c. 54, as re-enacted by 62 & 63 V. c. 16, s. 4, the defendant became entitled to scrip for land to be located by her. She sold the right to the scrip to the plaintiff, and gave him an order on the Commissioner for it. After delivery by the latter to the plaintiff, the defendant, knowing that the scrip was in the plaintiff's possession, deliberately assigned it to him for valuable consideration. She afterwards took the scrip from the plaintiff and refused to return it:—Held, that the contract of sale of the scrip was valid, and that the plaintiff was entitled to recover possession of it in an action of replevin. *Wright* v. *Battley*, 15 Man. L. R. 322, 1 W. L. R. 563.

Order for Sale of Goods Replevied— *Rules 1097, 1098.*]—Plaintiff had paid into Court $2,000 to obtain an order of replevin of some horses. He was further paying $5 per day for their keep. No trial could be had for considerable time. He therefore applied for order for sale of the horses under Rules 1097 and 1098:—Held, there is no power under those rules or otherwise to grant such an order. *Innes* v. *Hutcheon*, 5 O. W. R. 357, 9 O. L. R. 392.

Pleading — *Procedure — Evidence — Judgment Secundum Allegata et Probata — Ultra Petita — Surprise.*] — In an action for revendication of books, documents, and records retained by a fire insurance agent after his dismissal, and for damages in default of delivery thereof, several policy copy books, which could not be found at the time of the seizure, were delivered up in a mutilated condition by the defendant during the pendency of the action, the defendant being unaware of such mutilation. Some time afterwards the answers to the defendant's pleas were filed and contained no reference to the mutilated and incomplete condition in which these books were returned. At the trial the plaintiffs were allowed to give evidence as to the cost of replacing these books in proper condition, although the defendant objected to the adduction of such proof, and the trial Judge assessed damages in this respect at $200 and $2,000, in respect of certain mutilated plans, at the same time declaring the revendication valid, etc. On appeal by the plaintiffs from the judgment of the Court of King's Bench, reversing the judgment at the trial in regard to the pecuniary condemnation:—Held, affirming the judgment appealed from, that, as the defendant had been surprised, in so far as the issues affecting the policy copy books were concerned (art. 110 C. P. Q.), he was entitled to relief as to the item of $200 for damages in respect thereof, as the matter was not pleaded. With regard to the item of $2,000 damages, however, as the defendant could not have been taken by surprise, he himself having mutilated the plans, the Supreme Court of Canada reversed the judgment appealed from and restored the judgment at the trial as to that item of the damages assessed. *Norwich Union Fire Ins. Co.* v. *Kavanagh*, 25 Occ. N. 98, 36 S. C. R. 7.

Saisie-revendication — *Affidavit—Irregularities—Procedure.*]—It is not by an exception to the form, but by a petition in contestation, that the defendant to a saisie-revendication must make complaint of irregularities in the affidavit upon which the saisie-revendication was issued. *Albert* v. *Gravel*, Q. R. 22 S. C. 478.

Saisie-revendication—*Title—Res Judicata—Petition—Winding-up Act.*]—Where a person has petitioned in proceedings under the Winding-up Act to be put in possession of certain articles of which he alleges that he is owner, and judgment has been given granting the prayer of his petition as to certain of such articles, without adjudicating as to the others, he may subsequently replevy the other articles, although they have been sold by the liquidator to a third person; and such third person cannot plead that the judgment upon the petition is res judicata against the claimant. 2. A saisie-revendication may be taken against the party in possession of the thing, even if he detains it by virtue of an uncertain, temporary, and conditional title. *United Shoe Machinery Co. of Canada* v. *Flibotte*, 5 Q. P. R. 333.

Seizure—*Absence of Inventory.*]—The seizure of a lot of merchandise certain and ascertained and identified by the person seizing, is regular, and he whose goods are seized cannot complain of the want of a detailed inventory either in the affidavit for saisie-revendication, or in the procès-verbal of the bailiff. *Helfenberg* v. *Schwartz*, 7 Q. P. R. S.

See COSTS—FIXTURES — GIET—HUSBAND AND WIFE—INJUNCTION — LIS PENDENS—SALE OF GOODS—WRIT OF SUMMONS.

REPLICATION.

See PLEADING.

REPLY.

See PLEADING.

REPORT.

See REFERENCE AND REPORT.

RESCISSION.

See CONTRACT—SALE OF GOODS—VENDOR AND PURCHASER.

RESCISSION OF CONTRACT.

See CONTRACT — VENDOR AND PURCHASER — WRIT OF SUMMONS.

RESERVE FUND.

See COMPANY.

RESIDENCE.

See ARREST—COSTS—DOMICIL—MECHANICS' LIENS—MUNICIPAL CORPORATIONS—PARLIAMENTARY ELECTIONS — PARTNERSHIP —PLEADING—SCHOOLS.

RESISTING DISTRESS.

See CRIMINAL LAW.

RES JUDICATA.

Action for Penalty—*Previous Action—Distinct Contraventions of Same By-law—Ultra Vires—Judgment Ultra Petita.*]—The plaintiffs had sued the defendant for a penalty of $20 for having sold goods in November, 1900, without having taken out a license, contrary to a by-law of the municipality. This action was dismissed upon the ground that the by-law in question was ultra vires. Afterwards, the defendant having in the month of April following sold goods by retail in the municipality, the plaintiffs sued him again claiming a like penalty of $20, under the same by-law:—Held, that the new action of the plaintiffs should be dismissed upon the plea of res judicata in spite of the fact that distinct contraventions of the by-law were in question in the two suits. 2. That the fact that the first judgment had gone beyond the pleadings in declaring the by-law void without any pleading to that effect, could not deprive this first judgment, which had not been attacked by petition of the authority of res judicata. *Village of Dorval v. Legault*, Q. R. 21 S. C. 197.

Action to Set aside Assignment of Chose in Action—Previous garnishment proceeding in Division Court—Establishment of validity of assignment—Parties—False evidence—Fraud—Costs. *Johnston v. Barkley*, 4 O. W. R. 453, 6 O. W. R. 549, 10 O. L. R. 724.

Breach of Contract—*Identity of Parties and Causes of Action—Dispositif and Motifs of Judgment—Novation.*]—To an action for breach of contract, in which damages were claimed for the entire unexpired term of the contract, the defendant pleaded that he had made a judicial abandonment, and the Court of Appeal, affirming the decision of the Court of Review, dismissed the action. In a second action, by the same plaintiff against the same defendant, for damages for the same breach of contract, for a portion of the period covered by the first action:—Held, that there was chose jugée. 2. In a question of chose jugée, the dispositif only of the first judgment can be taken into account. The motifs of the judgment can be considered only for the purpose of explaining obscurity or ambiguity in the dispositif. And, even if the motifs could be looked at in the present case, the plaintiff would have no action, because the Courts, in the first action, held that there had been novation of the debt, and it was not alleged or proved that a second novation had taken place. *Canadian Breweries Limited v. Allard*, Q. R. 24 S. C. 515.

Division Court Action—Settlement before trial—No bar to subsequent action. *Williams v. Cook*, 1 O. W. R. 133.

Opinion of Court on Case Stated by Government.]—The opinion given to the government by the Court of Appeal upon a question referred to the Court under 61 V. c. 11, is an opinion only, and cannot make a point passed upon res judicata; and is not even a compromise, a transaction, nor an arbitration, inasmuch as the question referred to the Court of Appeal is not by the consent of the parties, put upon the sole initiative of the government. *Galindez v. The King*, Q. R. 26 S. C. 171.

See ACCOUNT—APPEAL—ASSESSMENT AND TAXES—CHAMPERTY AND MAINTENANCE—FRAUDULENT CONVEYANCE—LANDLORD AND TENANT—MASTER AND SERVANT — PUBLIC MORALS — PARTITION — PRINCIPAL AND SURETY.

RESOLUTIONS.

See MUNICIPAL CORPORATIONS.

RESTRAINT OF RELIGIOUS LIBERTY.

See WILL.

RESTRAINT OF TRADE.

See TRADE UNION.

RESTRAINT ON ALIENATION.

See SUBSTITUTION—WILL.

RESTRAINT UPON ANTICIPATION.

See RECEIVER.

RESULTING TRUST.

See TRUSTS AND TRUSTEES.

RETAINER.

See SOLICITOR.

RETRAIT SUCCESSORAL.

See CHAMPERTY AND MAINTENANCE.

RETURN.

See PARLIAMENTARY ELECTIONS—WRIT OF SUMMONS.

RETURNING OFFICER.

See MUNICIPAL ELECTIONS.

REVENDICATION.

See WRIT OF REVENDICATION.

REVENUE.

Amount Payable by Half-Sister of Testator.]—The words "sister of the deceased" in s-s. 4 of s. 2 of the Succession Duty Act Amendment Act of 1899, include a half-sister. *In re Oliver*, 21 Occ. N. 364, 455, 8 B. C. R. 91.

Bank Shares — *Mobilia Sequuntur Personam.*]—The appellant, as collector of provincial revenue, sued the respondent as executor of the last will of Allan Gilmour, claiming that, although the deceased had died domiciled in the Province of Ontario, the Province of Quebec was entitled to succession duties upon 626 shares of the stock of the Merchants Bank of Canada and 4,275 of the Canadian Bank of Commerce, which were registered at the offices of the respective banks in Montreal,—and also upon a certain loan made to a person domiciled in Quebec:—Held, that the succession devolved in Ontario and thus movable property, although locally situated in Quebec at the time of the death of the testator, was constructively situated in Ontario according to the rule "mobilia sequuntur personam," and therefore the Province of Quebec was not entitled to any succession duties thereon. *Lambe* v. *Manuel*, 21 Occ. N. 250, Q. R. 18 S. C. 184.

Canners—*Tackle Furnished Fishermen.*]—Where canners furnish fishermen with fishing apparatus, but there is no agreement binding the fishermen to sell their catch to the canners, the latter are not liable for the revenue tax in respect of such fishermen. *Campbell* v. *United Canneries*, 21 Occ. N. 456, 8 B. C. R. 113.

Customs Act—*Infraction—Smuggling—Preventive Officer—Salary—Share of Condemnation Money.*]—The suppliant had been empowered to act as a preventive officer of customs by the chief inspector of the department of customs. The appointment was oral, but a shorthand writer's note of what took place between the chief inspector and the suppliant at the time of the latter's appointment shewed the following stipulation to have been made and agreed to as regards the suppliant's remuneration: "Your remuneration will be the usual share allotted to seizing officers; and, if you have informers, an award to your informers, and you must depend wholly upon these seizures." Certain regulations in force at the time provided that in case of condemnation and sale of goods or chattels seized for smuggling, certain allowances or shares of the net proceeds of the sale should be awarded to the seizing officers and informers respectively:—Held, that where the Minister of Customs had not awarded any allowance or share to the suppliant in the matter of a certain seizure and sale for smuggling, the Court could not interfere with the Minister's discretion. *Bouchard* v. *The King*, 24 Occ. N. 390, 9 Ex. C. R. 216.

Customs Act—*Smuggling — Penalties—Averments in Information—Demurrer—Jurisdiction.*]—In an information for smuggling, laid under the provisions of s. 192 of the Customs Act, it is a sufficient averment to allege that the defendants in order to defraud the revenue of Canada did evade the payment of the duties upon dutiable goods imported by them into Canada; and did fraudulently import such goods into Canada without due entry inwards of such goods at the custom house. It is not necessary to charge the defendants with all the offences mentioned in such section; and the information is good in law if it sets out any one of the offences mentioned in the said section. 2. In such an information, where it is sought to recover, in addition to the value of the goods smuggled, a sum equal to the value of the goods, it is necessary to allege that the goods were "not found." The offender is only liable to forfeit twice the value of the goods, when such goods are not found, but their value has been ascertained. 3. The penalty "not exceeding $200 and not less than $50" mentioned in s. 192 of the Customs Act, as recoverable before "two justices of the peace or any other magistrate having the powers of two justices of the peace," cannot be sued for in the Exchequer Court of Canada. Barraclough v. Brown, [1897] A. C. 615, referred to. 4. While a claim for penalties in respect of goods smuggled more than three years before the filing of the information would be prescribed under s. 240 of the Customs Act, where the goods have been seized by a customs officer, such seizure is to be deemed a commencement of the proceeding within the meaning of s. 236. *Rex* v. *Lovejoy*, 25 Occ. N. 141, 7 Ex. C. R. 377.

Customs Duties—*Foreign-built Ship—Statutes.*]—A foreign-built ship bought in the United States and brought to Canada is liable to the duty imposed by the Canadian Customs Tariff Act, 1897, s. 4, sched. A., item 409. Judgment in 22 Occ. N. 249, 32 S. C.

R. 277, affirmed. *Algoma Central R. W. Co. v. The King*, [1903] A. C. 478.

Customs Duties—*Importation of Steel Rails—Return of Duties Paid Under Protest — Interest—Quebec Law.*]—The suppliants had imported, at different times during the years 1892 and 1893, large quantities of steel rails into the port of Montreal, to be used by them as contractors for the construction of the Montreal Street Railway. The customs authorities contended that the rails were subject to duty, and refused to allow them to be taken out of bond until duties, amounting in the aggregate to the sum of $53,213.54, were paid. The suppliants paid the same under protest. After the decision by the Judicial Committee of the Privy Council in Toronto R. W. Co. v. The Queen, [1896] A. C. 551, and some time in the year 1897, the customs authorities returned the amount of the duties to the suppliants. The suppliants claimed interest on the money during the time it was in the hands of the Crown, and they filed their petition of right therefor:—Held, that, as the duties were paid at the port of Montreal, the case had to be determined by the law of the Province of Quebec. 2. That on the question at issue the law of the Province of Quebec was the same as the laws of the other provinces of the Dominion. 3. That, as the moneys wrongfully collected for duties were repaid to the suppliants before the action was brought, there was no debt on which to allow interest from the commencement of the suit. If at the time of the commencement of the action the Crown was not liable for the interest claimed it could not be made liable by the institution or commencement of action. Laine v. The Queen, 5 Ex. C. R. 128, and Henderson v. The Queen, 6 Ex. C. R. 47, distinguished. *Ross v. The King*, 22 Occ. N. 86, 7 Ex. C. R. 287.

Customs Duties—*Lex Fori—Lex Loci—Interest on Duties Improperly Levied—Mistake of Law—Répétition—Presumption as to Good Faith.*]—The Crown is not liable, under the provisions of arts. 1047 and 1049, C. C., to pay interest on the amount of duties illegally exacted under a mistaken construction placed by the customs officers upon the Customs Tariff Act. Wilson v. City of Montreal, 24 L. C. Jur. 222, approved. Per Strong, C.J. (dubitante). The error of law mentioned in arts. 1047 and 1049, C. C., is the error of the party paying and not that of the party receiving. Money paid under compulsion is not money paid under error within the terms of those articles. Toronto Railway Co. v. The Queen, 4 Ex. C. R. 262, 25 S. C. R 24, [1896] A. C. 551, discussed. Algoma Railway Co. v. The King, 7 Ex. C. R. 239, referred to. Judgment appealed from, 7 Ex. C. R. 287, 22 Occ. N. 86, affirmed. *Ross v. The King*, 23 Occ N. 33, 32 S. C. R. 532.

Deduction of Debts—*Compromise of Claim by Executors.*]—An appeal by the Crown from the judgment in 32 O. R. 143, 20 Occ. N. 332, was dismissed with costs, the Court agreeing with the reasoning of the judgment appealed from. *Ross v. The King*, 21 Occ. N. 227, 1 O. L. R. 487.

Deposits in Banks—*Foreigner.*]—Payment of duty under the Succession Duty Act is based upon administration, and duty is payable upon any property which can properly be administered only in Ontario. Payment of non-negotiable deposit receipts, payable after notice at branches in Ontario of Canadian banks, held by a foreigner at the time of his death in the foreign country, cannot be enforced except by his personal representative in Ontario, and succession duty is payable there in respect of the amount covered by them. Judgment in 31 O. R. 540, 20 Occ. N. 70, affirmed. *Attorney-General for Ontario v. Newman*, 21 Occ. N. 225, 1 O. L. R. 511.

Double Duty—*Power of Appointment—Statutes.*]—The testator died in England on the 25th February, 1901, possessed of and entitled to lands in Ontario. He left a will and four codicils, by which his sister was named as sole executrix and trustee, and was bequeathed the income of his whole estate for life and given a general power of appointment by will in respect of the whole estate. The sister died on the 2nd March, 1901, without having proved the will and codicils and without having taken upon herself any of the burdens thereof. By her will, made in 1872, she gave all her estate to the defendant, who obtained from the High Court of Justice in England letters of administration to the estates of the testator and his sister with the wills annexed. He then applied to a Surrogate Court in Ontario for ancillary letters of administration to both estates and for legal authority to deal with the lands in Ontario:—Held, that, having regard to the provisions of clause (g) of s. 4 of the Succession Duty Act R. S. O. 1897 c. 24 (inserted by s. 11 of 62 V. c. 9), the lands in Ontario were subject to two duties, as having devolved under two wills:—Held, also, that the provisions of ss-s. 2 of s. 6 of 1 Edw. VII. c. 8 were not declaratory of the previous law nor retroactive, and, having become law since the two deaths, did not apply to this case. Attorney-General v. Theobald, 24 Q. B. D. 557, distinguished. *Attorney-General for Ontario v. Stuart*, 21 Occ. N. 527, 2 O. L. R. 403.

Inland Revenue Act—*Amending Act—Possession of Still—Conviction—"At any Place."*]—The defendant was convicted before the stipendiary magistrate in and for the city of Halifax, for that he did, in the said city of Halifax, on the 11th February, 1892, without having a license under the Inland Revenue Act then in force, unlawfully have in his possession, in the city of Halifax, aforesaid, a still, suitable for the manufacture of spirits, without having given notice thereof as required by the Act, the said still not being registered under s. 125. The prosecution and conviction were under the Inland Revenue Act, R. S. C. c. 34, s. 159 (e), as amended by the Acts of 1898 c. 27. The Act as it originally stood read, "Everyone who, without having a license under this Act, then in force, has in his possession any such still, &c., in any place or premises owned by him, or under his control, without having given notice thereof, &c., is guilty, &c." As amended it read ". . . has in his possession, at any place, any such still," &c.:—Held, sustaining the conviction, that the amendment gave the Act a much wider operation, and did not confine it to cases where the place was owned or controlled by the accused; and was intended to cover all cases of actual or constructive possession, no matter where the still was, the words "at

any place" in the amended Act being equivalent to "anywhere;" that the gist of the offence was not having possession of the still in any particular place, but having possession of it anywhere, or at all; that the intention of the Act was to prevent any unauthorized person from having possession of a still, &c., in any place, at any time, or in any capacity. *Rex* v. *Brennan*, 35 N. S. Reps. 106.

Inland Revenue Act—*Officer Acting Under—Search — Private Residence—Writ of Assistance—Inquiries—Privilege.*]—An officer of Inland Revenue, acting in good faith in the execution of his duty, and under competent authority, is not responsible in damages for entering a private house and making a search therein. A writ of assistance, signed by a Judge of the Exchequer Court of Canada, as provided by the Inland Revenue Act, R. S. C. c. 34, s. 74, constitutes legal and sufficient authority for a search in a private residence. Inquiries of, or consultations with, official or other persons in the neighbourhood, by a revenue officer, with a view to obtaining information, are privileged. The words "any building or other place," in the Inland Revenue Act, s. 75, include a private residence. *Duquenne* v. *Brabant*, Q. R. 25 S. C. 451.

Inland Revenue Act — *Possession of Still—Conviction—Jurisdiction of Stipendiary Magistrate—Penalty — Commitment—Misdemeanour — Constitutional Law.*]—The defendant was convicted for a like offence, committed at the same time, as that referred to in Rex v. Brennan, 35 N. S. Reps. 106. In addition to the grounds relied on in the Brennan case, in support of the application to set aside the conviction, and for the prisoner's discharge, the further objection was taken that the jurisdiction of the magistrate, by s. 113, was limited to cases where the penalty or forfeiture was not in excess of $500, whereas, reading ss. 124, 159, and 160 together, the penalty, in this case, would be in excess of that amount. Also, that, under the commitment, the prisoner was required to be detained until he paid a larger amount than he was adjudged to pay. It being admitted that there was a good conviction:—Held, that ss. 886, 896, of the Criminal Code applied, and that the objections taken afforded no ground for the prisoner's discharge:—Held, also, that calling the offence a misdemeanour would not affect the jurisdiction of the stipendiary magistrate, which was clearly given under the Inland Revenue Act, R. S. C. c. 34, s. 113:—Held, also, following Attorney-General v. Flint, 16 S. C. R. 701, that the Dominion Parliament had power to create such a court. *Rex* v. *Kennedy*, 35 N. S. Reps. 206.

Succession Duty—*Aggregate Value of Estate.*]—In order to arrive at the aggregate value of the property of a deceased person under s. 4 of the Succession Duty Act of New Brunswick, 1896, the debts due by the estate should be deducted. *Receiver-General of New Brunswick* v. *Hayward*, 35 N. B. Reps. 453.

Succession Duty—"Aggregate value" of property—Construction of statutes. *Attorney-General for Ontario* v. *Lee*, 4 O. W. R. 516.

Succession Duty—"*Aggregate Value*" *of Property—Incumbrances.*]—In estimating the "aggregate value" of the property of a deceased person under the Succession Duty Act, R. S. O. 1897 c. 24, as amended by 62 V. (2) c. 9, and 1 Edw. VII. c. 8, the value of the land of the deceased, where such land is incumbered or mortgaged, is to be regarded, and not merely the value of the deceased's equity of redemption therein. *Attorney-General for Ontario* v. *Lee*, 25 Occ. N. 39, 4 O. W. R. 516, 6 O. W. R. 245, 9 O. L. R. 9, 10 O. L. R. 79.

Succession Duty—*Appraisement of Property of Deceased Persons—Appeal to Surrogate Judge—Further Appeal to Judge of High Court—Amount in Controversy—Treasurer of Province—Status—Gift of Real Estate to Children before Death — Contemplation of Death—"Disposition" of Property—Conveyance More than a Year before Death—Valuation of Shares in Company.*]—Appeal by the Treasurer of the Province of Ontario from a judgment or decision of the Judge of the Surrogate Court of Wentworth, under s. 9 of the Succession Duties Act, R. S. O. 1897 c. 24; and cross-appeal by the executors of the will of George Roach from the same decision. The Surrogate Judge assessed the value of the estate of George Roach at $197,152.27, upon an appeal from the appraisement and assessment by the sheriff under s. 7 of the Act. In the amount arrived at by the Judge he refused to include the value of the homestead property of the deceased; and he refused to alter the valuation of $10,550 placed by the sheriff on certain stock in the Hamilton Park and Suburban Co.; but he included $1,000 in respect of the household goods of the deceased, which the sheriff had not included. By his appeal the Treasurer of Ontario sought to have the value of the homestead, stated at $7,680, added to the amount fixed by the Surrogate Judge, and to have the valuation of the stock in the Hamilton Park and Suburban Co., increased from $10,550 to $16,000. By the cross-appeal the executors sought to reduce the valuation of the stock from $10,550 to $4,000. The testator more than a year before his death, and while in good health, conveyed his homestead to his two daughters in fee. The conveyance was registered immediately. No change of possession however took place, and the testator continued to live in the house until his death. The Surrogate Judge, on the appeal, fixed the value of the estate at $197,152.27, refusing to include the homestead property, but he included the value of the household goods:—Held, that s. 9 of the Act included the Provincial Treasurer so as to give him the right of appeal; and that such appeal was not limited to the grounds expressly stated, the whole appraisement being open to appeal; and the appeal being for an amount in excess of $10,000 there was a further appeal to a Judge of the High Court:—Held, also, that the conveyance to the daughters of the homestead property could not be deemed to have been made in contemplation of death within s. 4 (b); but that came under s.-s. (c) of that section, and should be read in connection with the interpretation section, s. 2, whereby "property" included real as well as personal estate, and was subject to duty. *In re Roach*, 6 O. W. R. 189, 10 O. L. R. 208.

Succession Duty—*Bank Deposit by Foreigner.*]—Under the British Columbia Succession Duty Act, 1899, c. 68, s. 4, succession

duty is payable upon money deposited in a bank in British Columbia, belonging to a person domiciled in a foreign country at the time of his death. *In re McDonald Estate, In re Succession Duty Act*, 9 B. C. R. 174.

Succession Duty—*Charge against Legacies—Payment of Legacy Within Year—Set-off.*]—The direction in a will to executors to pay debts and funeral and testamentary expenses does not operate so as to make the payment of the succession duty, payable under R. S. O. 1897 c. 24, a charge on the residue and to exonerate the legacies from payment thereof. Manning v. Robinson, 29 O. R. 483, followed. The rule that executors are not bound to pay pecuniary legacies before the expiration of a year from the testator's death does not prevent them, where no time is fixed for payment, and there is sufficient to pay debts, legacies, and charges, from paying a legacy forthwith, and so to allow the amount thereof to be set off against a mortgage due by a legatee to the estate. *In re Holland*, 22 Occ. N. 164, 3 O. L. R. 406, 1 O. W. R. 73.

Succession Duty — *Debentures Exempt from Taxation.*]—A part of the estate of L., deceased, consisted of debentures of the Province of Nova Scotia, issued under the provisions of a statute of the Province, which exempted them from taxation for provincial, local, or municipal purposes:—Held, that, notwithstanding the exemption from taxation, under the provisions of the Act, the debentures in question must be included in the valuation of the estate for the purpose of determining the amount payable to the government of the province, under the Succession Duty Act, Acts of 1895 c. 8, s. 5. *Attorney-General* v. *Lovitt*, 35 N. S. Reps. 223.

Succession Duty—*"Dutiable" Property—Transfer of Property before Death—Donatio Mortis Causa—Contract — Consideration—Estoppel — Survivorship.*] — The aggregate value of the estate of an intestate was $12,877, and of this $7,540 passed to the hands of his niece by virtue of an agreement between them, given effect to by a donatio mortis causa, as established in Brown v. Toronto General Trusts Corporation, 32 O. R. 319:—Held, that the $7,540 was not dutiable under the Succession Duty Act, R. S. O. 1897 c. 24, and amendments, the transfer from the intestate to his niece not being a voluntary one, but one made in pursuance of a contractual obligation for value; and the niece not being estopped, by the form of the judgment in her action against the Toronto General Trusts Corporation, from setting up in this action, brought on behalf of the Crown to recover succession duty, that the transfer was not a gift, but the implementing of a contract:—Held, also, that the $7,540 did not pass by survivorship within the meaning of s. 4 (d) of R. S. O. 1897 c. 24. *Attorney-General for Ontario* v. *Brown*, 25 Occ. N. 90, 5 O. L. R. 167, 2 O. W. R. 30.

Succession Duty — *Property Exempt—Sale under Will—Duty on Proceeds—Costs—Crown.*]—Debentures of the Province of Nova Scotia are, by statute, "not liable to taxation for provincial, local, or municipal purposes" in the province. L. by his will, after making certain bequests, directed that the residue of his property, which included some of these debentures, should be converted into money to be invested by the executors and held on certain specified trusts. This direction was carried out after his death, and the Attorney-General claimed succession duty on the whole estate:—Held, affirming the judgment appealed against, 35 N. S. Reps. 223, Sedgewick and Mills, JJ., dissenting, that, although the debentures themselves were not liable to the duty either in the hands of the executors or of the purchasers, the proceeds of their sale, when passing to legatees, were. Costs will be given for or against the Crown as in other cases. *Lovitt* v. *Attorney-General for Nova Scotia*, 23 Occ. N. 212, 33 S. C. R. 350.

Succession Duty—*Provisions of Will—Income only Payable for Life or Years—When Duty Payable on Corpus.*]—The scheme of the Succession Duty Act, R. S. O. 1897 c. 24, is to provide a duty on succession to property by persons succeeding to estates and interests in property by testate or intestate title. A testator by his will devised his estate to trustees upon trust to collect the income and apply it or such part as the trustees thought proper for the benefit of children and grandchildren for the period of 21 years after his death, and to pay over to the beneficiaries the whole income, without accumulations, for the period between the end of the 21 years and the death of the last surviving child:—Held, that there was a plainly marked out period in the future, not sooner than 21 years, when the corpus of the estate was to be divided; that there was a prior interest for life or years according to the event in fact, during which the trustee, standing in loco parentis, was entitled to the present income of the property until the time arrived when the corpus was to be divided; that when there is a present enjoyment there should be present payment of the duties based upon the estate or interest which is enjoyed; that there was a prior estate for years or for life, after which came the future estate in fee, not now to be levied upon for duty; and that only the income was presently liable to the payment of succession duty. *Attorney-General for Ontario* v. *Toronto General Trusts Corporation*, 23 Occ. N. 89, 5 O. L. R. 216, 1 O. W. R. 867, 2 O. W. R. 271.

Succession Duty—*Quebec Act—Construction—Application to Ontario Property.*]—Taxes imposed on movable property by the Quebec Succession Duty Act of 1892 and the amending Acts apply only to property which the successor claims under or by virtue of Quebec law, and have no application to the several items in this case, which formed part of a succession devolving under the law of Ontario. Judgment of the Court of King's Bench, Quebec, affirming judgment in 21 Occ. N. 250, Q. R. 18 S. C. 184, affirmed. *Lambe* v. *Mannel*, [1903] A. C. 68.

Transfer of Shares in Lifetime.]—Shares in an incorporated company transferred by the deceased in his lifetime to different members of his family, but not for the purpose of evading the payment of succession duties, are not liable for the payment of such duties under 59 V. c. 42 (N.B.) *Receiver-General of New Brunswick* v. *Schofield*, 35 N. B. Reps. 67.

REVIVOR.

Action to Remove Curator of Interdict—*Death of Plaintiff—Survival of Action—Costs.*]—The plaintiff brought suit for the removal of the curator appointed to his son-in-law, interdicted for prodigality. While the case was proceeding the plaintiff died, and his testamentary executors petitioned to be permitted to take up the instance. The heirs of the deceased, who were relations by affinity of the interdict, also petitioned to be allowed to intervene and continue the suit for the removal of the curator, defendant:—Held, that while an action to remove a curator forms no part of the plaintiff's succession and is not transmissible to his heirs, nevertheless the claim against the defendant for costs incurred in the action is a claim which formed part of the patrimony of the plaintiff, and was transmitted under his will to his executors, who therefore, were entitled to take up the instance, not to have the defendant removed from the curatorship, but in order to determine his liability for costs. 2. The heirs were entitled to intervene to continue the action, not in virtue of any right transmitted to them, but in virtue of their quality of relatives by affinity of the interdict, and in this quality were entitled to ask for the removal of the defendant from his office of curator. *Wilson* v. *Giroux*, Q. R. 21 S. C. 56.

Deceased Plaintiff—*Continuance of Action—Adverse Party—Practice.*]—Art. 607, C. P., applies to a voluntary continuance on the part of the representatives of a deceased plaintiff. If the adverse party wishes to compel the heirs to continue the suit he must do so by means of a demand in the form provided by art. 273, C. P. *Routhier* v. *Nelson*, 7 Q. P. R. 205.

Executors — *Petition — Acceptance of Office.*]—When one of the parties dies during the pendency of a suit, the suit may be continued by his testamentary executors. 2. It is not necessary for the executors to allege that they have accepted office as such, inasmuch as the making of the petition is in itself a sufficient acceptance. *Gignac* v. *People's Telephone Co.*, Q. R. 21 S. C. 154.

Survival of Action — *Séparation de Corps—Universal Legatee.*]—The universal legatee of a deceased plaintiff, suing his wife for séparation de corps, has a right to continue the action, especially where the plaintiff has made a claim that the defendant shall be deprived of the right of exercising the advantages given to her under her marriage contract. *Lemay dit Delorme* v. *Brais*, 6 Q. P. R. 221.

See JUDGMENT—PARTNERSHIP.

REVOCATION.

See JUDGMENT—MUNICIPAL CORPORATIONS—WILL.

REWARD.

Extraordinary Services — *Arrest of Thieves—Danger—Value of Services.*]—One who has, even at the peril of his life, voluntarily joined in capturing robbers, and by reason of whose efforts the victim of the robbery has received a considerable sum, cannot recover from the latter more than the actual value of his services, and cannot exact a reward for the courage he has displayed and the risks he has run. *Wark* v. *People's Bank of Halifax*, Q. R. 18 S. C. 486.

RIGHT OF WAY.

See EASEMENT.

RIPARIAN OWNERS.

See WATER AND WATERCOURSES.

RIVER.

See WATER AND WATERCOURSES.

ROAD COMPANIES.

Tolls—*Exemptions from—Manure—Waste Matter of Packing Houses.*]—The exemption from tolls for the cartage of manure, provided by art. 2970, clause 2, R. S. Q., applies to the roads of companies formed by virtue of arts. 4998 et seq. of the same statutes. The waste matter of packing and rendering factories used as manure is "engrais" within the meaning of the exemption referred to. *Gatineau Macadamized and Gravel Road Co.* v. *Geo. Matthews Co.*, Q. R. 27 S. C. 170.

ROADS.

See WAY.

ROYALTIES.

See MINES AND MINERALS—PATENT FOR INVENTION.

RULE NISI.

Re-issue—*Return—Time.*]—The Court is without power to order the re-issue of a rule nisi or to extend the delay which has expired for the return thereof. *Palliser* v. *Vipond*, 6 Q. P. R. 304.

RULES OF COURT.

See COSTS.

SAISIE-ARRET.

See ATTACHMENT OF DEBTS.

SAISIE-CONSERVATOIRE.

Lex Fori—*Action for salary—Withdrawal of Property.*]—The law governing a saisie-conservatoire is the law of the place where the seizure is made. 2. A saisie-conservatoire cannot be granted in an action for salary, even upon the allegation that the defendant has ceased to do business in the provinces of Quebec and Ontario and has withdrawn all his valuables therefrom, thereby depriving the plaintiff of his recourse. *Sexton* v. *Violett*, 6 Q. P. R. 325.

See ATTACHMENT OF DEBTS—DISTRIBUTION OF ESTATES—LIEN.

SAISIE-GAGERIE.

See BANKRUPTCY AND INSOLVENCY—PLEADING.

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SALE OF GOODS.

I. ACCEPTANCE, 1443.
II. ACTION FOR PRICE, 1444.
III. CONDITIONAL SALES, 1447.
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I. ACCEPTANCE.

Action for Price—Deduction for inferior quality—Costs. *Vair* v. *United Fruit and Produce Co.*, (Man.), 2 W. L. R. 54.

Contract—*Receipt—Sale of Goods Ordinance.*]—In an action for the price of 43 head of horses at $23 per head, the evidence established that the plaintiff and defendant drove to the plaintiff's ranche and saw the plaintiff's bunch of horses; that the defendant specified such horses as were unsuitable for his purpose, which were thereupon marked and separated from the others; that the defendant gave the plaintiff $5 with which to purchase oats to feed the horses, and also bought and gave the plaintiff some rope with which to make halters for the horses; but that the horses never left the possession of the plaintiff:—Held, that, though there may have been a sufficient acceptance, there was not such an actual receipt by the defendant of the horses as to establish a contract binding under s. 6 of the Sales of Goods Ordinance. *Livingstone* v. *Colpitts*, 21 Occ. N. 102, 4 Terr. L. R. 441.

Defence as to Quality—*Offer to Return and Cancel Sale.*]—In an action for the price of goods and delivered, the defendant cannot plead that the goods delivered to him were not of the quality stipulated for and that he has been obliged to replace them by other goods, without at the same time offering to the plaintiff the goods received from him, and demanding the cancellation of the sale. *Dominion Bag Co.* v. *Bull Produce Co.*, 5 Q. P. R. 175.

Refusal to Accept—*Entire Contract—Failure to Supply Part.*]—The respondent ordered, by illustrated descriptive catalogue received from the appellant, several articles of furniture, at the prices stated in the catalogue, for furnishing a cottage in the country. The order included a table styled a "monk's bench." The appellant, being unable to supply this article as described in the catalogue, substituted another table of a similar character. Some of the other articles sent also differed slightly from the description in the catalogue. The respondent, treating the order as an entire contract, refused to accept the whole or any part of the articles sent to him. Subsequently, the appellant offered to take back the article substituted for the "monk's bench." The action, however, was brought for the price of all the articles sent:—Held, affirming the judgment in 21 Q. R. S. C. 336, that the order of the respondent being for specified articles forming a suite of furniture for a cottage, the order was an entire contract, and the respondent was entitled to get exactly what he had ordered; and in default, to refuse acceptance of articles different from those contracted for, and also to recover his disbursements made under the contract. *Tobey Furniture Co.* v. *Macmaster*, Q. R. 12 K. B. 34.

Refusal to Accept—*Perishable Goods—Sequestrator.*]—In an action to enforce a contract of sale and to recover the price, when the object of the sale has been tendered by the vendor to the purchaser, who refuses to take delivery, and where it is perishable and its price liable to fluctuate, the Court will appoint a sequestrator with power to sell. *Gordon* v. *Pinder*, 4 Q. P. R. 321.

Refusal to Accept—Non-compliance with contract as to time and mode of consignment. *Watterson* v. *McArthur*, 6 O. W. R. 11.

Refusal to Accept—Tender—Measurement of cordwood—Re-sale by vendor—Recovery of loss upon. *McLennan* v. *Gordon*, 5 O. W. R. 98.

II. ACTION FOR PRICE.

Acceptance of Part—Entire contract—Statute of Frauds. *Bastedo* v. *Simmons*, 2 O. W. R. 866, 955.

Account—Deductions—Freight overcharge—Inspection—Shortage—Defective quality—Interest—Costs. *McKenzie* v. *Miller*, 3 O. W. R. 242.

Ascertainment—Counterclaim for breach of contract—Representations not amounting to contract. *Kny-Scheerer Co.* v. *Chandler and Massey*, 4 O. W. R. 187.

Authority of Agent of Purchaser—Delivery—Acceptance — Sale of business by defendant—Evidence—Copies of orders for goods—Freight charges. *Shorey* v. *Van Meter* (N. W. T.), 2 W. L. R. 361.

Collateral Oral Agreement—Condition precedent—Waiver — Acceptance—Part performance — Consideration — Warranty — Failure to return goods. *New Hamburg Manufacturing Co.* v. *Klotz* (N.W.T.), 1 W. L. R. 471.

Combination of Dealers—Agreement—Construction — Course of dealing—Company. *O'Reilly* v. *Thompson*, 4 O. W. R. 506.

Condition as to Test—Non-fulfilment—Dismissal of action—Costs. *Mellick* v. *Watt*, 2 O. W. R. 1116.

Contract—Breach—Damages for delay—Penalties—Inspection fees. *Ontario Paving Brick Co.* v. *Toronto Contracting and Paving Co.*, 5 O. W. R. 561.

Contract—Damages for delay—Breach of contract—Penalties—Claim and counterclaim—Costs. *Ontario Paving Brick Co.* v. *Toronto Contracting and Paving Co.*, 3 O. W. R. 759.

Contract—Place of delivery—Inspection—Defect in quality. *Craig* v. *Shaw*, 2 O. W. R. 449, 508.

Contract in Writing—*Verbal Representation—Evidence.*]—The plaintiffs sent to the defendants the following telegram: "Can you handle 90,000 green cod? Answer price." The defendants replied: "If cod No. 1, large, no shrinkage, $1.45." The plaintiffs brought the cod to the defendants, and while the fish were being landed the defendants signed an agreement in writing by which they agreed to buy from plaintiffs "the cargo of fish now being landed," and to pay for the same at the rate of $1.46 per 100 lbs. In an action by the plaintiffs to recover the contract price of the fish, the defendants sought to give evidence of a verbal representation at the time of delivery that they were of No. 1 quality. —Held, that the trial Judge was right in refusing to receive such evidence, as tending to vary the written contract. Where the defendants were seeking a remedy in damages, by reduction in price, for breach of condition or warranty, the remedy was a purely common law one, and the authorities which would permit such evidence to be given in an action for specific performance, or to rescind a contract, were not applicable.—Semble, that if the defendants had not taken the fish, and the parties could have been restored to their original position, the evidence might have been given by way of defence to an action for the price. *Howard* v. *Christie*, 33 N. S. Reps. 367.

Conversion — Contract — Breach — False representations — Counterclaim. *Kny-Scheerer Co.* v. *Chandler and Massey*, 2 O. W. R. 215.

Counterclaim for Breach of Warranty. *Selby* v. *Mitchell*, 2 O. W. R. 496.

Counterclaim for Damages—Substitution of inferior material in manufactured articles — Warranty — Resale — Delay in furnishing goods — Measure of damages—Costs. *Centaur Cycle Co.* v. *Hill*, 1 O. W. R. 229, 377, 401, 639, 2 O. W. R. 1025.

Defence — *Inferior Quality—Receipt of Goods—Bar—Demurrer.*] — The purchaser may refuse the goods which his vendor has delivered to him, if they are not of the kind or quality agreed upon, or if, in the absence of agreement on this subject, they are not of a true and merchantable quality. 2. The fact of the receipt of the goods is not, by itself, a bar to the claim of the purchaser, if the silence of the latter is sufficiently explained, and if his conduct gives no occasion for suspicion. 3. Where the defendant, in an action for the price, alleges that the goods delivered were not of the quality agreed upon, and that he has notified the plaintiff to take them back, preuve avant fair droit will be ordered. *Topken* v. *Rameh*, 4 Q. P. R. 58.

Defence—Part not up to sample—Detention by purchaser—Damages—Set-off—Costs—Waiver — Conversion. *American Cotton Yarn Exchange* v. *Hoffman*, 2 O. W. R. 416, 987.

Delivery "on Approval"—*Onus—Conflicting Evidence—Findings of Trial Judge—Review—New Trial by Jury.*] — Where a question of fact, as to which the evidence is contradictory, and as to which there is no preponderance in favour of either party, has been determined by the trial Judge in favour of the plaintiff, but with doubt, and only for the reason that to send the case to a jury would probably result in a disagreement and in expense to the parties, the Court, if they consider that the interests of justice require it, will review the Judge's finding and will order a new trial, directing the issues to be settled by a jury; and where the delivery of goods, after negotiations for a sale, is as consistent with the defendant's account of the transaction (delivery on approval) as it is with plaintiff's, the trial Judge is in error in regarding the delivery as a fact which requires explanation, and throws the burden on the defendant. *Johnson* v. *Durant*, 37 N. S. Reps. 471.

Injury after Delivery — Warranty—Examination. *Harris* v. *Simpson*, 4 O. W. R. 82.

Interpleader — Ownership — Issue — Costs. *Re Pendrith Machinery Co. and Farquhar*, 2 O. W. R. 317.

Liability of Transferee to Vendor.]—A person who, not being the purchaser, obtains goods which have not been paid for, does not thereby incur the obligation of paying for them. *Walker* v. *Lamoureux*, Q. R. 21 S. C. 492.

Privilege of Returning Goods — *Defence.*]—Where, in a contract of sale, the purchaser had the privilege of freeing himself

from the obligation of paying the price upon his returning to his vendor the articles sold, an action for the recovery of the price will, nevertheless, lie, and the purchaser cannot plead, by way of defence in law, that the creditor should allow him to return the articles sold, and not claim the price until after default to return. *Leduc* v. *Rabeau*, 4 Q. P. R. 154.

Proof of Sale and Delivery—*Justice's Court—Limit Bond — Extension of Time after Breach.*] — In a Justice's Court a judgment by default was signed in an action for goods sold and delivered, the only evidence of the sale and delivery being that of the plaintiff, who swore that she sold the goods to the defendant's wife, as per bill put in evidence, and that she had received $5 on account. The bill contained the dates of the sales, the articles sold, and the amounts charged: — Held, sufficient to warrant the signing of the judgment. Per Barker, J. The giving of time to arrange payment by the plaintiff to the original defendant, after breach of a limit bond, is no defence to an action for such breach. *Kelly* v. *Thompson*, 35 N. B. Reps. 718.

Running Account — Balance—Appeal on questions of fact. *Hand* v. *Sutherland*, 2 O. W. R. 263.

Sale "Subject to Approval"—Return within reasonable time — Construction of contract. *Mason and Risch Piano Co.* v. *Thompson*, 3 O. W. R. 540.

Ship — Contract—Correspondence — Bill of sale—Damages for not accepting — Delay. *Garroch* v. *Purvis*, 2 O. W. R. 632.

III. Conditional Sales.

Agreement as to Default — *Resumption of Possession—Implied Contract—Extension of Time for Payment—Consideration — Novation — Interest — Damages.*]—Goods were delivered to the plaintiff by the vendors on the terms of two conditional sale agreements. Until payment in full the goods were to remain the property of the vendors, and on default for one month of any of the stipulated payments, or of any extended payment, the whole balance of the purchase money was to become due, and the vendors, notwithstanding action or judgment, were to be at liberty to resume possession and resell, etc. The plaintiff got into default, although he continued in possession, and in August, 1902, an agreement was come to between him and the vendors that he should pay $50 on account, and the balance of $242, made up of arrears of principal and interest, in quarterly instalments, with interest. The plaintiff paid the $50. In October, 1902, the defendant, who had a judgment against the plaintiff, paid the vendors the whole balance due and procured an assignment, and transfer of the goods to himself, subject to the plaintiff's right. In November 1902, the defendant went to the plaintiff's house and seized the goods. The plaintiff was not then in default under the agreement for extension of August, 1902:—Held, that the seizure was wrongful and the defendant liable to damages, because an implied contract arose between the plaintiff and the vendor, from the delivery of the goods to the plaintiff on the terms of the receipts, that the right of resumption by the vendors should not be exercised—should not arise—while the goods remained in the plaintiff's possession until default had been made for one month of any of the payments provided for by the agreements "or of any extended payment," by which was plainly intended a default after an extension of time for payment: — Held, also, that the fact that under the agreement of August interest was to be paid upon interest then in arrear, as well as upon principal, was sufficient consideration for that new agreement:—Held, also, that the lowest measure of damages was the sum which the plaintiff had paid to the vendors on account of the price, inasmuch as this was the value of his interest in the goods which had been wrongfully taken out of his possession. *Bridgman* v. *Robinson*, 24 Occ. N. 214, 7 O. L. R. 591, 3 O. W. R. 503.

Default — *Seizure—Re-sale—Rescission of Contract — Repairs — Warranty.*] — In an action for the balance of the price of machines sold by the plaintiffs to the defendants, it appeared that the sale was a conditional one, the agreement containing a warranty of the machines, and providing that on default of payment the plaintiffs might resume possession and sell the machines and apply the proceeds, after paying the expenses of taking possession and selling, towards payment of the amount remaining unpaid, and sue for the balance. The purchase price was $2,875, and when the defendants had paid $1,200 the plaintiffs resumed possession, made repairs, and effected a conditional re-sale to W. for $2,000, no part of which had been received by them: — Held, that the defendants, having failed to return the machines after trial, having used them during three seasons, and paid $1,200 on account, were barred, under the terms of the agreement, from claiming that the machines were not good and that payment should not be enforced. 2. That the agreement was not rescinded by the plaintiffs re-taking possession and re-selling. Sawyer v. Pringle, 18 A. R. 218, distinguished. Watson Mfg. Co. v. Sample, 12 Man. L. R. 373, 19 Occ. N. 94, followed. 3. That the plaintiffs had a right, under the circumstances, to charge the cost of the repairs and of resuming possession against the proceeds of the re-sale. 4. That the defendants were not entitled to be credited in this action with anything on account of the proceeds of the conditional sale to W., as nothing had yet been received; if the money should be paid by W., the defendants would then have their recourse against the plaintiffs. 5. That the plaintiffs were not entitled to charge the cost of the repairs against the defendants in this action. *Abell Engine and Machine Works Co.* v. *McGuire*, 21 Occ. N. 358, 13 Man. L. R. 454.

Default—*Re-sale by Vendor—Action for Deficiency—Agency—Estoppel.*]—Upon a conditional sale of chattels, where the property was not to pass to the vendee until payment, the contract provided that if default were made the whole amount of the unpaid purchase money and all obligations given therefor were at once to become due and payable and the vendor was to be at liberty to resume possession and sell the articles toward paying the amount remaining unpaid thereon and interest. Default having been made, the vendors resumed possession and sold the goods, and sued the vendee upon promissory notes

for the price, crediting the proceeds of the sale:—Held, following Sawyer v. Pringle, 18 A. R. 218, and Arnold v. Playter, 22 O. R. 608, that the vendor must fail because the contract did not expressly provide that on a re-sale the defendants were to remain liable notwithstanding the provision for sale "towards paying the amount remaining unpaid." 2. Nor did a request from the vendee "to take the engine back and sell the same and apply the proceeds, less the expenses, towards paying my indebtedness to you," put the vendor in a better position, for it was only a request to him to do what he might do under the contract; and it did not constitute the vendor the agent of the vendee to re-sell the goods, which were never the property of the vendee, and it did not estop the vendee. *Abell* v. *Campbell*, 21 Occ. N. 303.

Default—*Remedy — Taking Possession — Action for Price—Ratification — Defence of Intoxication—Onus.*] — A written agreement entered into between the plaintiff and defendant for the purchase of an organ by the defendant from the plaintiff, provided that the property in the organ should remain in the vendor until payment in full of the price, which was payable in instalments, but that the vendee, making the payments agreed upon when due, &c., should be entitled to the possession and use of the property. It was further provided that, if, at any time before payment in full of the price, the vendee should fail in the performance of the agreements on his part to be kept, &c., the vendor should be entitled to the immediate possession, and that if the rent due or to become due under the agreement was not paid within 30 days all rights of the vendee should cease, and any money paid by him on account of the purchase should be retained by the vendor. The vendee failed to make any of the payments as required:—Held, by two members of the Court, that the provision in the agreement enabling the vendor to retake possession in default of payment was cumulative, and that the vendor not having done any act towards making an election that he would forfeit the agreement to pay, and take possession of the instrument, was entitled to the ordinary remedy on breach of the agreement to pay; that the burden of establishing the defence of intoxication was upon the defendant, and that he had failed to make it out; and that the agreement, even if defective, had been fully ratified:—Held, by the other two members of the Court, that the agreement being one for the conditional sale of the organ, and no property passing until all instalments had been paid, and the agreement providing that, in the event of non-performance by the vendee of the conditions of sale, the payments made by him should be forfeited and that the vendor could retake possession, the latter was the only remedy open to the vendor and that he could not sue under the agreement for non-payment of the instalments. *Travis* v. *Way*, 33 N. S. Reps. 551.

Default in Payment — Contract—Incorporation of informal memorandum as to notice —Re-taking without notice—Damages. *Adams* v. *Newcombe*, 3 O. W. R. 201.

Destruction of Subject Matter.] — Where a mare, the subject of a conditional sale, was drowned while in the actual possession of the buyer after default in payments:—Held, that the loss fell upon the buyer and that therefore the seller was entitled to recover the balance of the price. *Gillespie* v. *Hamm*, 4 Terr. L. R. 78.

Hire Receipt—*Registration—Bills of Sale Ordinance, N.W.T.—Possession — Description of goods.*]—The Ordinance respecting receipt notes, hire receipts, and order for chattels (No. 8 of 1889) requires such instruments to be registered "where the condition of the bailment is such that the possession of the chattel should pass without any ownership therein being acquired by the bailee." The instrument in question in this case provided that "the title, ownership, and right to the possession of the property for which this note is given, shall remain in" the bailors:—Held, that, inasmuch as the "receipt note" in question in this case provided that the bailors might on certain contingencies take possession of the property, though the right of possession was in the bailors, the actual possession was to pass to the bailee, and therefore the instrument was one which came within the terms of the Ordinance. Sutherland v. Mannix, 8 Man. L. R. 541, and Boyce v. McDonald, 9 Man. L. R. 297, considered. The Ordinance provides (s. 2) that the provisions of the Ordinance respecting Mortgages and Sales of Personal Property (No. 18 of 1889) and amendments thereto shall apply to such receipt notes, hire receipts, or orders for the purposes of this Ordinance, in so far as the provisions thereof may not be incompatible with or repugnant to this Ordinance:—Held, that this provision made applicable to such instruments s. 8, Ord. No. 18 of 1889, which provides that mortgages, sales, assignments, or transfers of goods and chattels shall contain such sufficient and full description thereof that the same may be readily and easily known and distinguished. The receipt note in question in this case stated that it was "given for one team of oxen:"—Held, that, inasmuch as the instrument itself shewed further that the team of oxen was one bought by the bailee from the bailors for the price therein mentioned, that the team, immediately previous to the bailment, had been owned by the bailors, and at the time thereof was taken over by, and was in possession of, the bailee, the team of oxen was sufficiently described. *Western Milling Co.* v. *Darke*, 2 Terr. L. R. 40.

Hire Receipt—Removal of goods. *Sharkey* v. *Williams*, 1 O. W. R. 135, 419.

Lien—Enforcement—Extra-judicial seizure —Fees—Amount due—Tender—Extent of lien —Moneys expended in improving property. *Pease* v. *Johnston* (N.W.T.), 1 W. L. R. 208.

Lien Note Signed after Sale and Delivery—*Priority of Chattel Mortgage.*]—On the 10th December, 1903, the plaintiff sold to C. three head of cattle; he swore that C. agreed at the time to give him a lien on the cattle; the reason it was not given at the date of the sale was that he had no form of lien note at the house; he procured one and had it signed by C. on the 31st December. Besides the cattle, the lien note included a gray horse; the plaintiff stated that, when he presented the note to C. for signature, the latter wanted to put in the horse, and it was done. He never owned the horse and did not claim it. On the 21st January, 1904, C., who was indebted to the defendant, gave him

a chattel mortgage covering the cattle, horse, and other chattels; the chattel mortgage was duly registered. On the 29th March the plaintiff, having heard that C. had left the province, went to see the defendant and ascertained that he held the chattel mortgage, but had not yet taken possession of the cattle. They were in the stable of one P., to whom it was stated C. had sold them. The plaintiff made a warrant of distress under his lien note and tried to seize the cattle, but, during the night, the defendant had taken possession of them under his chattel mortgage and prevented the plaintiff from taking them:—Held, that if the lien note had been given at the time of the delivery of the cattle to C., it would have had its full effect under s. 26 (b) of the Sale of Goods Act, R. S. M. 1902 c. 152. The defendant, having obtained the chattel mortgage from C. in good faith and without notice of any lien or other right of the original owner, came within s. 26 (a), and was entitled to claim the goods under the chattel mortgage. Gallant v. Mellett, 18 Occ. N. 199, referred to. *Collom* v. *McGrath*, 24 Occ. N. 376, 15 Man. L. R. 96.

Name of Vendor — *Agreement to Purchase.*]—Upon a piano made by a company whose corporate name was "The Mason and Risch Piano Company, Limited," and place of business Toronto, claimed by them in replevin as against a mortgagee thereof, there was painted the words "Mason & Risch, Toronto:"—Held, that if the transaction came within the Conditional Sales Act, R. S. O. 1897 c. 149, this was not a compliance with the provisions of s. 1 of that Act. But held, also, that the transaction did not come within the Act, the mortgagor not being bound by the agreement under which the piano was in his possession, to purchase the piano, but having merely the option to purchase it. Helby v. Matthews, [1895] A. C. 471, distinguished and applied. *Mason* v. *Lindsay*, 22 Occ. N. 371, 4 O. L. R. 365, 1 O. W. R. 561, 583.

Possession — *Chattel Mortgage — Lien Notes Act—Bills of Sale Act—Registration—Assignment for Creditors—Exemptions.*]—The owner of manufactured articles, which were in his possession free from any lien for the unpaid portion of the purchase money, signed a lien note in favour of the defendant, the manufacturer, containing a description of the goods and statement that the property in them was to remain in the defendant until paid for in full and that on default the defendant might enter and retake them:—Held, in the absence of evidence to prove that defendant had obtained the lien note by fraud or misrepresentation, that it might be treated as a chattel mortgage on the articles for the debt secured by it as against the person who had signed it. The defendant had not put on the articles his name or any other distinguishing name so as to comply with s. 2 of the Lien Notes Act, R. S. M. c. 87:—Held, notwithstanding, that the lien note was valid as against the maker of it. The lien note was not registered under the Bills of Sale and Chattel Mortgage Act, 63 & 64 V. c. 31, and the maker of it, before maturity of the debt, became insolvent and made an assignment to the plaintiff under the Assignments Act, R. S. M. c. 7, for the benefit of his creditors:—Held, that, for want of such registration, the lien note, being an instrument intended to operate as a mortgage of goods which remained in the debtor's possession until the assignment, was null and void as against his creditors, including the plaintiff as his assignee, by virtue of s. 2 (a) of the Bills of Sale and Chattel Mortgage Act. It was doubtful upon the wording of the assignment whether the debtor had reserved any exemptions to which he would be entitled under s. 43 (f) of the Executions Act, R. S. M. c. 53;—Held, that defendant could not claim the benefit of any such exemption even if it was reserved by the debtor in the assignment. *Cox* v. *Schack*, 22 Occ. N. 188, 14 Man. L. R. 174.

Promissory Note—*Property Not to Pass—Judgment in Action on Note—Execution.*]—Under execution issued upon a judgment against the defendant, the sheriff seized a binder in the possession of the defendant. The Massey-Harris Company claimed the binder under a lien note, which provided that until the full amount of the purchase money was paid the property in the binder should remain in the company. Previous to the seizure of the binder the company had recovered judgment in a County Court against the defendant upon one of the lien notes or agreements for the balance due on the binder, and had issued execution for the amount, but in this execution there was no evidence of any action having been taken:—Held, in an interpleader issue, that, notwithstanding the judgment recovered by the company against the defendant on the note or agreement and the issuing of execution thereon, the property in the binder still remained in the company, and it was not liable to seizure by the sheriff under the execution issued by the execution creditor. Purtle v. Henry, 33 N. B. Reps. 607, not followed. *Morris* v. *McAulay*, 21 Occ. N. 547.

Property not Passing — Fixtures—Lien note—Alteration — Conversion. *Whitney* v. *Bruce*, 2 O. W. R. 625.

Property not Passing — *Judgment for Price—Bar to Saisie-revendication.*]—Where a vendor has obtained judgment upon promissory notes, representing the price of machines sold, and at the time of sale it was provided by special contract that these machines should remain his property until they should be entirely paid for, he cannot, without first having desisted from his judgment, issue a saisie-revendication for the machines, or obtain a declaration that he is the owner of them, and thus have a new judgment against the defendant. *Plessisville Foundry* v. *Leesque*, Q. R. 2 S. C. 396.

Property not Passing — *Refusal to Accept — Destruction by Fire — Action for Price.*]—The plaintiffs, by agreement in writing, sold an engine and stone crusher, with some extra parts, to the defendant, on terms of the property remaining in them until the price was paid, for which notes were to be given by the defendant within ten days after the machines were started. The plaintiffs were willing to deliver the goods, but the defendant refused to take them and to give the notes, or to pay, according to the contract. The plaintiffs then commenced this action, and, after notice to the defendant, removed the goods and stored them for safe keeping at the place of delivery in their own warehouse, where the goods were destroyed by fire:—Held, that the plaintiffs were, nevertheless, entitled

to recover the amount of the contract price. *Sawyer-Massey Co.* v. *Robertson*, 23 Occ. N. 182, 1 O. L. R. 297.

Property not Passing—Right of vendor to retake. *Waterous Engine Works Co.* v. *Livingston*, 2 O. W. R. 214.

Purchase and Hire Agreement — *Necessity for Filing — Bills of Sale Act — Rights of Vendors against Purchaser for Value from Vendee — Incomplete Clause in Agreement.*]—Where the plaintiffs sold to F. a piano for the sum of $300, F. paying a portion of the purchase money in cash and giving his promissory notes for the balance, and, immediately after the sale and delivery of the piano, signing a purchase and hiring agreement, under which, upon completion of the payments to be made by him, he was to become owner of the piano, the title to which, in the meantime, remained in the vendors, and in which it was provided that in the event of F. becoming insolvent, or attempting to sell or part with the possession of the piano, all rights of F. should cease and the vendors should be at liberty to retake possession, and, while about one-half of the purchase money was still unpaid, F. sold the piano:—Held, that the agreement, having been taken by way of security, should have been filed under the provisions of the Bills of Sale Act, R. S. N. S. 1900 c. 142, s. 8, in order to be valid against creditors or an innocent purchaser for value, and not having been so filed, the plaintiffs could not recover; and, the Court could not give effect to a clause in the agreement which contained a number of blanks which by inadvertence were not filed up at the time the agreement was executed, and which lacked ingredients to make it operative and must deal with the agreement as if the clause were not there at all. *Miller Bros.* v. *Blair*, 37 N. S. Reps. 293.

Resale by Vendee—*Conduct of Vendor—Estoppel—Implied Authority—Title of Bona Fide Purchaser—Waiver of Condition.*]—The plaintiffs, who were the owners of a quantity of logs, upon being asked by the defendant if they were for sale, replied in the negative, adding that they had already been sold to one M. The defendant thereupon bought a portion of said logs from M., who was in possession and had all the indicia of title to the same, and paid M. in cash for them. As a matter of fact the sale to M. was subject to the condition that no property in the logs was to vest in M. until they were paid for, of which condition the defendant had no knowledge. In an action of trover brought to recover the value of the logs so purchased from M. by the defendant:—Held, that the plaintiffs were estopped by their declaration as to the sale to M. from setting up that the title was not in him, and that a verdict ought, therefore, to be entered for the defendant. Per McLeod, J., that the evidence shewed an intention on the part of the plaintiffs to abandon the conditional element of their contract with M., and that he was clothed by the plaintiffs with authority to sell the logs, accounting to them for the proceeds. Per Gregory, J., that the circumstances were such that the defendant could not reasonably have had any doubt as to the right of M. to sell, and, as the plaintiffs had put M. in a position to practise a fraud on the defendant, they must suffer the loss. Further, it being apparent from the evidence that the plaintiffs intended that M. should dispose of the logs in the usual course of his business, he of necessity had an implied authority to sell and pass the title. *People's Bank of Halifax* v. *Estey*, 36 N. B. Reps. 169.

Rescission by Vendor — *Principal and Agent — Authority of Agent — Parol Evidence of Agency.*]—Held, that the buyer of an article under a sale, conditional upon the property not passing until full payment of the price, was entitled to treat the contract as rescinded where the seller took possession, used, offered for sale, and neglected to take proper care of, the article, although he made no actual use of it. Sawyer v. Pringle, 20 O. R. 111, 18 A. R. 218, followed. The evidence of the authority of a person assuming to act as agent for a dealer in agricultural implements, and the scope of his authority discussed. Where, on the trial, parol evidence was given, without objection, to establish agency, and afterwards it appeared that the agent's appointment was in writing, and, on appeal, it was contended that the parol evidence should not have been and should not be considered:—Held, that, though upon the written appointment being put in evidence, an application might, perhaps, have been properly made to strike out the parol evidence being on the same point, yet, as no such application had been made, nor any objection taken to its reception, the parol evidence might properly be considered. *Harris* v. *Dustin*, 1 Terr. L. R. 404.

Suspensive Condition—*Term of Credit — Delivery — Pledge — Shipping Bills — Bills of Lading — Indorsement — Notice — Fraudulent Transfer — Insolvency — Resiliation of Contract — Revendication — Pleading.*]—The absence of the indorsement on bills of lading by the consignee therein named is notice of an outstanding interest in the goods represented by the bills, and places persons proposing to make advances upon the security of those bills upon inquiry in respect to the circumstances affecting them. On failure to take proper measures in order to ascertain these facts and obtain a clear title to the bills and goods, any pledge thereof must be assumed to have been made subject to all rights of such consignee. But, per Taschereau, C.J.C., dissenting, that where a sale of goods has been completed by actual tradition and delivery, the mere absence of the consignee's indorsement upon shipping bills representing the goods made in the name of the vendor, cannot have the effect of reserving any right of property in the vendor. If the goods have been sold upon terms of credit, the unpaid vendor has no right to revendicate such goods after they have passed into the possession of a third person in the ordinary course of business, and, in the present case, on failure of the conservatory seizure and in the absence of any right of the plaintiff to revendicate the goods, the alternative relief prayed for by his action should not be granted. *Gosselin* v. *Ontario Bank*, 36 S. C. R. 406.

Waiver — *Intention — Secondary Evidence—Handwriting.*]—On proper evidence as to non-production of the original, secondary evidence of the contents of a letter, given by a witness who had seen the author write once only, was admitted. On a conditional sale, evidenced by writing, providing that the

title should remain in the seller till cash, notes, or drafts (for the balance of purchase price) as agreed upon, should be paid:—Held, that the question whether the conditions had been waived and thus the property had vested in the buyer, was entirely a question of intention, and that the facts shewn in evidence, one of which was that the seller had accepted, for the balance of the purchase price, the promissory note of a firm of which the buyer was a member, did not shew an intention to waive the condition as to property. *Marcy* v. *Pierce* (No. 2), 4 Terr. L. R. 246.

IV. CONTRACT.

Acceptance and Delivery—*Evidence—Demand — Dispensing with — Ascertained Goods.*]—Although the terms or conditions of a civil contract for an amount exceeding $50 (art. 1235, C. C.), cannot be proved by oral testimony, the acceptance of the contract and the delivery of the article sold may be proved by a witness. 2. From the moment that a party to a contract refuses to acknowledge the contract, a demand and tender of payment becomes useless. 3. A person who has bought en bloc a certain ascertained number of animals cannot be forced to accept a smaller number. *Wark* v. *Clancey*, Q. R. 25 S. C. 199.

Agent — *Representations—Contract — Vessel — Latent Defect — Inspection—Part Payment — Forfeiture.*]——The defendants wrote to the plaintiffs enquiring whether they knew of a vessel fulfilling certain requirements, and which they could "in every respect recommend and guarantee." The plaintiffs replied, mentioning and recommending a vessel offered for sale, but saying, "If you consider this vessel, we would advise you to send a man and inspect her, as we would not care about sending you a vessel and then not to turn out satisfactory." The defendants wrote in return that they were unable to send a man to examine the vessel, but were prepared to take her on the plaintiffs' recommendation. They thereupon authorized the plaintiffs to buy the vessel and draw on them for a portion of the purchase money, and agreed to pay the balance on delivery:—Held, that when the bargain was finally struck between the plaintiffs, acting for the vendor, and the vendee, the property passed, and there was no further locus penitentiæ after that date. Some time after delivery, the defendants discovered that the vessel was infected with dry rot, which made her practically valueless, but could not be detected by any ordinary inspection:—Held, that, in making the representations they did as to the condition of the vessel, and in the conduct of the negotiations, the plaintiffs were only bound to use ordinary diligence in the discharge of their duties, and the evidence fully warranted the conclusion that such diligence was used:—Held, further, that a reference to the part payment as "earnest money," and a provision for forfeiture of the amount paid in the event of the defendants failing to complete the purchase were not sufficient to give the defendants the option of forfeiting their deposit and refusing to carry out their contract as to the balance. *Hackett* v. *Rorke*, 37 N. S. Reps. 435.

Appropriation of Goods—Interception by assignment — Fraud—Warehoused goods. *Metalli* v. *Roscoe*, 6 O. W. R. 880.

Authority of Agent — Recognition by principal — Breach — Non-delivery of goods —Cause of action — Jurisdiction of Ontario Court — Correspondence — Refusal to complete delivery — Measure of damages. *Johnston* v. *Hurb*, 3 O. W. R. 192.

Breach — *Conditions — Shipping Payment — Construction of Contract — Damages.*]—By contract in writing M. agreed to sell to P. cedar poles of specified dimensions, the contract containing the following provisions: "All poles as they are landed at Arnprior are to be shipped from time to time as soon as they are in shipping condition. Any poles remaining at Arnprior over one month after they are in shipping condition to be paid for on estimate in 30 days therefrom, less 2 per cent. discount. . . . For shipments cash 30 days from dates of invoices less 2 per cent. discount:"—Held, that for poles not shipped P. was not obliged to pay on the expiration of one month after they were in shipping condition, but only after 30 days from receipt of the estimate of such poles. M. refused to deliver logs that had been on the ground one month without previous payment, and P. brought an action for specific performance and damages, contending that he could not be called upon to pay until the poles were inspected and passed by him, and also that M. should supply the cars. M. counterclaimed for the price of the poles: — Held, Sedgewick and Killam, JJ., dissenting, that each party had misconstrued his rights under the contract, and no judgment could be rendered for either. Judgment of the Court below, 3 O. W. R. 96, reversed. *Phelps* v. *McLachlin*, 25 Occ. N. 53, 35 S. C. R. 482.

Breach—Failure to give lien notes for price—Acceptance of goods—Measure of damages—Lien — Relief not claimed. *Krienke* v. *Mohr* (N.W.T.), 1 W. L. R. 254.

Breach—Refusal to accept—Damages — Costs. *Watts* v. *Hehsdoerfer* (No. 2) (N. W.T.), 1 W. L. R. 110.

Breach — Rescission — Damages. *Fisher* v. *Carter*, 5 O. W. R. 296.

Breach—Warranty — Defect. *Williams* v. *Cook*, 1 O. W. R. 133.

Completion—*Time of Payment.*]—It is not, in principle, necessary for the completion of a contract for sale of goods that the time for payment of the price shall be fixed: it is sufficient if the parties are agreed as to the price of the thing sold. *Hurlburt* v. *Stewart*, Q. R. 24 S. C. 19.

Condition — *Measurement of Logs by Surveyor — Action for Price—Evidence.*]—An agreement for the sale of logs contained a condition that the logs were to be surveyed by any surveyor the vendee might have in his employ and that such survey was to be final:—Held, that proof of such a survey was, in the absence of any charge of fraud or incompetency on the part of the vendee's surveyor, a condition precedent to the plaintiff's right to recover the price of the logs, and that the trial Judge was in error in rejecting the evidence of such surveyor on the ground that he was not proved to have been a duly sworn surveyor, appointed by the

municipality and under bonds. *Patterson* v. *Larsen*, 36 N. B. Reps. 4.

Condition as to Acceptance — *Post Letter — Time Limit — Term for Delivery —Breach of Contract — Damages — Counterclaim — Right of Action.*]—The plaintiff on 2nd October, 1899, wrote offering to supply the defendants with 37 car loads of hay at prices mentioned "subject to acceptance within 5 days, delivery within 6 months." On the 5th October the defendants replied: "We will accept your offer on timothy hay as per your letter to us of the 2nd instant. Please ship as soon as possible the orders you already have in hand, and also get off the 7 cars as early as possible . . . We will advise you further as to shipment of the 30 cars. Should we not be able to take it all in before your roads break up, we presume you will have no objection to allowing balance to remain over until the farmers can haul it in. Do the best you can to get some empty cars at once, as we must have three or four cars by next freight." This letter was registered, and, although it reached the plaintiff's post office within the five days, was not received by him until the following day. The hay was not delivered, and, before the expiration of the six months named for delivery, the defendants, in defence of this action (which was brought in respect of earlier transactions), counterclaimed for damages for breach of contract in the non-delivery of the 37 car loads:—Held, that the correspondence did not constitute a binding contract, as the parties were never ad idem as to all the terms proposed. 2. That, as the six months limited for making delivery had not expired, the company had no right of action for damages, even had there been a contract, and that the filing of the counterclaim was premature. *Oppenheimer* v. *Brackman and Ker Milling Co.*, 23 Occ. N. 62, 32 S. C. R. 699.

Cordwood—Measurement — Tender — Re-sale — Partnership — Dissolution — Acquiescence — Estoppel — Contract — Setting apart wood. *Smith* v. *Gordon*, 3 O. W. R. 397.

Correspondence—*Condition as to Quality — Acceptance — Completed Contract — Breach.*] — The plaintiffs offered to buy a quantity of fish from the defendants, at a price twenty-five cents per quintal above the Halifax price, provided the fish were so cleaned, or prepared for market, as to leave "little, if any, blood or black spot." The defendants answered, guaranteeing to furnish the quantity of fish required, at the price specified, and prepared as required by the plaintiffs, "with one exception, that it is impossible for us to take all black skin from the napes of fish." The plaintiffs, in reply, stated that the condition which the defendants wished to except was the most important requisite, that it was done in the case of all fish caught and cured in Iceland, and other places mentioned, and that, for this one reason, fish from those countries sold at a fair price, when fish not so prepared could not be sold at all. The defendants failed to make any immediate reply to this letter, and the plaintiffs wrote again, asking whether the defendants had decided to supply the cargo in the condition the plaintiffs would like to have it, as per their previous letter. The defendants thereupon wrote: "We will furnish any quantity of fish that you want, suitable for any market, at the price you offered." They added: "I will do my best in regard to removing the black skin, as you stated in your previous letter." To this letter the plaintiffs replied, stating that they would take a cargo of 2,500 quintals, "according to previous arrangement as to quality and price." The defendants failed to deliver the fish, as required, and the plaintiffs claimed damages:—Held, that, notwithstanding the words "I will do my best," there was a complete contract, upon which the plaintiffs were entitled to recover. *Anglo-Newfoundland Fish Co.* v. *Smith*, 35 N. S. Reps. 267.

Counterclaim — Onus. *Rat Portage Lumber Co.* v. *Kendall*, 1 O. W. R. 197, 528.

Delivery Abroad — *Importation Prohibited — Customs Laws — Knowledge of Vendor — Ignorance of Purchaser.*] — One who sells, promising to deliver to the purchaser in a foreign country, goods the importing of which to his knowledge is prohibited by the laws of that country, is obliged, in case of confiscation of the article sold, to repay the price to the purchaser, where the latter was ignorant at the time of the sale of the prohibition. *Quigley* v. *Desjardins*, Q. R. 23 S. C. 434.

Delivery Abroad — *Importation Prohibited — Knowledge of Purchaser — Confiscation by Customs Authorities.*]—When goods sold are deliverable in a foreign country, where the importation of that kind of goods is prohibited, to the knowledge of the purchaser, the vendor, who assumes all risk of confiscation of the goods until delivery, is not responsible to the purchaser if, after delivery and acceptance by the latter, the goods are confiscated by the customs authorities. *Couch* v. *Desjardins*, Q. R. 24 S. C. 543.

Description—Measurement — Rejection —Evidence — Findings. *Mickle* v. *Collins*, 2 O. W. R. 1147.

Foreign Forum—*Bill of Lading — Conditions.*]—Words or conditions stated in the margin of a bill of lading, which appeared there at the moment of acceptance, form part of the contract. 2. The stipulation in a bill of lading, executed in a foreign country, that "all disputes regarding this bill of lading are to be settled according to the law of the empire of Germany, and decided before the Hamburg law Courts," is not contrary to public order, and will be recognized and enforced by the Courts of this province. 3. The condition is restrictive in form. 4. Where it is expressly stated in the bill of lading that "in accepting this bill of lading, the shipper, owner, and consignee of the goods agree to be bound by all its stipulations, exceptions, and conditions as fully as if they were all signed by such shipper, owner, or consignee," the consignee of the goods in Montreal is bound by such condition. *Michalson* v. *Hamburg American Packet Co.*, Q. R. 25 S. C. 34, 6 Q. P. R. 165.

Fulfilment—Non-payment of Price—Exercise of vendor's lien — Changing character of goods. *Heaton* v. *Sauvé*, 5 O. W. R. 446.

Goods Shipped Failing to Comply with Order Both as to Quality and

Quantity—Payment of draft attached to bill of lading to obtain inspection—Acceptance of part of goods shipped — Return of part — Recovery of part of moneys paid on draft. *Arnold* v. *Peacock*, 3 O. W. R. 273.

Measurement—Tender — Insufficiency—Resale — Privity — Estoppel — Contract —Setting apart goods — Scale of costs. *Smith* v. *Gordon*, 2 O. W. R. 9[illegible].

Order Given to Agent — *Promise to Buy.*]—An order given to a travelling salesman of a wholesale house, whose power as agent to accept it is not shewn, is at least a promise to buy which binds him who gives it. *Théoret* v. *Morency*, Q. R. 27 S. C. 150.

Payment — Security — Lien — Oral contract — Novation — Consideration — Property passing. *Watts* v. *Hehsdoerfer (No. 1)* (N.W.T.), 1 W. L. R. 105.

Payment — Mistake — Recovery back — Counterclaim — Delay — Damages — Evidence. *Scott* v. *Tasker*, (N.W.T.), 1 W. L. R. 199.

Place of Delivery—*Receipt of Goods*—"*Delivered Price*"—*Notice* — *Estoppel.*]—The plaintiffs, while expressly stipulating against any obligation to deliver, offered to sell to the defendants 20 cars of Pittsburg slack at $1.25 at mine, which they would ship all rail, if the defendants wished, and if the plaintiffs would procure the necessary cars. The defendants telegraphed, giving order at the price named, "F.O.B. mine," adding "Route it G. T. R. London." On the same day the plaintiffs wrote accepting the order, and stating that they would ship as soon as railway equipment could be furnished, that an all rail rate of $2.10 to London had been quoted them, and they would ask the carriers to put same through at once. Subsequently and before any shipment had been made, it was arranged between the plaintiffs and defendants that No. 8 Pittsburg slack should be substituted for Pittsburg slack, and at the same "delivered price." Invoices sent with the coal shewed the mine price at $1.65, but, notwithstanding, the defendants accepted the coal, and made no protest until making their first payment:—Held, that the place of delivery was to be at London at the price of $3.35; and, even if the defendants could claim to have been misled by the correspondence, they were estopped by dealing with the coal when the invoices were received from shewing the contrary. *Burton, Beidler, and Phillips Co.* v. *London Street R. W. Co.*, 24 Occ. N. 337, 7 O. L. R. 717, 3 O. W. R. 666.

Sale "Commerciale" — *Goods of Another* — *Recovery.*]—The sale by a trader of the whole assets of his business, is a sale "commerciale." The owner of an article sold as part of such assets cannot recover it from a purchaser in good faith, the sale of the goods of another being, as a sale "commerciale," valid. *National Cash Register Co.* v. *Demetre*, Q. R. 14 K. B. 68.

Statute of Frauds—*Inability of Vendor to Deliver Goods — Breach of Contract — Sale of Business as a going Concern.*]—The plaintiffs were executors of one John McCalla, who had carried on a general grocery and hardware business in St. Catharines. They caused an advertisement to be published asking for tenders for the purchase en bloc of the grocery and hardware stock, goodwill, fixtures, etc., of the business. The advertisement stated, inter alia, that intending purchasers were to tender at a rate of so much in the dollar for the stock and fixtures, and a specified sum for the goodwill; that the business had been continued from McCalla's death by the executors, and was a going concern; that the stock sheets might be seen on application to the executor's solicitor; and that further particulars and conditions of sale might also be seen there. Defendant came into the office of the solicitor on two occasions and looked over the stock sheets; that on 22nd September, 1902, the day before the tenders were to be opened, defendant met him in the street in the evening and said he thought he would make a tender on the stock. Defendant asked the solicitor to write it out for him and gave him the figures, 75 cents for the grocery stock and 50 cents for the hardware stock; nothing for the goodwill. Solicitor then wrote the following offer: "To the Trusts and Guarantee Co. (Ltd.), Toronto. "Dear Sirs,—I offer 75 cents on the dollar for the grocery stock and 50 cents on the dollar for the hardware, but nothing for the goodwill. "Yours, "John Ross, per A. W. Marquis." This offer was accepted by the plaintiffs, and notice thereof in writing given by the solicitor to the defendant containing a request to call and execute the agreement in accordance with conditions of sale, and to make his deposit. The defendant by letter repudiated any liability on the contract. The conditions of sale were never produced nor proved. There had been a large quantity of staple goods sold prior to time for completion of the contract:—Held, that there was no valid contract under the Statute of Frauds; and further, that, by the depletion of the stock, the plaintiffs were not in a position to carry out the alleged contract. *Trusts and Guarantee Co.* v. *Ross*, 5 O. W. R. 558, 9 O. L. R. 715.

Unascertained Future Goods — *Appropriation to Contract — Property Passing.*]—Held, that, under the circumstances of this case, there was a sale by description of unascertained future goods, viz., wood to be cut, drawn, and delivered, and 714 cords of the wood were delivered at the place at which by the contract they were to be delivered, and in the state in which by a subsequent agreement they were to be delivered, and the plaintiff, by measuring, estimating, marking and stamping them with his own stamp, assented to the delivery of them in the state in which they were delivered, and unconditionally appropriated these 714 cords to the contract, and the property therein thereupon passed to the plaintiff, as was the intention of the parties; and the provisions of the subsequent agreement did not prevent the property passing; and the plaintiff must bear the loss of part of the wood which was destroyed by fire. *Wilson* v. *Shaver*, 21 Occ. N. 141, 1 O. L. R. 107.

Vendor's Risk—*Insurance Clause — Interpretation — Perishable Goods.*]—Under the "cost, freight, and insurance" clause in a contract of sale, the vendor is obliged to keep the goods fully insured against all loss, damage, or deterioration to which they may be exposed, until delivery; and, consequently, in the case of perishable goods, such clause

in not complied with by an insurance warranted free from particular average, or part loss, and which covered only a portion of the risk from ordinary perils of the sea. *Canada Hardware Co.* v. *Suren-Hartmann Co.*, Q. R. 24 S. C. 430.

Writing — *What Amounts to—Evidence—Commencement of Proof.*]—It is not essential that the writing required by clause 4 of art. 1235, C. C., set forth the contract of sale in all its details; it is sufficient if it set forth the essential terms of the contract, or refers to another writing which does contain them. The writing may be supplemented by the admission of the party, but such admission ought to include all the conditions contained in the writing, and ought to be complete in itself; furthermore art. 1235, forming, as it does, an exception to art. 1233, such admission cannot be offered as the commencement of proof by writing. A writing, signed by the party sued, which confirms the requirements of art. 1235, C. C., but which such party contends is not binding, would, nevertheless, be sufficient to form a basis for the admission of oral testimony of the contract of sale. *Molleur* v. *Mitchell*, Q. R. 14 K. B. 74.

V. DELIVERY.

Change of Possession — Animals — Visible and public change—Conversion—Dispute as to ownership—Costs—Scale of—Set-off. *McNichol* v. *Brucks* (N.W.T.), 1 W. L. R. 478.

Damages for Non-delivery—Contract —Correspondence — Executors of vendor—Corroboration. *Upton* v. *Eligh*, 2 O. W. R. 629.

Damages for Non-delivery—Measure —Claim and counterclaim — Payment into Court — Costs. *Delhi Fruit and Vegetable Canning Co.* v. *Poole*, 2 O. W. R. 413.

Denial of Delivery — *Novation — Evidence of Inferior Quality—Admissibility —Amendment.*]—Where, in an action for the price of piles of red pine, sold and delivered to the defendant, the plea, in addition to a general denial of delivery, was to the effect that the plaintiff had accepted other persons as his debtors instead of the defendant, thereby creating novation, evidence of the inferior quality of the goods supplied is irrelevant to the issue, and inadmissible. 2. Amendment of the plea at the trial, in order to allege that the goods supplied were not in conformity to the contract, ought not to be allowed, more particularly where the evidence did not shew objection or refusal to accept on this ground at the time of delivery. *Veilleux* v. *Atlantic and Lake Superior R. W. Co.*, Q. R. 23 S. C. 217.

Denial of Sale and Delivery—*Burden of Proof—Corroboration — Appeal — Reversal of Judgment.*]—In an action for the price of goods sold and delivered, judgment was given in favour of the defendants at the trial, on the ground that the denial of the sale and delivery threw the burden of proof upon the plaintiffs, and that they had failed to satisfy this burden, there being a conflict of evidence between the plaintiffs' traveller, E., and the defendant M. It appearing from the evidence that the ground upon which the case was determined at the trial was wrong, the evidence of E. being corroborated in a number of particulars, and there being a preponderance in favour of the plaintiffs:—Held, that the appeal should be allowed and judgment entered for the plaintiffs for the amount of their claim, with costs of action and appeal. *Fraser* v. *McCurdy*, 35 N. S. Reps. 467.

Failure of Seller to Deliver Part—*Action by Purchaser — Damages — Proportionate Value.*]—A purchaser who is not put in possession of a part of the goods sold to him en bloc, can claim from the vendor only the value of the part which he has not received in proportion to the total price, and the damages mentioned in art. 1518, C. C.; all other damages will be refused upon defence in law. *Muscat* v. *Montreal Hardware Manufacturing Co.*, 5 Q. P. R. 197.

Non-delivery of Quantity Contracted for—*Measure of Damages — Measurements — Specifications — Interest — Mise en Demeure.*]—An insolvent had agreed to deliver to V., a creditor, upon a certain dock, a quantity of wood at so much per foot, the expenses of measurement to be paid by the insolvent, who was to furnish specifications to V., the measurement to be made by the measurers of the Quebec harbour commission:—Held, that the delivery was not complete until the measurement had been made and the specifications furnished to V.; also that it was incumbent on the insolvent or on the curator representing him to prove his allegation that V. had received a larger quantity of wood than the specifications shewed or than V. admitted, and the proof of that must be clear and certain. 2. In a commercial matter interest upon money does not run unless it be alleged and shewn that it is allowed by commercial usage. 3. In a commercial matter mise en demeure arises by lapse of time alone. 4. By the default of the insolvent to deliver to V. the quantity of wood which he had contracted to deliver to him, V. had the right as damages to the difference between the price upon which he had agreed with V. and the price at which he had sold or could re-sell the wood. 5. In a commercial matter it is necessary to be faithful and to fulfil exactly a contract within the time agreed, for a disturbance may quickly be caused in the affairs of a trader by reason of one with whom he has contracted not punctually fulfilling his obligations. *In re Moisan*, Q. R. 22 S. C. 423.

Payment for — Covenant — Action on —Counterclaim for Non-delivery of Part—Nominal damages. *Delahey* v. *Reid*, 1 O. W. R. 522.

Refusal of Vendor to Deliver until Payment—Breach of Contract — Damages —Reference. *Phelps* v. *McLachlin*, 1 O. W. R. 806.

VI. FALSE REPRESENTATIONS.

Manufactured Article — *Damages — Deception.*]—The defendants, stove manufacturers, having in their possession a second-hand stove of the plaintiff's manufacture, re-

paired and refitted it. One of the defendants' employees, obeying the instructions of one of the firm, put on the stove a plate bearing their own name, and it was sold with this plate on it, but the purchaser was informed that the stove had been manufactured by the plaintiff. The stove was soon afterwards returned by the purchaser to the defendants, and another taken in its place: — Held, (affirming the judgment in Q. R. 16 S. C. 189), that there having been no misrepresentation or intention to deceive, and no damages proved, and the purchaser having been informed that the stove was of the plaintiff's manufacture, the plaintiff had no right to recover damages. *Chapleau* v. *Laporte*, Q. R. 18 S. C. 14.

Manufactured Article — *Injunction—Trade-Mark.*] — An action for damages lies against a person who passes off goods manufactured by him as the manufacture of another, and a writ of injunction may be granted to restrain the sale of such goods under false representations, although the plaintiff has not registered any trade-mark for the goods manufactured by him. *Vive Camera Co.* v. *Hogg*, Q. R. 18 S. C. 1.

VII. Property Passing.

Ascertainment of Quantity—*Culling—Destruction before Delivery—Property not Passing.*]—The plaintiff sold to the defendant all the apples of first and second quality on the trees in the plaintiff's orchard at a rate per barrel, the plaintiff to pick the apples and place them in piles, the defendant to supply barrels and pack the apples, and the plaintiff to take the apples when in barrels to the railway station. There was no agreement as to the time and mode of culling and packing or the time for payment. The plaintiff picked the apples and placed them in piles and told the defendant that they were ready for packing. The defendant was not at the time able to obtain barrels. About three weeks later, however, he took delivery of twelve barrels of apples. Two weeks after this a severe frost occurred and the rest of the apples were destroyed, neither the plaintiff nor the defendant having taken any steps to protect them:—Held, that the inference from the circumstances was that the culling was to be done by the defendant with the plaintiff's concurrence; that until the culling took place there could be no ascertainment of the apples intended to be sold; that the property had therefore not passed; and that the loss must fall on the plaintiff: *Lee* v. *Culp*, 24 Occ. N. 316, 8 O. L. R. 210, 4 O. W. R. 41.

Bill of Lading in Name of Vendor—*Transmission to Purchaser Unindorsed — Pledge by Purchaser—Right to Rescind — Right of Vendor to Recover from Third Party —Banks.*]—When the vendor of goods, to secure payment, has consigned them to himself at the ports of shipment, and taken from the carriers bills of lading in his own name, and afterwards sent these to the purchaser, without indorsing them and without completing the delivery of the goods, he alone has power to dispose of these bills of lading, and the purchaser cannot lawfully assign them to a bank to secure advances, nor pledge or otherwise give title to them. The vendor not having made delivery of the goods, since the bills of lading were made out to his order and were not indorsed, arts. 1543, 1998, and 1999, C.C., do not apply; but, by virtue of the provisions of art. 1065, the vendor, who had preserved his possession of and property in the goods, could avoid the sale, the purchaser having been guilty of failure to carry out his obligation to pay for them; and the bank which had made advances to the purchaser as aforesaid, was bound to account to the vendor for the bills of lading which had been received from the purchaser and the goods which they represented, and in default, for the value of such goods. Judgment in Q. R. 25 S. C. 430 varied. *Ontario Bank* v. *Gosselin*, Q. R. 14 K. B. 1.

Breach of Warranty—Counterclaim — Pleading. *Marks* v. *Waterous Engine Works Co.*, 1 O. W. R. 148.

Condition — *Waiver — Detinue — Demand and Refusal.*]—The plaintiff sold to the defendant his one-half interest in a heifer named Irene, registered as a thoroughbred, the defendant already being owner of the other half. The defendant subsequently charged the plaintiff with having wrongfully secured the registration of the heifer as a thoroughbred when, as he alleged, she was not. The charge was laid before the Executive Committee of the Dominion Short Horn Breeders' Association at Toronto. The parties then entered into a written agreement, which provided: (1) that the heifer should be resold to the plaintiff at a certain price; (2) that on payment of the price the heifer was to become the property of the plaintiff; (3) that the defendant should withdraw the charge above referred to, and upon all proceedings in respect to it being dropped by the association the "foregoing part" of the agreement was to be carried out. The defendant did not withdraw the charge, nor were the proceedings dropped. The plaintiff twice tendered the purchase price of the heifer to the defendant, which was refused. He then, without making a formal demand for the heifer sued the defendant in detinue:—Held, that, as the condition contained in the third clause of the agreement was inserted for the plaintiff's benefit, he could waive it; that he had waived it, by proferring payment; that on refusal to accept the price the defendant became ipso facto the wrongful detainer of the heifer; that a demand and refusal was therefore not essential to the plaintiff's right of action; and that the plaintiff was, therefore, entitled to succeed. *Wright* v. *Shattuck*, 4 Terr. L. R. 455, 5 Terr. L. R. 264.

Destruction on Vendor's Premises—Liability — Damages. *Taylor* v. *McClive*, 4 O. W. R. 252.

Entire Contract—Property not passing —Action for price—Deduction for defects — Damages. *Crompton and Knowles Loom Works* v. *Hoffman*, 1 O. W. R. 717.

Future Delivery — *Destruction before Measurement.*] — Whether the property in goods contracted to be sold has or has not passed to the purchaser, depends in each case upon the intention of the parties, and the property may pass even though the goods have not been measured and the price has not been ascertained. The property in the cordwood in question in this case was held to

have passed to the purchaser before measurement, although owing to the destruction of the wood by fire the price could not be ascertained with precision. Judgment of a Divisional Court, 1 O. L. R. 107, 21 Occ. N. 141, affirmed. *Wilson* v. *Shaver*, 22 Occ. N. 11, 3 O. L. R. 110.

Goods to be Manufactured—Breach—Construction—"If it is satisfactory"—Damages—Property passing—Destruction by fire—Appropriation of goods to contract. *Delapianie* v. *Tennant*, 4 O. W. R. 76.

Loss of Goods—Default of vendee—Specific goods—Unconditional contract—Postponement of delivery and payment. *Craig* v. *Beardmore*, 2 O. W. R. 985.

Place of Inspection — *Acceptance of Part—Rejection of Residue.*]—Contract for sale of butter then manufactured and also for all butter to be manufactured during the season; quality to be "fine;" delivery to be f. o. b. cars, Birtle. Purchaser carried on business in Winnipeg. No inspection took place at time of contract. Vendor shipped car load at purchaser's request to Winnipeg. Purchaser refused to accept because of defect in quality. Vendor re-sold and sued for difference between contract price and amount realized:—Held, that the agreement as to quality was a condition of the contract; that the property in the butter had not passed; that the place for inspection was Winnipeg; that the purchaser's duty to accept depended upon the quality of the butter; that the fact that the purchaser had accepted other car loads of "fine" butter did not bind him to accept one that was not. (Dyment v. Thompson, 9 O. R. 566, 12 A. R. 658, 13 S. C. R. 303, commented on;) that the onus was on the vendor to prove the quality of the butter; that such evidence could not be given in rebuttal. *Lewis* v. *Barré*, 22 Occ. N. 336, 14 Man. L. R. 32.

Specific Goods — *Deliverable State — Property Passing—Destruction before Payment or Delivery.*]—Unless a contrary intention appears, where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer at the time the contract is made; and it is immaterial whether the time of payment or the time of delivery or both be postponed. The plaintiffs agreed to sell to the defendants a quantity of tan bark which lay in piles in the woods at a distance of 14 miles from the railway siding at which it was to be delivered. The price agreed upon was to cover the plaintiff's trouble and expenses of carrying the bark to the siding and placing it on the cars there. At the time the contract was made the bark was ready for immediate delivery so far as its condition was concerned; nothing remained to be done by the plaintiffs to entitle themselves to the price but the hauling and shipping. The bark was destroyed by fire where it lay in the woods, payment not having been made by the defendants for it:—Held, that the property had nevertheless passed to the defendants, and they were liable for the price. Judgment of Meredith, J., 2 O. W. R. 985, affirmed. *Craig* v. *Beardmore*, 24 Occ. N. 308, 7 O. L. R. 674, 3 O. W. R. 547.

Unascertained Goods — Contract—Appropriation—Passing of property—Acceptance and part payment. *Southampton Lumber Co.* v. *Austin*, 1 O. W. R. 548.

VIII. Rescission.

Action — *Time—Defect in Goods—Vice Redhibitoire.*]—An action to set aside a contract for the sale of goods, begun 16 days after the sale, where the parties lived 20 miles from each other, and the purchaser has, two days after the sale, asked to have it rescinded, and has not ceased since to negotiate with the vendor to obtain rescission by consent, is begun within a reasonable time. 2. A certain lameness or halting which was shewn when the horse, the subject of the sale, was at rest for a time, and which did not appear when the trial was made by the purchaser at the time of the sale, is a defect which affords ground for setting aside the sale; art. 1522, C. C. *Balcer* v. *Provancher*, Q. R. 24 S. C. 137.

Breach—Damages. *Fisher* v. *Carter*, 4 O. W. R. 319.

Contract — *Refusal to Perform — Remedies.*]—A refusal by the promisor to perform the contract unless the promisee will do something which he is not bound to do, may be treated as an absolute refusal to perform it, and the promisee may at once rescind the contract and sue for damages. Freeth v. Burr, L. R. 9 C. P. 208, Withers v. Reynolds, 2 B. & Ad. 882, and Mersey Steel and Iron Co. v. Naylor, 9 App. Cas. 434, followed. When the promisee has thus rescinded a contract of sale of ascertained goods, and afterwards put it out of his power to perform it by otherwise disposing of some of the goods, subsequent negotiations on his part to induce the promisor to take other similar goods on the same terms, or offers to settle the dispute for the sake of avoiding litigation, will not necessarily be considered as doing away with the effect of the previous rescission. *McCowan* v. *McKay*, 22 Occ. N. 100, 13 Man. L. R. 590.

Default of Payment—*Stipulation for Right—Time for Exercise—Extension—Insolvency—Demand for Assignment.*]—A demand for an assignment and the filing of a claim, being only a demand for payment, do not deprive the creditor of his right to rescind a sale of goods for default of payment of the price. 2. In the case of a sale of movables, this right of rescission may, in case of insolvency, be exercised after 30 days, when delay has been allowed for payment of the price, and the right of rescission has been formally stipulated for. *In re Girouard*, Q. R. 24 S. C. 396.

Defect—*Diligence.*]—Where communication between buyer and seller may be had easily and promptly, and, in the case of the sale of a horse, the defect complained of is one which would have been quickly discovered if a proper trial of the animal had been made promptly, but the buyer did not make any complaint until sixteen days after the sale, and even then did not tender the animal back, but allowed eight days more to elapse before bringing suit, the action for resiliation of the sale was not instituted with reasonable diligence. *Brown* v. *Wiseman*, Q. R. 20 S. C. 304.

Evidence—Conduct. *Vipond* v. *Griffin*, 2 O. W. R. 532.

Sale by Sample—*Reasonable Diligence—Acceptance—Pledging—Tender.*]—Where the buyer of goods (in this case, eggs) by sample, after he had knowledge of the alleged inferior quality of the goods, instead of tendering them back immediately, completed a sale of part of them at a reduced price, a week later sold another lot, and afterwards obtained permission from the holder of the warehouse receipt to take a further lot out of warehouse:—Held, that he had not shewn "reasonable diligence" within the meaning of art. 1530 of the Civil Code, and was not entitled to resiliate the contract. 2. There may be a receipt of goods without an acceptance, but the buyer, in order to be entitled to bring a redhibitory action, must not, by his acts, have adopted the contract. Pledging the goods is an adoption. 3. A tender back of the goods to the vendor is ineffective where, at the time it is made, the goods are really out of the control of the buyer, and in the possession of a party who has made advances thereon. *Loynachan* v. *Armour*, Q. R. 25 S. C. 158.

Sample Sale—Knowledge by vendor of destination—Sale of Goods Act—Variation of contract—Buyer's risk—Goods not up to sample. *Mills* v. *Manitoba Commission Co.* (Man.), 2 W. L. R. 30.

Specific Article—Vendor supplying another article—Purchaser accepting after inspection—Vendor's fraud—Return of money paid. *Wallace* v. *Garrett*, 3 O. W. R. 640.

Terms—Re-sale by vendor—Repudiation—Evidence—Amendment. *Brown* v. *Dulmage*, 4 O. W. R. 91.

IX. Statute of Frauds.

Actual Delivery—Samples—Conduct—Carriers—Interpleader. *Re Cleghorn and Asselin*, 2 O. W. R. 28.

Actual Receipt.]—Action for the price of forty head of horses "sold and delivered to the defendant at $23 a head." There was no agreement in writing nor part payment to bind the bargain. By s. 6 (3) of the Sales of Goods Ordinance, in order to establish a binding contract, the plaintiff had to prove an acceptance and an actual receipt by the defendant of at least a part of the goods. The plaintiff said he was to keep the horses until paid for, but he had no direct agreement not to give them till paid for. The horses which the defendant orally agreed to buy were kept on the plaintiff's ranche separate from the rest of the plaintiff's herd:—Held, that, even if there was an acceptance, there was no actual receipt by the defendant; and the action failed. *Livingstone* v. *Colpitts*, 21 Occ. N. 102.

Correspondence—Completed contract—Terms—Payment and inspection—Oral assent—Breach of contract—Non-delivery of goods—Damages. *Upton* v. *Eligh*, 3 O. W. R. 219.

Letters—Oral evidence to identify subject matter of contract. *Frank* v. *Gates*, 3 O. W. 76.

Memorandum—Signature—Conflicting evidence. *Nasmith Co.* v. *Alexander Brown Milling and Elevator Co.*, 4 O. W. R. 451.

Memorandum in Writing—*Omission of Term — Oral Evidence Connecting Documents.*]—The plaintiff's agent took an oral order for goods from the defendant, one of the terms of payment being that he should, in a certain event, have six months' credit. The plaintiff's agent signed a memorandum containing all but this term of the contract. The defendant subsequently wrote cancelling the order. This led to further correspondence. In none of the letters was any reference made to the term allowing six months' credit. The Sale of Goods Ordinance, No. 10, 1886, s. 4 (now C. O. 1898 c. 39, s. 6), (substantially a re-enactment of s. 17 of the Statute of Frauds), was pleaded:—Held, that it was open to the defendant to prove, as he had, that the term as to six months' credit was part of the contract, and, as it did not appear in any of the documents submitted to constitute the note or memorandum in writing, the plaintiff was not entitled to recover. 2. That as the statement of claim alleged the term as to six months' credit to be part of the contract sued on, it was unnecessary for the defendant to have proved it, and he might have taken the objection immediately upon the written evidence of the contract being put in. 3. That a letter cancelling the contract for the purchase of goods cannot be taken to constitute an acceptance of the goods. Semble, that parol evidence is admissible to connect several writings so as to constitute them together a note or memorandum under the Ordinance. Oliver v. Hunting, 44 Ch. D. 205, referred to. That a memorandum of sale required to be in writing may be complete and binding, though silent as to price and to time and mode of payment, if no agreement in fact was made on these points, the omission being equivalent to a stipulation for a reasonable price and immediate payment in the usual mode. Valpy v. Gibson, 4 C. B. 837, referred to. *Calder* v. *Hallett*, 5 Terr. L. R. 1.

Payment on Account—*Garnishment—Waiver.*—The primary creditor sued the primary debtor to recover damages for refusal to accept and pay for a horse bought by the primary debtor from the primary creditor for $50. At the time of the sale the primary debtor had deposited $5 in the hands of the garnishee, which was to have been paid over to the primary creditor when the horse was delivered. There was no delivery, no acceptance, no memorandum in writing, and nothing given by way of earnest:—Held, that there had been no compliance with s. 17 of the Statute of Frauds; the payment to the garnishee was not sufficient to satisfy the statute, the primary creditor, by his action in garnishing this amount, having elected to treat it not as a payment under the contract (in which case it would be the primary creditor's money and not garnishable), but as the primary debtor's money. *Weese* v. *Peak*, 21 Occ. N. 43.

X. Terms and Conditions of Sale.

Contract—*Written Order—Parol Variation — Evidence.*]—Judgment in 33 N. S. Reps. 21, affirming by a division of opinion

the judgment of the trial Judge in favour of the defendants, affirmed on appeal. *Wilson* v. *Windsor Foundry Co.*, 31 S. C. R. 381.

Sale of Specified Cargo—*Sale "on arrival"—Duty to Ship—Quantity Mentioned.*]—The sale of a cargo of coal, not then loaded, evidenced by two writings, the first being an agreement to accept "a cargo . . consisting of from 1,000 to 1,100 tons to arrive at this port (Levis) later from Swansea during this fall from Mr. Francis Gunn of Quebec," and the second providing that "the cargo of Welsh anthracite which is now declared to arrive per S.S. 'Avona' in September, for Messrs. P. Robitaille & Fils of Levis," is not a sale of a cargo "on arrival," and so conditional upon arrival, but made it the duty of the vendor to ship the quantity mentioned by the ship designated, and the contract was not satisfied by the delivery of 465 tons carried by the vessel named. *Rabitaille* v. *Gunn*, Q. R. 13 K. B. 552.

XI. Warranty.

Absence of—*Waiver of Inspection—Damages for Inferior Quality.*]—Cheese was sold without special warranty as to quality, but subject to inspection at the factory before shipment. The purchaser's agent did not avail himself of the opportunity to make an inspection at the factory. The purchaser complained after delivery that the quality of the cheese was inferior, and that some damage had been done by nails in packing it, and he tendered the price, less half a cent per pound, deduction for damage. The Court below allowed a deduction for the damage by packing, but maintained the action for the balance. The defendant inscribed in review:—Held, that there being no special warranty as to quality, and the buyer, by his agent, having waived inspection at factory by asking that the cheese be forwarded before it had been inspected, could not afterwards claim damages for inferior quality, which, if it existed, would have been disclosed by the inspection. *Lebrecque* v. *Duckett*, Q. R. 22 S. C. 135.

Action for Contract Price — *Defence and Set-off—Counterclaim for Damages—Substitution of Inferior Material—Condition precedent — Resale — Measure of Damages — Delay.*]—In an action for the contract price of goods sold and delivered, in which it was shewn that the goods delivered were not manufactured as agreed upon, the vendors having substituted castings for forgings:—Held, that the defendants were entitled to have their damages applied in reduction of the plaintiffs' claim:—Held, also, that as soon as the vendee discovers the defect he may bring an action on the warranty and recover the value of the article he should have received, and that the right of action is complete without a resale, and that the measure of damages is the same whether the goods are in his warehouse or in the hands of persons to whom he may afterwards have pledged or sold them:—Held, also, that where credit is given or where the goods have been paid for, the vendee may sue at once, or in the case of credit, if the vendee so elects, he may await an action for the price and set off or counterclaim for his damages by reason of the defective material or other breach of warranty:—Held, also, that where there had been delay in the delivery of the samples, as well as the bulk of the goods ordered for a particular season, which arrived late for the season, and in consequence were sold at a loss, the measure of the damages was the difference between the value of the goods at the time at which they were to have been delivered according to the contract and their value for the purpose of resale. Wilson v. Lancashire and Yorkshire R. W. Co., 9 C. B. N. S. 632, and Schultz v. Great Eastern R. W. Co., 19 Q. B. D. 30, followed. *Centaur Cycle Co.* v. *Hill*, 22 Occ. N. 253, 24 Occ. N. 121, 209, 1 O. W. R. 229, 377, 401, 639, 2 O. W. R. 1025, 3 O. W. R. 255, 354, 4 O. L. R. 92, 493, 7 O. L. R. 110, 411.

Breach—Damages. *Robinson* v. *Boyd* (N. W.T.), 2 W. L. R. 425.

Breach — Damages — Costs. *Moran* v. *Woodstock Wind Motor Co.*, 5 O. W. R. 650.

Breach—*Implied Condition as to Reasonably Good Usage.*] — In an action to recover the amount of a promissory note given by the defendant for the price of a bicycle purchased by him from the plaintiff's agent, the defendant pleaded an undertaking on the part of the agent that the bicycle delivered would carry the defendant or bear his weight, but that the bicycle delivered would not carry defendant or bear his weight, and broke down. The evidence shewed that the agent by whom the bicycle was sold was to have come the following morning to instruct the defendant in the use of it, but that the defendant, who was a heavy and clumsy man, and who had never ridden a bicycle before, undertook to try it in the absence of the agent. The County Court Judge found that a warranty that the bicycle would bear the defendant's weight implied the condition of reasonably good usage, and that, under the circumstances in proof, the defendant assumed the risk of injuring the bicycle, and even if there was a warranty as alleged, there was not sufficient proof of breach:—Held, that the Judge was right. *Johnson* v. *Moore*, 34 N. S. Reps. 85.

Breach—Remedy — Contribution. *Ferguson* v. *Arkell*, 1 O. W. R. 190.

Breach—*Rescission of Contract—Fraudulent Representations—Finding of Jury — Appeal—Value of Goods.*] — Where a chattel sold with a warranty is delivered as agreed upon and is not up to the warranty, that fact, in the absence of fraud, affords no ground for rescinding the contract, but the remedy is for a breach of warranty. A court of appeal will not disturb the finding of a jury on a question of fraudulent representations, where there is any evidence upon which the verdict may reasonably be supported. Evidence of the value of the chattel (a horse) at the time of the trial, a year after the sale, was properly rejected when offered to prove the value at the time of the sale. *Finn* v. *Brown*, 35 N. B. Reps. 335.

Breach—Soundness of animals—Damages—Action on promissory notes given for price—Counterclaim—Set-off—Costs. *Swilling* v. *Arnold*, *Swilling* v. *Glass* (N.W.T.), 2 W. L. R. 48.

Correspondence—*Construction — Breach—Damages.*]—The plaintiff, a private banker, wrote to the defendants, safemakers, for an

estimate of a burglar proof door. The defendants, in answer, described No. 67, as 1⅛ inches thick, the entire surface protected with hardened drill proof plate, and enclosed a cut of No. 67, called "fire proof vault door with chilled steel lining." The plaintiff, in reply, asked whether No. 67 would furnish a fair protection against burglars, and the defendants answered, "No. 67 door gives both fire and burglar proof protection." The plaintiff purchaser a No. 67 door, which was blown open by burglars. It appeared that the handle to the spindle by which the lock was turned had been knocked off and dynamite introduced between the spindle and the door plates; the explosion of the dynamite then stripped the nuts which held the door plates together, and gave entrance to further explosives by which the door was wrecked. The door having been taken to pieces, it was found that the centre layer of the three layers making up the door, represented to be hardened drill proof plate, was not so, and was easily perforated by a hand drill:—Held, that the correspondence could not be construed as containing an absolute warranty on the part of the defendants that the door was proof against the efforts of burglars, without qualification as to time or place. The warranty which was given was that which would have been created by an answer simply in the affirmative to the plaintiff's question whether the door would furnish "a fair protection against burglars;" and the further warranty, in a former part of the correspondence, that the entire surface of the door was protected by hardened drill proof plate composed of chilled steel. The former warranty meant that, so far as the thickness of the plates used would admit, the securities against burglary were as complete as the experience of safemakers could make them. Both warranties had been broken:—Held, as to damages, that the loss of the money contained in the vault was not a natural consequence of the defects in the vault door, because the presence of these defects was not the reason why the burglars were enabled to break it open; but the plaintiff, having sustained a total loss by reason of the article supplied being valueless, was entitled to recover as damages the price, $250. *Denison* v. *Taylor*, 23 Occ. N. 264, 6 O. L. R. 93, 2 O. W. R. 386, 469.

Defect in Article—Contract—Conditions as to return—Compliance with—Authority of agent of vendor—Waiver—Notice. *John Abell Co.* v. *Long* (N.W.T.), 1 W. L. R. 24.

Defective Condition — Damages caused to purchaser by—Contract—Absence of express warranty—Implied warranty—Conditional sale—Property not passing. *Warder* v. *Bell*, 3 O. W. R. 682.

Express Stipulation of no Warranty — *Fraudulent Concealment of Defect.*] — "Tic" or "rot" in a horse is a defect for which a contract for the sale of the horse can be set aside. 2. Even where the seller of a horse sells it without warranty, and the purchaser buys it at his own risk, the seller will be held to have warranted it if at the time of sale he knew that the horse had such a defect; for, in stipulating that there shall be no warranty in these circumstances, he has been guilty of fraud as against the purchaser. 3. When the seller has refused to cancel the sale of a horse having, to his knowledge, such a defect, and persists in his refusal in his defence to an action, he cannot object that the buyer has not offered the horse back to him before action; the fraud practised leaving the purchaser always in a position to rescind the fraudulent sale. *Ducharme* v. *Charest*, Q. R. 23 S. C. 82.

Implied Warranty—*Latent Defect—Inspection—Caveat emptor.*] — The plaintiffs sought to recover from the defendants a sum of money paid on account of the purchase of a boiler and engine purchased by the plaintiffs from the defendants for the purpose of operating a grist mill, claiming that the engine and boiler were not reasonably fit for the purpose for which they were sold:—Held, that the case came within the first class of cases mentioned in Jones v. Just, L. R. 3 Q. B. 202, and that the goods being in case, and in a position to be inspected by the buyers, and there being no fraud on the part of the sellers, the maxim caveat emptor applied, even though the defect was latent, and could not be discovered on examination. *Higgins* v. *Clish*, 34 N. S. Reps. 135.

Machinery—Defects — Implied warranty —Damages—Costs. *North-West Thresher Co.* v. *Darrell* (Man.), 2 W. L. R. 262.

Quality—Deduction for inferiority—Notice of breach. *Beech* v. *Ferguson*, 5 O. W. R. 770.

Sale of Horse—*Subsequent Development of Vice.*]—A horse sold by the defendant to the plaintiff was guaranteed sound and without vice, fault, or tricks. The evidence shewed that for a period of eight years prior to the sale the horse was without faults or tricks, but that, immediately afterwards, in the hands of the plaintiff, it baulked and kicked when in harness, and was useless for the purpose for which it was purchased. Judgment having been given, on these facts, in favour of the defendant:—Held, McDonald, C.J., dubitante, that the appeal must be dismissed. *McGill* v. *Harris*, 36 N. S. Reps. 414.

Specific Article — *Implied Warranty — Knowledge of purpose — Inspection.*] — In a sale of a specific ascertained article, by one who is not a producer or manufacturer, for a particular purpose, known to the vendor at the time of sale, there is no implied warranty on the part of the vendor that the article is reasonably fit for the purpose for which it is intended, if the vendee has inspected, or has had the opportunity of inspecting it, before purchasing. *Jordan* v. *Leonard*, 36 N. B. Reps. 518.

Written Warranty—Inconsistent undertaking of agent for vendors—Return of goods —Condition precedent—Notice—Waiver—Implied warranty—Counterclaim—Defects in goods—Costs. *Cockshutt Plow Co.* v. *Mills* (N.W.T.), 2 W. L. R. 355.

XII. Weights and Measures Act.

Agreement — *Objection not Raised at Trial—Payments on Account.*]—When a defendant seeks to avoid payment of an account for lime furnished to him on the ground that it was sold to him by measure and that the

measure used was not stamped as required by the Weights and Measures Act, R. S. C. c. 104, the onus is on him to prove that the measure was not properly stamped. Hanbury v. Chambers, 10 Man. L. R. 167, followed. Section 21 of that Act does not render it illegal for parties to agree upon a sale by some authorized measure, and then that the quantities should be ascertained by authorized weights, and, when lime is ordered by the bushel and supplied by weight, the sale would not be illegal or void if the purchaser knew that such was being done, and the onus is on him to prove that he did not know of it. After the passing of 61 V. c. 30, s. 2 (D.), a bushel of lime was to be determined by weighing, unless a bushel by measure should have been specially agreed upon:—Held, that, as to certain lime furnished by measure after the passing of the Act of 1898, the plaintiff was entitled to recover for it, on the ground that the defendant had not raised at the trial the objection that there had been no agreement for a determination by measure. The defendant had voluntarily made certain payments on account of certain other sales of lime which were admitted to have been illegal, but he gave no evidence to shew that, when he made the payments, he was ignorant of the illegality:—Held, that he could not recover back the amount of such payments. *Hughes* v. *Chambers*, 22 Occ. N. 333, 14 Man. L. R. 163.

XIII. Other Cases.

Bailment — *Evidence — Alterations in Documents.*]—The plaintiff delivered wheat to the defendants, millers, from time to time, receiving delivery tickets, of which the following is a sample, "22/11" (date) "H. L. Cargo. 85 B. Wht. J. & E., K." (defendants' miller). The plaintiff alleged a sale of the whole; the defendants a purchase of a part of the wheat delivered, and a bailment of the remainder:—Held, that the tickets shewed delivery only, and that the question of sale or bailment must be determined by extrinsic evidence. On the evidence the trial Judge found for the defendants. The effect of alterations in documents discussed. *Cargo* v. *Joyner*, 4 Terr. L. R. 64.

Illegality of Sale—*Intoxicating Liquors —Liquor-License Act—License in Name of One Partner.*]—Where a firm sold intoxicating liquors in quantities for which, under s. 78 of the Liquor License Ordinance (C. O. 1898 c. 89), action may be brought, but the only license under which the firm purported to sell was one issued to one of the members of the firm in his own name:—Held, that the plaintiffs could not recover in respect of the liquors; but the action being upon a bill of exchange, and an additional open account, judgment was given for the portion of each which were not for intoxicating liquors. *Indian Head Wine and Liquor Co.* v. *Skinner*, 23 Occ. N. 73; *Plisson* v. *Skinner*, 5 Terr. L. R. 391.

Insolvency of Vendee — Stoppage in transitu—Termination of transitus—Carriers — Warehousemen — Railway. *Re Purity Manufacturing Co.*, 6 O. W. R. 418.

Lien for Purchase Money — Equitable lien—Notice to purchaser—Chattel mortgagee —Solicitor's knowledge. *Trimble* v. *Laird*, 4 O. W. R. 63.

Owner not in Possession—*Authority to Sell — Secret Agreement — Estoppel.*] — The owner of logs, by contract in writing, agreed to sell and deliver them to McK., the title not to pass until they were paid for. The logs being in custody of a boom company, orders were given to deliver them as agreed. E., a dealer in lumber, telephoned the owner asking if he had them for sale, and was answered, "No, I have sold them to McK." E. then purchased a portion of them from McK., who did not pay the owner therefor, and he brought an action of trover against E.:—Held, affirming the judgment in 36 N. B. Reps. 169, Nesbitt and Killam, JJ., dissenting, that the owner, having induced E. to believe that he could safely purchase from McK., could not afterwards deny the authority of the latter to sell. *People's Bank* v. *Estey*, 24 Occ. N. 170, 34 S. C. R. 429.

Ownership—Conversion—Seizure — Delivery—Acceptance. *Union Bank of Canada* v. *Blackwood* (Man.), 2 W. L. R. 574.

Right of Unpaid Vendor—*Conservatory Attachment—Insolvency — Time for Seizure.*] —When a conservatory attachment is issued and the property of a person who is not shewn to be a trader is seized by the unpaid vendor thereof, the attachment will not be quashed upon petition on the ground that the seizure was not made within thirty days of the delivery of the goods. *Swaeschnikoff* v. *Breitman*, 6 Q. P. R. 30.

Title—Trover— Bills of Sale Act—Estoppel—Ownership—Evidence. *Mitchell* v. *Weese*, 4 O. W. R. 346.

Undisclosed Principal — *Judgment against Husband and Wife — Married Woman's Act.*]—A husband, as agent for his wife, purchased goods from the plaintiffs, who were ignorant that she was the purchaser, but, on becoming aware of it, and the goods not having been paid for, sued both husband and wife, but, on the husband giving a promissory note signed by him for part of the debt, and the wife paying the balance in cash, the action was not further proceeded with. The note not having been paid at maturity, an action was brought in a County Court for the balance due on the goods, being the amount for which the note had been given, and judgment was entered against both husband and wife:—Held, on appeal, that the proper inference was that the husband's note was not taken in satisfaction of the debt, and that there was no election to look to him alone for payment; and the plaintiffs were therefore entitled to sue on the original cause of action; but that they could not have judgment against both husband and wife; and must elect as to which they desired to hold it, and that they could properly hold it against the wife, a recovery against her being now maintainable under the Married Woman's Property Act, R. S. O. c. 168. Wagner v. Jefferson, 37 U. C. R. 551, distinguished. *Davidson* v. *McClelland*, 21 Occ. N. 118, 32 O. R. 282.

SALE OF GOODS ACT.

See EXECUTION.

SALE OF LAND.

Judgments Act—*Equitable Mortgage — Notice—Right to Dispose of Timber—Estoppel by Course of Litigation.*]—In 1891 O.'B. pre-empted Provincial Crown land, and in 1898 M. obtained a judgment against him, which provided that he might cut timber from O'B.'s pre-emption, and apply the proceeds in satisfaction of the judgment, and which restrained O'B. for six months from cutting or selling timber. M. registered his judgment in 1899. In January, 1900, O'B. agreed to sell to McK. the timber for $1,050, payable at various times, part of the consideration being the fees payable to the Crown for Crown grant; and, on these being advanced by McK., the Crown grant was delivered to him as security for such advance. The plaintiff moved for liberty to sell the land under his judgment, and Drake, J., made on order for sale, holding that McK., being an equitable mortgagee, was excluded by the statute:—Held, reversing the decision, that the sale should be subject to McK.'s interest. Per Martin, J., that, as the plaintiff at the trial induced the Court to grant him a judgment recognizing the defendant's right to timber, he was estopped from afterwards contending that, by virtue of certain sections of the Land Act, the defendant had no right to dispose of timber. *Manley* v. *O'Brien, In re Mackintosh*, 22 Occ. N. 74, 8 B. C. R. 280.

Judicial Sale—Tenders—Sale to highest bidder—Re-sale. *Piggott* v. *French*, 6 O. W. R. 398, 877.

See ARBITRATION AND AWARD — BANKRUPTCY AND INSOLVENCY — COMPANY — CONTRACT — COURTS — DEVOLUTION OF ESTATES ACT—DOWER—EXECUTION—INDIAN LANDS—MORTGAGE — OPPOSITION — PRINCIPAL AND AGENT—REGISTRY LAWS—SPECIFIC PERFORMANCE—STATUTES—VENDOR AND PURCHASER —WILL.

SALE OF RAILWAY.

See RAILWAY.

SALVAGE.

See APPEAL—INSURANCE—SHIP.

SALVATION ARMY.

See PARTIES.

SAVINGS BANK DEPOSIT.

See GIFT.

SCALE OF COSTS.

See COSTS

SCANDAL.

See SOLICITOR.

SCHOOLS.

I. HIGH SCHOOLS, 1476.
II. PUBLIC SCHOOLS, 1476.
III. SEPARATE SCHOOLS, 1486.

I. HIGH SCHOOLS.

Maintenance of County Pupils in City School—Dispute as to amount to be paid—Arbitration—County Court Judge—Injunction. *County of Essex* v. *Windsor Board of Education*, 3 O. W. R. 403.

II. PUBLIC SCHOOLS.

Accommodation for Pupils—Formation of new section—Award—Action to set aside—Mandamus — Postponement of application — Convenience—Terms. *Re Russell and Doyle*, 2 O. W. R. 727.

Agreement with Teacher—*Dismissal—Seal—Validity.*]—Semble, that where public school trustees had entered into an agreement for securing the services of a teacher, and had directed the officer who had the custody of the seal to affix it, and both parties had for two years acted on it as a binding agreement, the fact that the seal had not been actually affixed did not invalidate the agreement. Where such an agreement is entered into with the intention that it shall supersede a previous agreement of a like character entered into between the trustees and the same teacher, if the second never becomes operative, the first agreement will remain in force and govern the relations between the teacher and the trustees. Where such an agreement is valid on its face, and has been acted upon for several years, the onus of proving invalidity by reason of the requirements of s. 19 of the Public Schools Act, R. S. O. c. 292, enacting that no proceeding of a rural school corporation shall be valid or binding unless adopted at a meeting at which at least two trustees are present, except as stated in that section, not having been complied with rests upon the trustees; and semble, that the absence of a formal minute of the proceedings of the meeting at which the first agreement was signed would not be fatal to its validity. A teacher acting under an agreement, who has been wrongfully dismissed, may treat his discharge as a rescinding of the contract by the trustees, and, adopting the rescission, is entitled to his salary pro rata up to the time of his discharge, and thence to the time of bringing his action. *McPherson* v. *Usborne School Trustees*, 21 Occ. N. 181, 1 O. L. R. 261.

Alteration of School Sections—*Appeal —Arbitrators—By-law—Description of Lots.*]—The arbitrators appointed by a county council on appeal from the refusal of a township council to alter school sections as asked in a petition of ratepayers, have power only to grant or refuse what is asked for in the petition, and have no power to direct the formation of a section differing from that asked for in the petition. Re Southwold School Sections, 3 O. L. R. 81, applied. In by-laws altering existing school sections or adding territory to them, the lots and parts of lots dealt with must be accurately and exactly described. *In re Sydenham School Sections*, 23 Occ. N. 305, 6 O. L. R. 417, 2 O. W. R. 830. Affirmed 24 Occ. N. 88, 7 O. L. R. 49, 3 O. W. R. 227.

Boundaries of School Sections—By-law—Petition—Award—Powers of arbitrators —Finality—Award set aside as to one section—Effect on others. *Re Kincardine School Sections*, 4 O. W. R. 157.

Collection of Rates—Protestant separate school—Building—By-law—Petition— Status of plaintiff. *Scott* v. *Township of Ellice*, 2 O. W. R. 880, 4 O. W. R. 38, 93.

Commissioners—*Election of — Duties of President — New Municipality—Procedure—Justice of the Peace—Status of Candidates—Of Mover and Seconder.*]—The president of a meeting for the election of school commissioners may have other persons to help in the performance of his duties, provided that he is present during the whole time of the election, personally, authorizing and participating in all that is done. In case of a first election of commissioners in a new municipality, whilst it may be said that this election ought to be presided over by a justice of the peace or three electors, if the resident justice of the peace is not in fact known as such, the three electors may call the first meeting. The irregularity in case of such meeting will not nullify the election if such justice of the peace is present and allows nominations to be made without protest, and only calls in question the legality of the meeting after the proclamation of the election of commissioners by the president of the meeting. The lack of status, supposing it existed in certain persons who moved and seconded the nomination of candidates, would not render the election void. The fact of candidates being indebted for school taxes to the neighbouring school municipalities or to municipalities out of which the new municipality has been formed, does not render such candidates ineligible as school commissioners under the terms of art. 148 of the School Code. *Nadon* v. *Labelle*, 7 Q. P. R. 45.

Commissioners—*Liability to Valuators— Valuation Roll — Errors in — Correction.*]—The valuators named by the superintendent of public instruction are entitled to be paid for their services by the school commission. 2. The commissioners of schools cannot declare void the valuation roll prepared by their valuators, because lands belonging to dissidents are entered thereon, or because the description of lands therein is erroneous, but they ought, according to the provisions of art. 353 of the statute respecting public instruction, to examine and correct the errors in the roll. *Robert* v. *Commissioners of Schools of St. Hermengilde*, Q. R. 20 S. C. 540.

Contract—*Salary — Evidence — Parol Agreement — School Returns—School Regulations.*]—In an action in a County Court brought by a public school teacher for a balance of salary, evidence of a parol agreement of January, 1902, and the school returns, were admitted to explain a written contract signed by the parties on the 4th February, providing that the plaintiff should teach for the unexpired portion of the term ending the 30th June, 1902, for $75. The term contained 121 days, of which the plaintiff's contract covered 100. The plaintiff taught for the unexpired portion of the term, and was paid the agreed salary, and continued teaching the next term, which began on the 1st July, and ended on the 31st December following, but which, in consequence of holidays under the regulations of the board of education, contained only 92 teaching days. The returns sent to the chief superintendent by the teacher and trustees, as required by the school law, stated the salary to be $180 per year. These returns were sworn to by two of the trustees. The trustees refused to pay the plaintiff for the short term more than $69, asserting that she was entitled only to the same rate per day as the first term, viz., 75c. per day. Clause 4 provided "that for a term or any part of a school year the teacher is to receive such proportion of the salary stated in the contract as the number of days actually taught bears to the whole number of teaching days in the unexpired portion of the term," instead of "in the school year," as in the form prescribed by the regulations, clause 5 of which provides that "in default of written notice the contract shall continue in force from school year to school year." The County Court Judge, reading the written agreement and the parol evidence together, found that the plaintiff was entitled to $90 for the short term:—Held, that the finding was right. *Southampton School Trustees of District No. 9* v. *Haines*, 36 N. B. Reps. 617.

Contract with Teacher—Execution by trustees—Necessity for meeting—"Continuation class" — Appropriation of payments — Salary—Days of absence. *Acheson* v. *Bastard School Trustees*, 2 O. W. R. 451.

Dissolution of Union School Section—Formation of new union section and non-union section—Award—Jurisdiction of arbitrators — Petition—Costs—Reference back—Construction of Public Schools Act—"Or." *Re Churchill and Townships of Goderich and Huliett*, 6 O. W. R. 66.

Division of Township into Sections—Mandamus—Demand—Particular by-law—Duty of council—Discretion — Newly organized township—Public Schools Act, s. 12—Construction—Costs. *Re Ellis and Township of Widdifield*, 5 O. W. R. 47, 11 O. L. R. 284.

Erection of School District — *Consent of Ratepayers—"Actual Resident"—Person "Affected"—Residence—Domicil.*] — The expression "all the resident ratepayers affected by such permission," as used in s. 12 of the School Ordinance, c. 5, C. O. 1898, means, not "all the resident ratepayers," but only those who are affected by the district being more than five miles long, and when the district purported to be erected is in fact over

five miles long, the residents in each of the tiers of sections which lie at the extremities of the district must be considered as affected, since it is impossible to say which tier should be regarded as the excess in length. Where a ratepayer owned real property in the district, and had a house with furniture in it locked up on this property, but rented a house out of this district for the use of his wife and family, while he was prospecting in the mountains and for some time also working in a coal mine, both out of the district:—Held, that he was not an "actual resident" whose consent in writing could be required under s. 12. The meaning of "residence," "actual residence," and "domicil," considered. *Curren v. McEachen*, 5 Terr. L. R. 333.

Expenditure—*Annual Estimates — Revision—Power of Municipal Council.*] — Under the proper construction of ss. 65 (9) and 71 (1) of the Public Schools Act, 1 Edw. VII. c. 39—which provide that the public school trustees are to submit to the municipal council an estimate of the expenses of the schools under their charge for the current year, and that the council shall levy and collect upon the taxable property of the municipality such sums as may be required by the trustees, and shall pay the same to the treasurer of the public school board—the right of the school board, in preparing their estimate, is to include therein everything that in their best judgment may be needed to meet legitimate expenditure, that is, expenditure upon objects or for purposes within their lawful authority, and their duty to the council is to prepare it in such a manner as to shew generally what these purposes are, and what is required in respect of each. The right and duty of the council is to examine the estimate so far as to ascertain that it is for purposes intra vires of the school board. If an item or class of items is clearly for a purpose for which the board is not authorized by law to expend money, it is the right and duty of the council to reject it. But beyond this the council cannot go. The council has no voice in the control or management of the affairs which are committed by law to the school board; its duty is to levy and collect and pay out, from time to time, as required, the moneys shewn by the estimate to be necessary for lawful school purposes. Judgment of a Divisional Court, 2 O. L. R. 727, 22 Occ. N. 15, affirmed. *In re Toronto Public School Board and City of Toronto*, 22 Occ. N. 279, 4 O. L. R. 468, 1 O. W. R. 443.

Formation of New School Section — Award of arbitrators — Statutory requirements—Area of section—Number of children of school age—Determination of arbitrators—Jurisdiction—Power of Court to review. *Re Bainsville School Section*, 4 O. W. R. 455, 5 O. W. R. 250.

Formation of New School Section — Award—Action to set aside—Costs—Submission of rights. *Doyle* v. *Drummond School Trustees*, 2 O. W. R. 1029.

Formation of Union School Section — Award — Appointment of arbitrators — Township councils — By-law — Resolution — Description of lots—Reference to petition—Arbitrator—Municipal clerk—Award—Unanimity—Publication—Time—Uncertainty as to surplus — Reference back. *Re Arthur and Minto Union School Section, No. 17*, 2 O. W. R. 930.

Formation of Union School Section —Appointment of arbitrators—Amendment of Public Schools Act—Effect on pending appeal —Stay of proceedings. *Re Arthur and Minto Union School Section*, 4 O. W. R. 3.

Formation of Union School Section —Alteration in boundaries—Award—Petition —Ratepayers in two townships—Necessity for petition from both — Setting aside award — Costs. *Re Osgoode and Mountain Union School Section*, 3 O. W. R. 87.

Model School — Town separate from county—Liability of county. *Toronto Junction Public School Board* v. *County of York*, 3 O. L. R. 416, 1 O. W. R. 216.

Money for School Site and Building —*Meeting of School Board—Notice—Meeting of Council—Adjournment — New Business — By-law — Recital of Debts—Debentures.*] — After the injunction in a previous action (24 Occ. N. 15, 6 O. L. R. 539) had been dissolved the defendant school board passed a new resolution asking the village council to pass a by-law for the issue of debentures for $12,500 for the purchase of a school site and the erection of a school house. This was presented on the same day to the council, who repealed their by-law and passed a new one as requested. The plaintiff then brought this action to have the new by-law declared invalid, alleging that notice was not given to the members of the board of the object of the meeting, and that the council meeting was an adjourned one and no notice of this by-law had been given:—Held, that, in the absence of some rule requiring the object of the meeting to be stated in the notice calling it, it was unnecessary to specify the business to be transacted. Rex v. Pulsford, 8 B. & C. 350, and La Compagnie de Mayville v. Whitley, [1896] 1 Ch. 788, distinguished. Marsh v. Huron College, 27 Gr. 605, and Cannon v. Toronto Corn Exchange, 5 A. R. 268, referred to. It was the duty of every member of the council to be present at the adjourned meeting, and it was competent to the members present to transact any business that might have been transacted at the original meeting. As the later by-law was passed only to overcome certain defects in the earlier one, it might well have been passed without any new requisition. The by-law sufficiently recited the amount of the debt intended to be created, as it recited that application had been made by the school board to the council to raise $12,500 by debentures, and it authorized an issue to that amount:—Held, also, that s.-s. 1 of s. 386 of the Municipal Act, 1903, authorized the issue of debentures providing for the payment of principal and interest together by equal instalments spread over the whole period for which the debentures are to run, and is alternative to the provisions of s.-s. 5 of s. 384 of that Act. *Forbes* v. *Grimsby Public School Board*, 24 Occ. N. 15, 130, 6 O. L. R. 539, 7 O. L. R. 137, 2 O. W. R. 947, 1158.

Municipal Corporations—*Estimate of Expenses—Taxes.*]—Under s. 62, s.-s. 9, of the Public Schools Act, R. S. O. c. 292, it is the duty of a board of education, formed under s. 10, to submit to the municipal council at certain times "an estimate" of the expenses of the schools under their charge for the twelve months next following: — Held, that such estimate should furnish the council with the like details upon which the board

base their own calculation, and not merely state a certain sum as required. If, as in this case, the sum in question is for repairs and improvements, there ought to be information given as to the schools to be repaired and improved, and the amounts required in respect of each, as well as some indication of the nature and extent of the repairs and improvements. The municipal council have the right, indeed it is their duty, to take some care that they are not made the instrument by which any intentional or unintentional excess of the powers of the school board are given effect to by levying for them any sum of money which the law does not authorize them to exact. *Board of Education of City of London* v. *City of London*, 21 Occ. N. 210, 1 O. L. R. 284.

Payment to City High School for County Pupils—*Dispute as to—Reference to County Court Judge—Absence of Jurisdiction—Res Judicata—High Schools Act—Payment for Particular Year.*]—The town of Windsor separated from the county of Essex on 1st January, 1881, and remained separated until it became a city on 14th April, 1892. The High Schools Act was passed on 4th May, 1891. Until then the county was under no legal obligation to contribute towards the support of a high school situated in a town separated from the county, or in a city, but by s. 31, s.-s. 2, a change was introduced, and a county became liable thereafter to pay its proportionate share, upon the trustees of the high school notifying the county clerk that such high school was open to county pupils. Acting under this provision the trustees of the Windsor High School, on 11th June, 1891, notified the county clerk of the county of Essex, and the next day a meeting was held between the warden of the county and the Windsor high school board, for the purpose of settling the amount which the county should pay, and a proposition was made by the warden to pay $500 as a fixed sum per annum, but not accepted by the board. Then on 30th December, 1891, this cheque was issued to and received by the plaintiffs: "$500. Treasurer of the county of Essex, pay to the order of Alex'r Bartlet five hundred dollars due from the county to him for amount granted to Windsor high school for 1891. F. B. Bouteiller, warden of the county of Essex. Office of the County Council, Sandwich, Decr. 30th, 1891." The defendants had previously made grants in each year for several years prior to 1891, but these were wholly voluntary, and not in any way based upon allowance or expenditure, as became the case under the Act of 1891, and as made in each year were plainly for that year and not for a previous year, and were usually so expressed in the cheques. The next previous one, the only one which could bear upon the question in this action, bears date 23rd January, 1891, and is for $500 "for amount granted to Windsor high school for 1890." Then following upon the cheques before set out are yearly cheques for 1892, 1893, 1894, 1895, 1896, and 1897, all paid at or near the end of each of these years, all expressing on their face for what year they were given, and all in like manner accepted and received by plaintiffs without objection. In 1898 the cheque expresses on its face that it was for the year 1897, and the same with the cheque issued in 1899, which on its face says that it is for the year 1898. But the cheque issued in 1900 again follows the course of the first seven, and says it is for the year 1900 and the same in 1901 and 1902. Certain statements submitted from time to time by plaintiffs to defendants were produced and much relied on by plaintiffs. They shewed that the amounts payable from year to year were calculated upon the previous year's attendance, which was what the statute intended, but this circumstance did not alter the fact really in question that the amount to be paid in 1903, however arrived at, was in fact the payment for that, and not for the previous year, and therefore one to which the reduction authorized by the statute 3 Edw. VII. c. 33 would apply. The defendants' contention is correct, and the appeal should be allowed and the action dismissed, both with costs. *Windsor Board of Education* v. *County of Essex*, 5 O. W. R. 726, 10 O. L. R. 60.

School Board—*Notice of Meeting—Terminating Contract with School Master — Salary—Division Court.*]—The plaintiff was the master of a public school. The contract between him and the school board gave either party the right to terminate it on one month's notice. There were eight members of the school board, and at a meeting on the 19th February a resolution was passed instructing the secretary to notify the plaintiff that the contract between him and the board should cease on the 31st March, which he accordingly did. The notice of the meeting given to the members of the board did not state that the matter of determining the plaintiff's contract was to be considered, and some of the members had no knowledge of this fact, nor had the plaintiff any knowledge or notice of the meeting. Only six members of the board attended the meeting, of whom four voted in favour of the resolution, and two against it: —Held, that the above resolution and notice to the plaintiff in pursuance of it was not a fair or proper exercise of the power and option to determine the plaintiff's contract contained in it, and the agreement with the plaintiff was not terminated thereby. The plaintiff brought this action under the above circumstances, claiming a balance of salary, and had recovered judgment for $132.03:— Held, that the matters of difference between the parties fell within R. S. O. c. 292, s. 77, s.-s. 7, and a Division Court had jurisdiction. *Greenlees* v. *Picton Public School Board*, 21 Occ. N. 520, 2 O. L. R. 387.

School Rates—*Partnership — Co-owners of Mine—Assessment.*]—The Act to amend and consolidate the Acts relating to public instruction, Acts 1895, c. 1, in relation to the assessment of property for school purposes, provides that all ratable property belonging to any association, corporation, or firm shall be assessed in the name of the firm, association, or corporation:—Held, that the defendants were properly assessed as a firm, in respect of a mining property owned by them in the plaintiffs' section, the property having been purchased by the defendants with a view to working or sale, and having been worked by them jointly for upwards of two years, the proceeds, after paying expenses, being equally divided. The evidence shewed a community of interest in the profits and losses and capital employed:—Held, that the defendants were partners in the business of carrying on the mine, and that their liability, as such, could not be affected by evidence on their part denying the existence of a partnership

or authority on the part of either to bind the other. *Montagu School Trustees* v. *Oland*, 35 N. S. Reps. 409.

School Sections—*Subdivision into—Mandamus.*]—The Public Schools Act, 1 Edw. VII. c. 39, s. 12, enacts as follows:—"The municipal council of every township (except where township boards have been established) shall sub-divide the township into school sections, so that every part of the township may be included in some section, and shall distinguish each section by a number; provided that no section formed hereafter shall include any territory distant more than three miles in a direct line from the school house." The applicants asked for an order of mandamus commanding the respondents to subdivide the township into school sections:—Held, that there must be some discretion left to a township council as to when the township shall be subdivided; and, that even where the majority of the council may be mistaken as to what would be best, which did not appear to be the case here, the Court will be slow to interfere if the duly constituted governing body have honestly attempted to do their duty; and upon the facts, as proved in the evidence here, this did not appear a case in which it would be just or convenient that an order of mandamus should be made. *In re Ellis and Township of Widdifield*, 24 Occ. N. 298, 3 O. W. R. 802.

Selection of Site—*Arbitration and Award.*]—Under s. 34 of the Public Schools Act, 1 Edw. VII. c. 39 (O.), the arbitrators appointed in consequence of a majority of the ratepayers at a special meeting differing (from the trustees) as to the suitability of the site for a school house selected by the trustees, can determine only whether or not the site selected by the trustees is a suitable one; they have no power to select another site. *In re Sombra Public School Section No. 26*, 24 Occ. N. 16, 6 O. L. R. 585, 2 O. W. R. 928.

Selection of Site — Difference between trustees and ratepayers—Powers of arbitrators — Award — Reference back. *Re Sombra Public School Section*, 26, 928; 6 O. L. R. 585.

Selection of School Site — *Trustees—Ratepayers—Difference—Award—Invalidity—Mandamus—Estoppel.*]—It is only in case of a difference between the trustees, on the one hand, and a majority of the ratepayers at a special meeting, on the other, as to a school site selected by the trustees, that an arbitration is to be had, under s. 31 of the Public Schools Act, R. S. O. 1897 c. 292. And where a majority of the ratepayers at a special meeting voted in favour of a change of school site, without any selection of site having been first made by the trustees:—Held, that there was no foundation for an arbitration, and that an award made by arbitrators appointed in the manner prescribed by s.-s. 2, whether such award was or was not valid on its face, was an absolutely void proceeding, and no answer to a motion by the trustees for a mandamus to the corporation requiring them to pass a by-law for the issue of debentures to provide funds for the purchase of a school site and the erection of a school house in pursuance of the vote of the ratepayers. Quære, whether the award was valid on its face, inasmuch as it did not shew a difference between the trustees and the ratepayers:—Held, also, that there could be no estoppel against the applicants, or waiver of the public right. Judgment of a Divisional Court, 22 Occ. N. 291, 1 O. W. R. 387, 447, 4 O. L. R. 272, affirmed. *In re Cartwright Public School Trustees and Township of Cartwright*, 23 Occ. N. 216, 5 O. L. R. 699, 2 O. W. R. 340.

Separate Town within County — *County Model School Situated in.*] — The town of Toronto Junction, territorially within the limits of the county of York, but a separate town within the provisions of the Municipal Act, and as a municipality not under the jurisdiction of the county council, is yet part of the county, within the meaning of ss. 83 and 84 of the Public Schools Act, 1 Edw. VII. c. 39; and the county is bound to contribute to the support of a county model school situated in the town. *Toronto Junction Public School Board* v. *County of York*, 22 Occ. N. 145, 3 O. L. R. 416.

Site — Change — Trustees — Adoption by ratepayers' meeting — Resolution — Minutes — Evidence dehors—Inspector—Arbitration — Award — Injunction—Estoppel—Res judicata — Reverting to former site after change — Resolution of ratepayers—Poll—Qualification of voters—Scrutiny. *McLean* v. *Robertson*, 1 O. W. R. 578, 2 O. L. R. 111.

Supporter of Separate School — *Right to Withdraw and Support Regular School.*]—It is permissible for any ratepayer in a school section to withdraw from a dissident corporation and join the majority under the control of the school commissioners, even where such ratepayer has previously petitioned for the creation of the dissident corporation, to which he has paid taxes for a certain time, and even when he is of a different religion from that of the majority. *Outremont School Syndics* v. *Ainslie*, Q. R. 25 S. C. 348.

Trustee—*Election of—Equality of Votes—Casting Vote—Complaint—Jurisdiction of County Court Judge.*]—Upon the complaint of S. of the election of L. as a public school trustee for the year 1902 for a ward in a city:—Held, that the Public Schools Act, 1 Edw. VII. c. 39, s. 63, presupposes an election, and that, inasmuch as in the election in question there was a tie, and the proper officer had not yet given the casting vote, there was not an election within the meaning of the section, and the Judge of the County Court had no jurisdiction to hear the complaint. *In re Ireland*, 22 Occ. N. 151.

Trustees—*Agreement with Teacher—Meeting—Necessity for.*]—An agreement between a board of school trustees and a teacher, which appeared not to have been adopted at a meeting of the board, was held to be void as against the board by reason of the provisions of the School Ordinance. *Sparling* v. *Spring Coulee School Trustees*, 4 Terr. L. R. 366.

Trustees—*Declaration of Office Inspector—Inquiry—Replevin—Parties—Use of Name of School Corporation.*] — An inspector appointed under the Public Schools Act, R. S. M. 1902 c. 143, is not authorized by s. 32 of the Act or otherwise to inquire whether a trustee duly elected has forfeited his office under s. 243 of the Act by refusing or neglecting to take the declaration of office required by s. 31. Where an inspector undertook such inquiry and declared the seats of two trustees

vacant, and two new trustees were subsequently elected at a meeting of the ratepayers called by direction of the inspector, the proceedings were declared null and void, and the plaintiff corporation held entitled to succeed in an action of replevin commenced by direction of the old board against the two new trustees and others who had broken into the school building and taken away the furniture. Chaplin v. Woodstock Public School Board, 16 O. R. 728, followed. Quære, whether the defendants could resist the action which was brought in the name of the school corporation, the acknowledged owner of the goods, and whether the defendants in any case could do more than apply to the Court to stay the use of the name of the corporation in the action, on the ground that its use was not authorized by those who were lawfully the trustees. *Youville School District Trustees* v. *Bellemere*, 24 Occ. N. 146, 14 Man. L. R. 511.

Trustees—Duty of—Action by teacher—Injury to health—Neglect to employ caretaker —Waiver—Evidence—Cause of illness—Costs. *Emerson* v. *Melancthon School Trustees*, 3 O. W. R. 12, 426.

Trustees—*Power to Borrow — Ordinary Expenditure.*]—The plaintiff, one of the trustees of a school section, at the instance of his co-trustees, lent to the trustees a sum of money required for payment of the teacher's salary:—Held, that, as the amount borrowed was to be applied to ordinary expenditure, and did not increase the liabilities of the corporation, no special authority to borrow was necessary. *McNeil* v. *Victoria School Trustees*, 34 N. S. Reps. 546.

Trustees—*Qualification — Contract with Board—Termination.*]—The lack of qualification of a school trustee which results from his having a contract with the school board, ends with such contract, and after he has been paid the amount owing in respect of it, he is no longer liable to be unseated on this ground. A school trustee who, at the order of the board, causes certain work to be done on account of the board, and pays for it himself, and afterwards is paid what he has expended and for his time in overseeing the work, is not a contractor with the board within the meaning of art. 147 of the School Code, and does not by thus acting forfeit his seat. *Larochelle* v. *Roi*, Q. R. 27 S. C. 55.

Trustees — *Secretary-Treasurer of Board — Security — Validity.*] — The security furnished by the secretary-treasurer of a board of school commissioners and accepted by the chairman, is not void because it is not made by notarial act nor by act sous seing privé signed and acknowledged before a justice of the peace, in accordance with art. 2088, R. S. Q.; but such formality being only accidental and not essential to the validity of the security, a security sous seing privé not signed and acknowledged before a justice is a valid engagement on the part of the surety. 2. Although art. 2089, R. S. Q., says that the security should be given jointly and severally by two solvent sureties, a security given by a single surety is not less valid. 3. The neglect to transmit the security to the superintendent of public instruction is without effect upon the validity of the security. *St. Norbert School Commissioners* v. *Paquette*, Q. R. 18 S. C. 289.

Trustees — *Teacher—Power of Dismissal —Inquiry.*]—Under s. 16 (7) of the Public Schools Act, 1 Edw. VII. c. 40 (O.), which enables the board of education of a municipality "to appoint and remove such teachers, officers, and servants, as they may deem expedient," members of the board are the sole judges of what they may deem expedient in each particular case in the matter of the removal or dismissal of a teacher on the ground of unsuitability for the position. They may institute a private inquiry into such a matter without allowing the usual safeguards of representation by counsel to the person affected, or they may dispense with such investigation and proceed on their own conviction of what is right from a general knowledge of the situation; they may also act on the report of an inspector, although irregularly obtained, or may remit the matter to a committee and act on its report, and they should not be interfered with by injunction in any action they may be advised to take. Although honorary trustees of the property held for the purposes of public education, their relation is not in any sense fiduciary. Cases of charitable endowments, in which property is clothed with a trust, considered. *Dunn* v. *Toronto Board of Education*, 24 Occ. N. 223, 7 O. L. R. 451, 3 O. W. R. 393.

Union of School Sections—*Powers of Arbitrators — Appeal to County Council—1 Edw. VII. c. 39, s. 42.*]—An application was made to a township council to alter the boundaries of school sections 12, 13, and 14, by taking about 1,200 acres from 13 and adding them to 12, and by taking about 2,000 acres from 14 and adding them to 13. The township council refused the application; an appeal was taken to the county council against such refusal; and arbitrators were appointed by the latter council under the authority of s. 42 (3) of the Public Schools Act, 1 Edw. VII. c. 39. The arbitrators made no alteration in the boundaries of any of the sections, but by their award assumed to unite sections 12 and 13, and recommended the building of a new school house in a central position in the thus united sections:—Held, that it was not within the power of the arbitrators to unite the two school sections upon an appeal against a refusal to comply with an application to alter boundaries only. The arbitrators are given power "to form, divide, unite, or alter the boundaries," but that means to form, divide, unite, or alter in accordance with the subject matter of the appeal. Award set aside without costs. *In re Southwold Public School Sections*, 22 Occ. N. 62, 3 O. L. R. 81, 1 O. W. R. 32.

III. Separate Schools.

Adjoining Municipalities — *Three-mile Limit—Separate School Supporters — Notice —Change in Assessment Rolls—Court of Revision.*] — Roman Catholic supporters of a separate school who live in a town may, by giving notice, become supporters of the nearest separate school in an adjoining rural municipality, within three miles distance; and the High Court has power, in an action brought by the trustees of the rural separate school section against the town corporation, to adjudge that taxes levied and collected from ratepayers of the defendant municipality, who gave the required notice, shall be paid over to the plaintiffs for the support of the rural separate school. *Sandwich East*

(*No. 1*) *Roman Catholic Separate School Trustees* v. *Town of Walkerville*, 5 O. W. R. 211, 527, 10 O. L. R. 214.

Division of Property between School Boards — *Arbitration and Award.*]—Award of Street, J., as arbitrator. *In re Windsor Schools*, 24 Occ. N. 173.

Establishment of — *Debts of Public School District—Liability of Separate School Supporters for—Construction of Statutes.*]—On the 24th February, 1899, the Grattan Roman Catholic Separate School District was established in the town of Regina by the Roman Catholic ratepayers, the limits of the school district being those of the municipality of the town, as also the limits of the previously organized public school district of Regina. At the time of the establishment of the separate school district, the public school district was liable for debts, to secure the repayment of which by yearly instalments (one falling due in 1899) the public school corporation had issued debentures, and the trustees included the amount of the 1899 instalment in the amount which they required the municipal council of the town to levy for the year. In making the levy the town council exacted payment from the plaintiff of $1.95, which was his assessed proportion of the amount necessary to pay the debenture instalment, and which he paid under protest and now sought to recover back from the municipality, upon the ground that the council had no power to assess him, he being a separate school supporter:—Held, that the plaintiff was not liable for the rate in question. Construction of s. 14 of the North-West Territories Act, R. S. C. c. 50, as amended by 61 V. c. 5, s. 1, and s. 36 of the School Ordinance. *McCarthy* v. *Town of Regina*, 21 Occ. N. 321.

Protestant School — *Pupil of another Faith — Scholarship — Withholding—Mandamus — School Regulations.*] — The petitioner, a British subject, resident in Montreal, but not the owner of real estate, was by religion a Jew. His son was admitted to a Protestant school under the control of the respondents, and by his success in his classes and in the examinations would, in ordinary course, have been entitled to a commissioners' scholarship, which gives a right to a high school course free of tuition fees. The commissioners having, under their regulations, withheld the scholarship, the petitioner applied for a writ of mandamus to compel the respondents to grant his son such scholarship:—Held, that the remedy by mandamus was the proper one under the circumstances, the petitioner alleging the refusal on the part of the respondents to perform a duty incumbent on them by law. 2. The petitioner not being a Protestant, and not being the owner of real estate inscribed on the Protestant panel, his son was not entitled, as of right, to admission to the Protestant schools. 3. His admission to a Protestant school by grace of the Protestant school commissioners did not amount to a warranty that the existing school regulations were to be permanent and unchanged throughout the entire scholastic course. 4. The respondents had, within the limits of their corporate authority, power to change the school regulations from year to year, and particularly in regard to prizes and other competitive rewards; and, consequently, they had power to provide by regulation that the child of a Jew, not the owner of real estate, should be ineligible to compete for a commissioners' scholarship. *Pinsler* v. *Protestant Board of School Commissioners*, Q. R. 23 S. C. 365.

Qualification of Teachers—*Construction of Statute — Religious Community — Status.*] — The general policy declared by later statutory enactments is to require teachers of separate schools to undergo the same examinations and receive the same certificates as common school teachers, but some persons are exempted from its immediate operation, and the word "persons" in s. 36 of R. S. O. 1897 c. 294, is to be read as "individuals;" and where, as in that enactment, there is found in unambiguous language a general declaration as to the qualification required, any restriction upon that declaration should not be extended beyond what the language, construed in the ordinary and natural meaning of the words, and in the light of the context, clearly requires. Judgment of MacMahon, J., 24 Occ. N. 319, 8 O. L. R. 135, 4 O. W. R. 58, affirmed. *Grattan* v. *Ottawa Roman Catholic Separate School Trustees*, 25 Occ. N. 104, 9 O. L. R. 433, 4 O. W. R. 389.

Supporters of — *Assessment for Public School Debts.*]—A ratepayer rated as a supporter of a separate school where a separate school district has been formed is not liable to be assessed for a debenture indebtedness of the public school incurred prior to the establishment of the separate school district. *McCarthy* v. *Town of Regina*, 21 Occ. N. 321, 5 Terr. L. R. 71.

Teachers — *Religious Community — Residence—Contract.*] — The Ottawa separate school trustees entered into an agreement to secure the services of Christian Brothers as teachers in a proposed separate school for boys, the agreement among other things providing for the erection by the trustees of a house or residence with chapel, etc., for the Brothers, and the advance of $100 for each of the Brothers for furniture, this furniture to become the property of the Brothers at the rate of one-fifth for each year, the contract to be in force for ten years unless previously put an end to by notice in a prescribed way:—Held, that the agreement was invalid because (1) Christian Brothers as such are not qualified to teach in separate schools in Ontario; (2) school trustees have no authority to expend money in erecting a house for teachers; or (3) to enter into a contract with a teacher extending beyond a year. *Grattan* v. *Ottawa Separate School Trustees*, 24 Occ. N. 319, 8 O. L. R. 135, 4 O. W. R. 58, 389.

Withdrawal of Supporter—*Continuance of Liability.*] — Property which was owned by a separate school supporter and so assessed for rates imposed under by-laws passed before the time when the supporter has withdrawn, does not remain liable for such rates in the future unless the property is still owned by him at the time of each assessment, and he resides in the section. But the ratepayer who was such when the loan was effected remains liable for future assessments to the extent of the ratable property he possesses, so long as he is resident within the school district. *In re Education Department Act and Separate Schools Act*, 21 Occ. N. 288, 1 O. L. R. 584.

SCHOOL COMMISSIONER.

See NOTICE OF ACTION.

SCIENTER.

See ANIMALS.

SCIRE FACIAS.

Crown Lands — *Grant — Error — Adverse Claim — Cancellation.*] — The provisions of the Quebec statute respecting the sale and management of public lands, 32 V. c. 11, R. S. Q. art. 1299, do not authorize the cancellation of letters patent by the Commissioner of Crown Lands, where adverse claims to the lands exist. Judgment of the Court of Queen's Bench reversed, and judgment of the Superior Court (in review), Q. R. 18 S. C. 520, restored. *Rex* v. *Adams*, 21 Occ. N. 328, 31 S. C. R. 220.

See CROWN.

SCRUTINY.

See MUNICIPAL ELECTIONS.

SEAL.

See COMPANY—CONTRACT — DISTRIBUTION OF ESTATES.

SEAMEN'S ACT.

See CONSTITUTIONAL LAW.

SEARCH WARRANT.

See MALICIOUS PROSECUTION.

SECONDARY EVIDENCE.

See EVIDENCE.

SECRET PROFITS.

See MASTER AND SERVANT.

SECURITY FOR COSTS.

See COSTS.

SEDUCTION.

Evidence—Action brought for daughter's benefit—Judge's charge—Credibility of witnesses—Rejection of evidence—Miscarriage. *Grainger* v. *Hamilton*, 1 O. W. R. 819.

Evidence of Plaintiff's Daughter — *Rape—Nonsuit—No Reasonable Evidence of Seduction—Disagreement of Jury—Rule 780 —Scope of.*]—Father brought action for seduction of his daughter and the jury disagreed three times. Motion was made by the defendant, under Rule 780, for judgment dismissing the action. The plaintiff's daughter swore that the defendant was the father of her child, but that the connection effected with her by the defendant was by force and without her consent. The daughter was not in the plaintiff's service or living at home at the time of the seduction:— Held, that it was for the jury to say, on the evidence of the daughter, whether or not they accepted her statement on the whole, as they might be satisfied as to the paternity but still discredit the evidence of force. Vincent v. Sprague, 3 U. C. R. 283, and Brown v. Dalby, 7 U. C. R. 160, considered. *Gambell* v. *Heggie*, 2 O. W. R. 1174, 5 O. W. R. 746, 6 O. W. R. 184. S. C., sub nom. E. v. F., 10 O. L. R. 489.

Right of Action — Death of father—Action by mother—Proof of service—Survival of father's right—Amendment — Statute of Limitations—Trustee Act. *O'Brien* v. *Ellis*, 2 O. W. R. 685.

See CRIMINAL LAW.

SEIZURE.

See ATTACHMENT OF DEBTS — EXECUTION —SAISIE-CONSERVATOIRE.

SENTENCE.

See CONSTITUTIONAL LAW—CRIMINAL LAW —LIQUOR ACT OF ONTARIO—STATUTES.

SEPARATE ESTATE.

See HUSBAND AND WIFE.

SEPARATE SCHOOLS.

See SCHOOLS.

SEPARATION.

See HUSBAND AND WIFE.

SEQUESTRATION.

Petition — *Grounds.*]—In a petition for sequestration the grounds upon which the petition is based should be special, and it is not sufficient to allege simply that it is in the interest of the petitioner that the immovable should be judicially sequestrated. *Crevier* v. *Cloutier*, 4 Q. P. R. 347.

Petition — *Grounds — Administration.*]—In a petition for sequestration, the grounds upon which the demand is based must be special, and it is not sufficient to allege simply "that the immovables have not been leased nor administered," especially where the defendant, being absent from the country, has named an attorney to see to the administration of such properties. *Meyers* v. *Ritson*, 4 Q. P. R. 394.

See COSTS—SALE OF GOODS.

SERVICE OF PAPERS.

Action for Price of Goods—*Service of Account.*]—In an action for goods sold and board furnished by an innkeeper, where an account of the plaintiff's claim has been filed with the report of the action, there is no ground for a motion to suspend the proceedings until a copy of the account has been served on the defendant. *Chateau Frontenac Co.* v. *Lionais*, 3 Q. P. R. 352.

Action for Physician's Fees—*Service of Account.*]—In an action by a physician for the value of professional services:—Held, that the default of serving a detailed account upon the defendant is not a ground for an exception to the form, and can have no other effect than to delay the judgment or proceedings until the account is served. *Perrigo* v. *Arcand*, 3 Q. P. R. 350.

Advocate — *Election of Domicil—Ceasing to Occupy.*]—When an advocate has his chosen place of domicil within a radius of a mile from the court house, all services on him should be made at this chosen domicil, even if he has ceased to occupy it, and service can not be made on the clerk of the Court unless this domicil has been found closed. *Hogue* v. *Davelny*, 7 Q. P. R. 129.

Interrogatories — *Personal Service — Domicil—Place of Business.*]—A motion that interrogatories sur faits et articles shall be taken as answered against him, in pursuance of art. 364, C. P., will not be granted against a defendant in default, unless such interrogatories have been served upon him personally or at his domicil (art. 361, C. P.), if it is not established that he is absent or in hiding. 2. Service effected at his place of business is only valid when such defendant has no regular domicil or ordinary residence, as that exists for the service of process in an action under art. 128, C. P. *Myers* v. *Mercier*, 5 Q. P. R. 6.

Petition — *Husband and Wife—Substituted Service.*] — If a defendant is absent from his domicil, habitually during the hours in which the service of process may be regularly effected upon him, and leaves a writing upon his door notifying those seeking him to apply at the house of one of his neighbours, permission will be granted to serve upon him a petition pour ester in justice en séparation, by serving the neighbour indicated by the writing. *Mead* v. *Fyen*, 4 Q. P. R. 406.

Practice — *Time—Saturday Afternoon.*]—Service of papers in an action on the solicitor of a party after one o'clock on Saturday afternoon is bad. *Couture* v. *Belanger*, Q. R. 27 S. C. 77.

Time — *Summary Procedure — Hour of Service — Exception.*] — An exception to the form, served on the second day after the return of the proceeding excepted to, in a summary matter, but after five o'clock in the afternoon, will not be received. *Prefontaine* v. *Wiseman*, 7 Q. P. R. 135.

See ATTACHMENT OF DEBTS — BAILIFF—CANADA TEMPERANCE ACT—COURTS—HUSBAND AND WIFE—JUDGMENT — MECHANICS' LIENS — MORTGAGE—PARLIAMENTARY ELECTIONS —PLEADING — RAILWAY — TRIAL—WITNESSES — WRIT OF REVENDICATION — WRIT OF SUMMONS.

SERVITUDE.

See EASEMENT — MUNICIPAL CORPORATIONS —WATER AND WATERCOURSES.

SESSIONS.

Sessions — *Jurisdiction — Appeal from Summary Conviction — Recognizance—Payment of Fine and Costs—Bar to Appeal—Order for Repayment—Surplusage — Public Schools Act—Refusal of Trustee to Perform Duty—Conviction for—Right of Appeal.*]—The conviction was for that defendant, being a person who had been elected a school trustee for school section No. 18 in the township of Peel, in the county of Wellington, did on 5th January, 1905, refuse or neglect to perform the duties of the office by refusing or neglecting to engage a teacher, and by not providing the necessary school accommodation for the school. The defendant was adjudged to pay a fine of $20 and the costs of the prosecution, and he paid both:—Held, on appeal, that the conviction should be quashed, and repayment of the fine and costs ordered. Payment of the fine does not bar the right of appeal, when the payment is made contemporaneously with the expression of intention to appeal, and under pain of distress. In re Justices of York and Peel, Ex p. Mason, 13 C. P. 15, followed. Rex v. Neuberger, 9 B. C. R. 272, distinguished. A recognizance to appear at the general sessions and "enter an appeal," is sufficient. Rex v. Geiser, 21 C. L. T. Occ. N. 604, distinguished. Upon the allowance of such an appeal repayment of the fine and costs and payment of the costs of the appeal are properly ordered. Regina v. McIntosh, 28 O. R. 603, followed. Under R. S. O. c. 90, s. 7, any party who considers himself aggrieved by a conviction or order of a justice of the peace under any statute in force in Ontario, and relating to matters within the legislative authority of the legislature of Ontario, may, unless it is otherwise provided

by the particular Act under which the conviction or order is made, appeal therefrom to the general sessions of the peace. There is no provision in the Public Schools Act which alters or limits the effect of the above section. *Rex* v. *Tucker*, 6 O. W. R. 533, 10 O. L. R. 506.

See WAY.

SESSION OF PARLIAMENT.

See PARLIAMENTARY ELECTIONS.

SET-OFF.

Account — *Disputed Items—Absence of Liquidation.*] — Set-off will not be allowed when the amount of the account which the defendant assumes to set off cannot be determined without a long discussion and contestation of the majority of the items. 2. A defendant in such a case cannot complain of a judgment which allows him a set-off in part, to which he had no right, and properly rejects the remainder of his account. *Pharand* v. *Deslandes*, Q. R. 24 S. C. 324.

Action on Contract — *Damages for Breach.*]—Where an action is brought on a contract, and the defendant pleads non-fulfilment of contract, he may plead as a set-off damages which are alleged to have directly resulted from the negligence and defaults of the plaintiff in connection with the contract sued on. *Latour* v. *Yasinooski*, Q. R. 20 S. C. 292.

Bank — *Winding-up — Promissory Note Maturing after Order—Set-off of Deposit to Credit of Indorser—Note made by Municipal Officers for Municipal Purposes — Personal Liability — Set-off of Deposit to Credit of Municipality.*]—The funds of a township corporation were deposited in a chartered bank to the credit of an account kept in the name of "A. M., treasurer of R." The township council purported, by by-law, to authorize the treasurer and reeve to borrow from the bank money to be used for drainage purposes. Accordingly the treasurer made a promissory note which he signed in his own name with the words "treasurer of the township of R." after it, in favour of the reeve, and the reeve indorsed it, signing his own name with the words "reeve of R." after it. This note was discounted by the bank, the proceeds placed to the credit of the account referred to, and paid out for the drainage purposes specified. The bank being in liquidation under the Dominion Winding-up Act, the liquidators sued the reeve and treasurer in their personal capacities upon the note, which matured after the winding-up order:—Held, that the defendants were personally liable upon the note, and were not entitled to set off, against the plaintiffs' claim upon it, the balance in the bank to the credit of the account kept in the name of the treasurer at the date of the winding-up order; but the defendant the reeve was entitled to set off the amount standing to the credit of his private account in the bank at the date of the winding-up order, and the defendants were allowed to amend their pleadings so as to claim that set-off. Vanier v. Kent, Q. R. 11 K. B. 373, not followed. *Kent* v. *Munroe*, 25 Occ. N. 40, 8 O. L. R. 723, 4 O. W. R. 468.

Bank — *Winding-up—Transfer of Assets to Debtor within 30 days—Moneys Deposited by Third Parties to Satisfy Debt.*]—After a bank have suspended payment, and their insolvency is notorious, compensation of a debt due to the bank cannot be effected by a transfer to the debtor of debts due by the bank to third parties, where such transfer has been made to the debtor after the suspension and within 30 days prior to winding-up proceedings under the Winding-up Act. This rule is not affected by the circumstance that the amounts offered in compensation consisted of moneys deposited with the bank by such third parties, for the special purpose of aiding the debtor to meet his indebtedness to the bank, but not transferred to the debtor until after the suspension of payment. *Communauté des Sœurs de la Charité de la Providence* v. *Kent*, Q. R. 13 K. B. 483.

Bank in Liquidation — *Deposit — Note Discounted and not yet Due— Renunciation of Term—Indorser—Intervention — Costs.*] —A deposit made in a bank is a loan to such bank, and art. 1190, which says that a debt arising from a deposit shall not be the subject of set-off, does not prevent the same deposit being set off by a debt due to the bank by the depositor. 2. The set-off of a debt due to a bank by the claim resulting from a deposit in such bank, may be effectuated up to the time of service of a petition for the winding-up of the bank, provided that both debts are equally liquidated and exigible. 3. Nevertheless, the term of the currency of a bill of exchange or promissory note is to be regarded as a stipulation in favour both of the creditor and of the debtor, and, therefore, the maker or indorser of a note discounted in a bank cannot, by renouncing the benefit of the time which the note has to run, set off the debt arising upon such note by the sum, which he has on deposit in the bank. 4. The indorser of a note discounted in a bank does not become the debtor of such bank until the note has been protested for non-payment and notice of protest given to him. 5. Although a creditor of a bank in liquidation has a right to intervene in a suit pending between the liquidators and a debtor of the bank, who alleges that his debt has been extinguished by set-off, in order to watch the proceedings and take measures necessary for the protection of his rights, such creditor will be ordered to pay the costs incurred by the debtor of the bank if he produces, in opposition of the demand of the latter, a useless contestation founded upon grounds which have already been set up by the liquidators. *Vanier* v. *Kent*, Q. R. 11 K. B. 373.

Claim and Counterclaim—Judgments —Debt and costs—Powers of trial Judge—Rules 253, 1130, 1164, 1165—Solicitor's lien. *Levi, Blumenstiel & Co.*, v. *Edwards*, 5 O. W. R. 796, 6 O. W. R. 734, 11 O. L. R. 30.

Claim on Note — *Unliquidated Claim—Cross Demand—Pleading.*] — A defendant cannot, to an action for a money demand based upon a notarial instrument and a promissory note, set up a defence of set-off based upon a claim which is not liquidated

even when his claim arises from the same transaction as the principal demand and when he asserts it by a cross-demand in the principal action. Judgment in 2 Q. P. R. 429 affirmed. *Lepitre* v. *King*, Q. R. 9 Q. B. 453.

Costs — Damages—Different actions in same Court—Discretion — Solicitor's lien—Assignment to solicitor. *Hogan* v. *Baatz, Hogan* v. *Baatz and Taylor* (Y.T.), 1 W. L. R. 513.

Debt Due by Mandatory — *Damages for Non-performance.*]—Where the claim is for ascertained sums of money due by virtue of bills or notes or of the receipt of money as mandatory, the defendant cannot set off damages accruing by reason of the plaintiff having failed to discharge the obligations which he assumed by the contract of mandate. *London Guarantee and Accident Co.* v. *Groilt*, Q. R. 18 S. C. 398.

Goods Sold — *Damages for Short Delivery—Cross-demand—Pleading.*]—In an action for goods sold and delivered, the defendant cannot plead set-off of damages alleged to have been suffered by him in consequence of the plaintiff's default to complete delivery of the whole quantity of goods stipulated in the contract. Such claim should be urged by cross-demand. *Walshaw* v. *Rosenfield*, Q. R. 24 S. C. 80.

Money Advanced by Another—*Liquidated Amount — Costs.*]—One who has paid money for the benefit of a third person, who has contracted to repay it, may claim such sum from the third person or set it off, although it is asserted that the money was furnished by another, to whom it must be repaid. 2. In order to have a set-off it is sufficient that the debt which the debtor asserts as a set-off shall be liquidated; it is not necessary that the debt against which the set-off is asserted shall be liquidated. 3. Costs due to a party upon a verdict of acquittal, where the complainant has been ordered to pay the costs, may be the subject of set-off, for such costs may be easily ascertained. *Bérard* v. *Doré*, Q. R. 24 S. C. 298.

Plea — *Objection to — Practice.*] — The objection to a plea of set-off, as being a matter for an incidental demand and not a defence to the action, should be raised by means of exception to the form, not of inscription in law. *Levinson* v. *Renaud*, 6 Q. P. R. 114.

Pleading — *Acknowledgment — Trial—Counterclaim—Tender.*]—A plea of compensation, setting forth a contra-account, followed by an allegation of acknowledgment and promise to pay by the plaintiff, will not be rejected on a reply in law. 2. The Judge presiding at the trial has, however, power to order that the settlement of account and acknowledgment by the plaintiff, alleged by the defendant, be proved by him before he is allowed to prove his counterclaim. 3. The validity of a tender, especially in commercial matters, may be a question of fact, and allegations relating to a tender will not be rejected on answer in law, although the tender may appear not to have been made in the manner prescribed by law for legal tenders. *Laurentide Pulp Co.* v. *Curtis*, 4 Q. P. R. 109.

Pleading — *Damages — Construction of Contract—Penal Clause—Waiver.*] — A debt which is not clearly liquidated and exigible cannot be set off in compensation of a claim upon a promissory note except by means of a cross-demand made under art. 217, C. P. Q., of the province of Quebec; Nesbitt and Idington, JJ., dissenting. By a clause in a contract for the construction of works the completion thereof was to be made within a specified time, in default of which it was agreed that the contractor should pay "as liquidated damages and not as a penalty the sum of $50 for every subsequent day until the completion." The works were not completed within the time limited, and both parties joined in a petition to the municipal corporation for an extension of the time, during which subsidies it had granted towards the cost of the works should be earned. The petition was granted, and the works were completed within the extension of time so allowed:—Held, Nesbitt and Idington, JJ., dissenting, that damages accruing under the clause in question did not, upon mere default, become sufficiently liquidated and ascertained to be set off in compensation against a claim upon a promissory note:—Held, per Girouard and Davies, JJ. (Nesbitt and Idington, JJ., contra), that by joining in the petition for extension of time the party in whose favour the penal clause might take effect had waived the right to claim damages thereunder during the period of the extension so obtained in the interests of both parties to the contract. *Ottawa Northern and Western R. W. Co.* v. *Dominion Bridge Co.*, 25 Occ. N. 123, 36 S. C. R. 347.

See ATTACHMENT OF DEBTS—BANKRUPTCY AND INSOLVENCY — CROWN — DEFAMATION —JUSTICE OF THE PEACE—PLEADING.

SETTING DOWN FOR TRIAL.

See TRIAL, VII.

SETTLED ESTATES.

Leave to Mortgage—*Express Declarations in Settlement.*]—This was an application by the trustees of a settled estate, under R. S. O. 1897 c. 71, for leave to mortgage the estate for the purpose of building, the existing buildings having been destroyed by fire. The settlement contained a clause that the trustees might "sell, but not mortgage, the trust property or any part thereof;"—Held, that this clause of the settlement was not an express declaration that the lands should not be mortgaged within the meaning of s. 37 of the Settled Estates Act; and merely meant that the power of sale given to the trustee was not to be construed as including a power to mortgage. *In re Curry and Watson's Settlement*, 24 Occ. N. 291, 7 O. L. R. 701, 3 O. W. R. 776.

Leave to Petition Under — Status of applicants. *Re Asselstine*, 1 O. W. R. 178.

Leave to Sell Land—*Trust for Sale at Named Period — Acceleration with Sanction of Adult Children—Advantage to Beneficiaries — Death of one Adult — Sale without*

Sanction of Survivor.]—Lands were devised in trust for sale, but not till the youngest child should become of age, unless with the sanction of the two adult children. One of the adult children died and the youngest child had not yet become of age. Upon petition under the Settled Estates Act, R. S. O. 1897 c. 71, s. 2 (1), Chancellor Boyd held with some hesitation that the case came within the scope of the Act. *In re Cornell*, 5 O. W. R. 60, 9 O. L. R. 128.

SETTLEMENT.

Deed — *Substitution — Donatio Mortis Causa.*]—An acte by which the children assign to their mother the enjoyment of immovables devised by their father, and stipulate that after her death they shall enjoy them in the same fashion, and that the property will go to their children, does not effect a substitution but a donatio mortis causa, which is void. *Kannon* v. *Kannon*, 6 Q. P. R. 455.

Gift — *Stipulation in Favour of Third Party—Revocation before Acceptance — Relinquishment by Grantee.*] — A stipulation made by a donor for the benefit of a third party, as a condition of the gift, can be revoked without the assent of the third party, so long as he has not given notice of his intention to take advantage of it. A relinquishment by the donee of the charge in her favour is deemed a revocation of the stipulation made for the benefit of the third party. *Guérette* v. *Ouellet*, Q. R. 27 S. C. 45.

Life Interest in Land—*Gift Over to Children—Death of Grantee without Children—Testamentary Disposition by Grantee—Breaking of Entail—Gift—Trust.*] — By deed of gift inter vivos the grantor granted to the grantee, pour lui et les siens de son côté, estoc et ligne, certain lands for the benefit of the grantee during his life, without power to dispose of the same in the meantime; and directed that the property upon his death should go to the children born of his marriage. On these conditions the grantor transferred to the grantee all his rights in the property given "to vest it in the grantee et ses héritiers de son côté, estoc et ligne;"—Held, that the deed of gift created an entail; and, in case of the death of the grantee in tail without children, this entail became broken, and a testamentary disposition of the property made by the grantee in tail was valid. (2) That this grant in tail did not extend to relations of the grantee other than children; and that the phrase "pour lui et les siens de son côté, estoc et ligne," did not constitute a fidéicommis, even under the law in force at the time the gift was made (1844), the only effect of this clause being to constitute an appointment in favour of the heirs who would have taken in succession to the grantee in case he should not have legally disposed of the property otherwise. (3) That the restraint on alienation in the deed applied only to the enjoyment of the property by the grantee in tail, and did not affect the entail created in favour of the children of the grantee, nor the power of the grantee to dispose of the subject matter of the gift, in case of the failure of the entail. *Crevier* v. *Cloutier*, Q. R. 26 S. C. 373.

SETTLEMENT OF ACTION.

Collusive Settlement of Action — Leave to proceed—Trial of question—Finding of true settlement—Costs — Solicitor's lien—Acquiescence. *Bonter* v. *Nesbitt*, 2 O. W. R. 610, 1043.

Collusive Settlement of Action — Notice of lien. *McCauley* v. *Butler*, 1 O. W. R. 72, 343.

Consideration — Forbearance — Costs —Enforcement — Judgment. *Anderton* v. *Montgomery*, 2 O. W. R. 413.

Discontinuance — *Judgment for Costs —Costs of Acte of Tutorship.*]—If a discontinuance is filed in a suit without notice thereof being given to plaintiff's attorneys, and evident collusion is shewn against the latter by the plaintiff and defendant, the plaintiff's attorneys will be entitled to take judgment against the defendant for their costs. 2. Such costs do not comprise the costs of appointment of the plaintiff as tutrix to minors, there being no lien de droit, in respect thereof, between the defendant and the plaintiff's attorneys. *Skelly* v. *Thibault*, 5 Q. P. R. 75.

Fraud—*Costs.*] — As a general rule, a settlement of the suit by the parties thereto is valid, unless it be made in fraud of the rights of the plaintiff's attorney, in which case it will be carried out subject to the obligation to pay the plaintiff's attorney his costs. 2. The mere fact that the settlement was made by the defendant without paying the plaintiff's attorney his costs, although aware that the plaintiff was unable to pay them, does not constitute fraud, more particularly where it appears that the plaintiff's action was unfounded, and that the defendant was induced by her knowledge of the plaintiff's inability to pay costs, and her reluctance to continue the contestation under such circumstances, to make a settlement by which the plaintiff profited to some extent. *Lareau* v. *Martineau*, Q. R. 21 S. C. 469.

See COSTS — JUDGMENT — PEREMPTION —PLEADING.

SEWERS.

See MUNICIPAL CORPORATION—NUISANCE.

SHARES AND SHAREHOLDERS.

See BUILDING SOCIETY — COMPANY — RECEIVER.

SHEEP.

See JUSTICE OF THE PEACE.

SHERIFF.

Bond — *Condition on Appointment to Office—Resignation of Office — Re-appointment—Subsequent Breaches—Liability—Res Judicata.*] — The plaintiff resigned his office of sheriff, and the defendant was appointed in his place under a commission containing a condition that he should pay the plaintiff "out of the revenues of the said office" a certain sum for his life; and he gave a bond to the plaintiff for the due fulfilment of the condition. Finding that the revenues were not sufficient to pay the amount, the defendant resigned his office, and soon afterwards was re-appointed under a commission without any such condition. In an action on the bond, the plaintiff obtained judgment for the amount of the penal sum, and damages were assessed for the breaches up to the time of the defendant's resignation. A petition was subsequently presented by the plaintiff, asking for assessment of damages for alleged breaches since the re-appointment and for execution. On the trial of an issue as to whether the plaintiff was entitled to execution for any further damages:—Held, that want of good faith was not to be imputed to the Crown, who had the right to permit, and did permit, the defendant's resignation, and by accepting it made it effectual, and thereby discharged the condition and all further liability on the bond; that the condition was attached to the first commission, and the annuity was payable only during the occupancy of the office thereunder, and when that commission was gone there ceased to be any contract to pay it. Semble, that there was no implied obligation on the defendant's part to refrain from invoking the consideration of the Crown to relieve him from the obligation it had imposed upon him:—Held, also, that the question was not res judicata by the principal judgment, and that the judgment upon the issue was appealable as a final judgment as to matters set up as a defence to further liability in respect of alleged breaches subsequent to the new appointment. *Smart* v. *Dana*, 2 O. W. R. 287, 3 O. W. R. 89, 5 O. W. R. 387, 5 O. L. R. 451, 9 O. L. R. 427, 23 Occ. N. 170, 24 Occ. N. 436, 25 Occ. N. 456.

Capias — *Gaol — Mileage.*]—A sheriff is required to safely keep a person arrested on a capias, and, as there is no common gaol in Vancouver, the sheriff of Vancouver is entitled to lodge a person arrested in his bailiwick in New Westminster gaol and charge mileage therefor. *Carson* v. *Carson*, 10 B. C. R. 83.

Execution — *Wrongful Act—Indemnity—Solicitor — Directions — Overcharges — Error — Knowledge — Recovery.*]—Where a sheriff had been mulct in the costs of an action brought against him for wrongfully charging certain lands with an execution, he was held entitled to recover in an action brought by him against the solicitor who gave him directions to charge the lands, for indemnity against such costs, although in giving such directions the solicitor acted merely as agent for his client. 2. Upon a counterclaim of the solicitor against the sheriff for alleged overcharges:—Held, assuming that there was an error in the charges, that, as there was no evidence that the solicitor was not aware of such error when he paid the charges, he could not recover. *Robertson* v. *Taylor*, 21 Occ. N. 270.

Executing Writ — *Public Officer—Notice of Action.*] — The sheriff is not, when executing a fi. fa. at the suit of a private individual, a public officer entitled to notice and other protection under s. 408 of the Judicature Ordinance, R. O. 1888 c. 8. McWhirter v. Corbett, 4 C. P. 205, followed. *MacDonnell* v. *Robertson*, 1 Terr. L. R. 458.

Fees — *Payment in Advance—Fi. Fa.—Mileage — Seizure — Conduct of Solicitor.*] —The meaning and effect of the Judicature Ordinance, R. O. (1888) c. 58, s. 461, providing for the payment to officers, in advance, of the fees and allowances fixed by tariff, discussed:—Semble, a sheriff is not under that section entitled to demand in advance his charges for mileage or seizure before executing a fi. fa. goods:—Held, that the finding of the trial Judge that the conduct of the first execution creditor's advocate did not have such effect that the fi. fa. was not originally placed, or had ceased to be, in the sheriff's hands for execution, was justified by the evidence. *Parsons* v. *Hutchings*, 1 Terr. L. R. 317.

Fees—*Re-sale on False Bidding.*] — When a property is resold upon false bidding, the sheriff is only entitled to one commission and tax, as if there had been but one sale. *Nieuwenhuyse* v. *Town of Farnham*, 5 Q. P. R. 160.

Fees—*Seizure of Land under Execution—Division into Lots.*]—An immovable, within the meaning of art. 706, C. P. C., does not necessarily mean a cadastral lot, but an exploitation; and an immovable composed of several lots upon the official plan and book of reference constitutes, notwithstanding, only one immovable if it constitutes only a single exploitation. 2. Article 7 of the tariff of fees for sheriffs, allowing an additional fee for every additional lot seized, must be interpreted as referring to art. 6 of the same tariff and as meaning every additional immovable; so, if the bailiff has grouped several lots according to their respective situations to constitute different immovables, the sheriff can charge an additional fee only for each group or additional immovable. *Gault* v. *Dufort*, Q. R. 24 S. C. 77, 5 Q. P. R. 353.

Interpleader — Seizure of goods—Claim of third party—Chattel mortgages—Rent—Withdrawal — Costs—Issues. *McNaughton Co.* v. *Hamel* (N.W.T.), 1 W. L. R. 169.

Interpleader—*Seizure of Goods—Interest of Execution Debtor as Co-owner.*]—A sheriff acting under the plaintiff's execution entered upon the lands of the claimant and seized hay and oats alleged to be the property of the execution debtor. The owner of the land asserted that he was the absolute owner of all the hay and oats seized. The execution creditor alleged that the execution debtor was entitled to a one-half interest therein:—Held, that the sheriff was entitled to an interpleader order; the issue to be framed so as to determine whether the execution debtor had any, and if so what, interest in the hay and oats seized.

Lucas v. *Holliday*, 24 Occ. N. 365, 8 O. L. R. 541, 3 O. W. R. 732.

Poundage — *Money Paid before Sale—Possession Money.*]—Where a sheriff made a seizure under writs of fieri facias of property of the judgment debtor, and a few hours before the sale the judgment debtor came to the sheriff and paid the full amount of the judgment debt:—Held, that the sheriff was entitled to poundage on the full amount of the judgment debt, and not merely on the value of the property seized:—Held, also, that under the circumstances of this case $2.25 per day was not too much to allow for possession money. *In re Black Eagle Mining Co.*, 23 Occ. N. 331, 6 O. L. R. 512, 2 O. W. R. 797.

Right to Interplead—*Seizure of Mortgage—Registration of Notice—Assignment of Mortgage — Execution Creditor.*] — The right of a sheriff to an interpleader order depends upon his either having the subject matter of the interpleader in his possession or having the right under an execution accompanied with an intention to take possession. And where an execution debtor who was a mortgagee of lands had assigned the mortgage, although the assignment was not registered until after registration of a notice of seizure:—Held, that the mortgage could not be seized under the provisions of the Execution Act, R. S. O. 1897 c. 77, s. 23 et seq., and that the sheriff could not proceed until the execution creditors had in an action obtained a declaration of the Court that the assignment was void; and that he could not interplead. *Keenan* v. *Osborne*, 24 Occ. N. 132, 7 O. L. R. 134, 3 O. W. R. 143.

Sale under Execution—*Proceeds Stolen from Sheriff's Bailiff—Responsibility — Satisfaction of Judgment—Advertisement of Sale—Chattel Mortgage.*] — 1. Notwithstanding the provisions of s. 21 of the Executions Act, R. S. M. 1902 c. 58, a sale of goods by a sheriff's bailiff under fi. fa. was, in the peculiar circumstances set forth in the statement below, held to have been good, although made immediately after seizure and without the notice required by that section. 2. A sheriff is responsible for all money realized by his bailiff by a sale under a fi. fa., though the money be stolen from the bailiff as a result of his carelessness and never comes to the sheriff's hands. 3. A seizure by a sheriff of sufficient goods to satisfy a judgment in part will be a discharge to the debtor as to such part. 4. When the goods seized are subject to a chattel mortgage, the sale of the goods themselves, instead of only the equity of redemption, will be good unless objected to by the mortgagee. 5. It is not an absolute rule that a sheriff's sale under execution must be for ready money; but, if the sheriff does not comply with such rule, he will be responsible for the money if he fails to collect it. 6. The fact that the sheriff failed to comply with s. 25 of the Executions Act, by advertising the amount realized and keeping the money to be distributed ratably, is no answer to the defendant's claim to have such amount credited upon the execution against him, when nearly three years have elapsed, and there is no evidence that any other execution against the defendant has been placed in the sheriff's hands. *Massey-Harris Co.* v. *Molland*, 15 Man. L. R. 364, 1 W. L. R. 424.

Seizure of Company's Property under Execution — Interruption by winding-up order—Right to fees and poundage—Rule 1190. *Re Palmerston Packing Co., Allan's Claim*, 4 O. W. R. 339.

Seizure under Execution — *Levy — Sale after Commencement of Action against Sheriff—Damages—Value of Goods Sold.*]—Goods seized by the sheriff under an execution at the suit of B. v. R., were claimed by E. R., the wife of R., as her property. After a formal levy it was arranged between the sheriff and E. R. that she should hold the goods for the sheriff until they were required for sale under the execution. After the seizure and before sale, a suit was commenced by E. R. against the sheriff, and a declaration was filed containing two counts: 1st, for seizing, taking away, and converting the plaintiff's goods; 2nd, for detention. Part of the goods seized were sold, and part released:—Held, that a verdict for the full value of the goods sold was proper, though the sale did not take place until after the commencement of the action; that, as far as the sheriff was concerned, the levy was effectual and complete. *Rideout* v. *Tibbits*, 36 N. B. Reps. 281.

Theft of Money Received by Bailiff under Fi. Fa. — *Entry of Satisfaction—Liability of Sheriff for Acts of Bailiff.*]—In January, 1900, the plaintiff recovered judgment against the defendant for $436.98, and issued to a sheriff a fi. fa. against the defendant's goods. The same sheriff received a fi. fa. against the defendant's goods at the suit of H. & Co. The sheriff issued to one A. as his bailiff his warrants to realize under the writs. The defendant died, and his executors decided to sell his chattels by auction, and employed A., as auctioneer, to conduct the sale. He advertised the sale as being by order of the executors to be held on the 5th April, 1901. Some of the chattels were under mortgages from the defendant to a trustee for the Union Bank of Canada. A. sold the goods and placed the moneys received in a cash box, which was stolen:—Held, that the judgment was discharged by the seizure and sale to the extent of the amount realized and applicable to the fi. fa., and that it has since been discharged in full by the payment made directly to the sheriff. Order made to dispense with the signature of the satisfaction piece and for satisfaction to be entered. The executors' costs of the motion and of entering satisfaction to be paid by the plaintiffs and the sheriff. A sheriff is liable not merely for moneys received by his bailiff, but also for those received by the bailiff's clerk: Gregory v. Cotterell, 5 E. & B. 571. A. sold the goods under the fi. fa. and received the proceeds for the sheriff, and his receipt was, in law, that of the sheriff. All the time he held the money he held it for the sheriff. The loss was the result of A.'s carelessness, and that must be held to be in law the carelessness of the sheriff himself, so far as liability to others was concerned. *Massey-Harris Co.* v. *Molland*, 24 Occ. N. 377.

See ARREST—ATTACHMENT OF DEBTS—DISCOVERY — EXECUTION — LIEN — MINES AND MINERALS — OPPOSITION — PARLIAMENTARY ELECTIONS—REGISTRY LAWS—TRIAL.

SHIP.

I. Bill of Lading, 1503.
II. Charterparty, 1504.
III. Collision, 1505.
IV. Judicial Sale, 1512.
V. Pilotage Dues, 1513.
VI. Salvage, 1513.
VII. Seaman's Wages, 1514
VIII. Other Cases, 1516.

I. Bill of Lading.

Custom of Port.]—A trade custom, in order to be binding upon the public generally, must be shewn to be known to all persons in whose interests it would be to have a knowledge of its existence, and, in any case, the terms of a bill of lading, inconsistent with and repugnant to the custom of a port, must prevail against the custom. *Parsons* v. *Hart*, 20 Occ. N. 372, 30 S. C. R. 473.

Delivery—*Shortage in Goods — Carrier—Custom of Trade.*]—Where the ship-owners and their agents never notified or requested the consignee to take delivery of the goods from the ship's side, after arrival at the port of destination, as they had a right to do by the terms of the bills of lading, but, on the contrary, retained possession of the goods, and proceeded, after they were landed, to sort the boxes and arrange them in separate lots, partly in their own shed, and partly upon the wharf itself, and caused the goods to be watched by their employees, without any interference or participation by the consignee, and where, in the opinion of the Court, the only delivery which took place was made by the ship-owners upon orders given by the consignee to the parties who had purchased the goods at an auction sale held five days after the arrival of the ship, the shipowners are responsible for any shortage in the quantity mentioned in the bills of lading as compared with the quantity delivered, notwithstanding the payment of freight made under reserve and before delivery. Judgment in Q. R. 15 S. C. 515 reversed. *Hart* v. *Parsons*, Q. R. 10 K. B. 555. (Reversed 20 Occ. N. 372, 30 S. C. R. 473).

Exceptions in — *Voyage — Obligation to Provide Fit Ship—Clause Limiting Liability of Ship-owners.*] — The plaintiff shipped six cases of dry goods on board the defendants' ship for carriage from Vancouver to Skagway and thence to Dawson, under a bill of lading which provided that all claims for damage to or loss of any of the merchandise must be presented within one month. The grating on the outside of the hull of the ship and at the mouth of the pipe in which the seacock was placed was defective and rendered the ship unseaworthy, the result being that salt water entered the after-hold and damaged the plaintiff's goods. The plaintiff did not present his claim within a month, but subsequently sued for damages:—Held, that the stipulation in the bill of lading to the effect that no claim for loss should be valid unless presented to the company within a month, did not apply to damage occasioned by the defendants not providing a seaworthy ship. *Drysdale* v. *Union Steamship Co.*, 22 Occ. N. 74, 8 B. C. R. 228.

Limitation of Time to Sue—*Damage from Unseaworthiness.*]—On a shipment of goods by steamer the bill of lading provided that all claims for damage to or loss of the same must be presented within one month from its date, after which the same should be completely barred: — Held, reversing the judgment in 8 B. C. R. 228, 22 Occ. N. 74, Mills, J., dissenting, that this limitation applied to a claim for damages caused by unseaworthiness of the steamer. *Union Steamship Co.* v. *Drysdale*, 22 Occ. N. 278, 32 S. C. R. 379.

II. Charterparty.

Contract—*Letters and Telegrams.*]—The plaintiffs, through their agents, H., and defendants negotiated for the chartering by the plaintiffs to the defendants of the steamer T., then at Chatham, N.B. The defendants desired to have the steamer delivered to them at North Sydney, but, after some negotiation, on the 9th October offered to take delivery at Chatham and use the vessel for three months if navigation remained open. The plaintiffs declined to take the risk of navigation remaining open, and on the 15th October the plaintiffs offered to close at three months and take the risk of navigation remaining open. On the same day the plaintiffs' agents replied: "Have closed in accordance your telegram to-day and arranged delivery North Sydney." On the following day the defendants replied: "Telegram received closing T. Try to get her delivered North Sydney end October:"—Held, that the defendants, by their telegram of the 15th October, in view of previous correspondence, disclosed an intention to authorize a contract according to what had already been embodied in writing, and that the reply to that telegram conveyed all that was required to embody the terms of the charter; and that the defendants, whose position was changed on the 22nd, could not, by continuing the correspondence and raising other questions, escape the effect of the mutual terms previously agreed upon. *Heckle* v. *Cunard*, 17 N. S. Reps. 97.

Foreign Vessel—*Necessaries—Authority of Master — Liability of Owners.*] — Action against a foreign vessel and owners for necessaries supplied at a Canadian port to the vessel, which was under charter, the possession and control of the vessel being by the charterparty transferred to the charterers, who appointed the master, and he for them the crew, and who paid their wages and the running and other expenses of the vessel. The plaintiff knew that the vessel was under charter, but not the terms of the charterparty. The trial Judge found, on conflicting testimony, that the necessaries were supplied on the order of the master and the credit of the vessel and owners, and he held the vessel liable therefor:—Held, that the plaintiff ought to have the benefit of the finding in his favour, but, as the master was the servant of the charterers and not of the owner, he had no authority to pledge the latter's credit, and, as the owner was not liable, the vessel was not. *The "David Wallace"* v. *Bain*, 23 Occ. N. 103, 8 Ex. C. R. 205.

Renewal—*Option — Notice — Agents — Burden of Proof — Jury.*] — A charterparty made between the plaintiff and defendant companies provided that the plaintiffs should have the right of renewal, upon giving notice on or before a specified date. On the date specified the plaintiffs gave notice of renewal to M. K. & Co., who had acted as agents of defendants in connection with the negotiation of the charterparty, and the receipt and remittance of the hire of the vessel. The defendants refused to renew, on the ground that the notice required had not been given:—Held, that the authority given by the defendants to M. K. & Co. was a special authority, and that the duty devolved upon the plaintiffs of shewing that, by usage or otherwise, they had authority to receive notice in connection with the extension of the time, such notice not being incidental or necessary to their original authority. The trial Judge having refused to submit to the jury a question tendered on behalf of plaintiffs as to the authority of M. K. & Co.:—Held, Graham, E.J., dissenting, that he was right in doing so:—Held, that the Judge was justified in deciding, as matter of law, that there was no proof of agency, and that there was, therefore, nothing that could properly be submitted to the jury. *Dominion Coal Co.* v. *Kingswell S. S. Co.*, 33 N. S. Reps. 499.

Time Limit for Loading—*Loading at Port—Custom — Obligation of Charterer.*] — A ship, by the terms of the charter, was to load grain at Fort William before noon of the 5th December:—Held, affirming the judgment of the Court of Appeal, 6 O. L. R. 432, 23 Occ. N. 319, Girouard, and Nesbitt, JJ., dissenting, that to load at Fort William meant to load at the elevator there; that the obligation of the shipowner was to have the vessel placed under the elevator in time to be loaded before the expiration of the time limit; and where, finding several vessels ahead of him, the captain saw that he could not be loaded by the time fixed, and left to save insurance, the obligation was not fulfilled, and the owner could not recover damages. *Midland Navigation Co.* v. *Dominion Elevator Co.*, 24 Occ. N. 202, 34 S. C. R. 578, 1 O. W. R. 393, 2 O. W. R. 754.

Voyage — Damages for short cargo — Demurrage — Delay and detention—Counterclaim—Inferior cargo. *Warren* v. *MacKay*, 2 O. W. R. 537, 3 O. W. R. 285.

III. Collision.

Action for Damages—*Preliminary Act —English Rules — Non-observance of Sailing Rules.*]—Action for damages sustained by the plaintiffs' steamer, "The Canadian," in a collision with the defendants' steamer, "The Merwin." The plaintiffs did not file a preliminary act, as required by Order XIX., r. 28, of the English Rules, which Dugas, J., held to be in force in the absence of a local Rule:—Held, by Dugas, J., and by the full Court, that no evidence could be given in support of the plaintiffs' claim. "The Canadian," navigated by an American pilot, was making a landing against a current of about six miles an hour, "The Merwin," also navigated by an American pilot, was coming down stream. Both vessels before collision gave blasts which were interpreted by each ship according to American regulations:—Held, by Dugas, J., that under the circumstances "The Canadian" was alone to blame:—Held, in appeal, by Walkem and Drake, JJ., that both vessels were to blame, and the appeal should be allowed without costs. Per Irving, J., that both vessels were to blame, and that there should be a reference back to assess the damages to "The Canadian," and then the damages should be apportioned according to the Admiralty rule. Per Martin, J., that the appeal should be dismissed. Observations as to the undesirability of the importation of foreign sailing rules and as to the necessity of using in Canadian waters the signals authorized by the Canadian Rules. *Canadian Development Co.* v. *Le Blanc*, 21 Occ. N. 600, 8 B. C. R. 173.

Anchor-Light — *Lookout — Weight of Evidence—Credibility.*]—A collision occurred between the A. L. T., a ship at anchor, and a steamship, the L. O., proceeding in charge of a pilot to her dock, within the harbour of Halifax, N.S., at night in the month of January. The weather was blustering, and intermittently clear and cloudy. On arriving at the quarantine grounds the L. O. had signalled, by guns and whistles, for the medical officer of the port, and then proceeded up the harbour on the east side of George's Island. After passing the northern line of George's Island the L. O. changed her course westerly toward her berth, and in proceeding thereon passed between the lights of two vessels anchored on the northern side of the island. While doing so she suddenly came upon the A. L. T. lying at anchor, collided with and sank her. The only person on board of the A. L. T. was a caretaker, and while admitting that he was not on deck at the time, he swore that a proper anchor-light was burning on his ship. His statement as to the anchor-light was corroborated by the captain of a fishing schooner lying close by, and that of some boatmen and labourers on the wharves. On the other hand the pilot of the L. O., the captain and the first and third officers, boatswain and boatswain's mate, and four of the seamen, all swore positively that there was no light on the A. L. T. while they were approaching her, and that she was not seen by any one until their lookout called that there was something ahead. The evidence further shewed that both the officers and crew were alert at the time of the accident, and anxiously working the ship through anchored vessels in the darkness and blustering weather:—Held, that the state of facts as substantiated by the evidence for the owners of the L. O. must be accepted as correct, and that being so, the collision and subsequent loss were wholly attributable to the A. L. T. in not keeping a proper light and lookout. *Dominion Coal Co.* v. *The Lake Ontario*, 7 Ex. C. R. 403.

Appreciation of Evidence — *Findings of Fact—Appeal—Proper Navigation.*]—In an action claiming compensation for loss of the fishing schooner "Carrie E. Sayward" by being run into and sunk while at anchor by the "Reliance," the decision mainly depended on whether or not the lights of the lost schooner were burning, as the Admiralty rules required, at the time of the accident. The local Judge gave judgment against the "Reliance:"—Held, that though the evidence given

was contradictory, it was amply sufficient to justify the judgment, which should not, therefore, be disturbed on appeal. Santanderino v. Vauvert, 23 S. C. R. 145, and Village of Granby v. Menard, 21 Occ. N. 7, 31 S. C. R. 14, followed. *The "Reliance"* v. *Conwell*, 22 Occ. N. 77, 31 S. C. R. 653.

Barque Approached by Steamer — *Manœuvres.*]—Where a steamer is proceeding on a course north seventy-two degrees west, and a barque is sailing on the starboard tack within about seven points of the wind, whose direction is east north-east, the barque is not an overtaken ship within the meaning of the regulations. *Smith* v. *The "Empress,"* 21 Occ. N. 430, 8 B. C. R. 122, 7 Ex. C. R. 430.

Between Foreign Vessels—Jurisdiction of Canadian Court — Arrest in Canadian waters — Inevitable accident—Look-out. *St. Clair Navigation Co.* v. *The "D. C. Whitney,"* 6 O. W. R. 302.

Breach of Regulations—*Minor Breach not Contributing—Lights—Negligence.*] — If a collision upon the high seas has been brought about by a ship neglecting to follow her course as prescribed by the regulations for preventing collisions at sea, the other ship will not be held equally at fault because of a contravention of a statutory regulation, where such contravention could not by any possibility have contributed to the collision. 2. A vessel "hove-to" with her helm lashed is not obliged to carry the lights mentioned in article 4 of such regulations, as she is not "a vessel which from any accident is not under command. *The "Birgitte"* v. *Forward*. *The "Birgitte"* v. *Moulton*, 9 Ex. C. R. 339.

Damage to Wharf — *Negligence.*] — A ship was moored in her dock with her bow to the east. Her stern, being at the inner end of the dock, was partly protected by the wharf and stores to the south, while the bow and fore-part of the ship, extending easterly beyond any such protection, was exposed to the full force of a south-easterly gale. There was an anchor out, with 25 fathoms of chain, on the starboard bow of the ship; but it was not in a position to keep the ship from swinging against the wharf in the event of such a gale. A gale from that direction having sprung up, the master ran out a wire rope from the starboard side of the ship's stern to a wharf on the south of her berth; but the evidence shewed that this rope had no effect in preventing the collision of the port bow of the ship with the wharf, which was damaged by the pounding of the ship against it from the force of the wind and waves:—Held, that the master had failed to exercise seamanlike care, forethought, and skill, in omitting so to place his anchor as to protect his ship from the force of the gale and prevent her colliding with the wharf, and that the damage was attributable to his negligence and not to inevitable accident. *Boak* v. *The "Bades,"* 8 Ex. C. R. 343.

Fishing Vessels — *Sufficiency of Anchor Light—Careless Navigation — Costs — Witness Fees — Parties.*]—The C. E. S., a fishing schooner, while lying at anchor on Bank Quero, was run into and sunk by another fishing vessel, the R., which was changing her berth in the night time. The weather was fine and the sea smooth. The C. E. S. was displaying a light, in order to comply with the regulations; but it was claimed by the crew of the R. that they did not see the light until it was too late to avoid a collision. It was shewn that the R. had been fishing in a berth four or five miles distant from the C. E. S., that her crew knew that there were a number of vessels fishing in their vicinity, and that the master of the R. took no extra precautions in sailing at night over the closely crowded fishing grounds, but on the contrary went below himself, leaving the ship under full sail to the charge of those on deck:—Held, that the R. was solely to blame for the collision. The crew of the ship of the plaintiffs, twelve in number, were landed in Nova Scotia, and were maintained at Halifax until they gave their evidence on the trial, a period of about one week. Before the trial was commenced, they were added as plaintiffs in the cause. Judgment was given in favour of the plaintiffs, condemning the defendant ship in damages and costs to be taxed. Upon the taxation the plaintiffs sought to tax the amount expended in maintaining the crew while they waited for the trial, and also their ordinary witness fees during the trial, it having been shewn that they were kept for the sole purpose of giving evidence. Counsel for the defendant objected on the ground that the crew, having been made parties to the action, were not entitled to any fees as witnesses, and that it was unreasonable that they should receive any sustenance fees. The District Registrar referred the matter to the local Judge, who:—Held, that the parties to an action are entitled to the usual witness fees, when they attend the trial to give evidence:—Held, also, that the plaintiffs were entitled to tax a reasonable sum as sustenance fees for the crew while they awaited the trial. *Conwell* v. *The "Reliance,"* 21 Occ. N. 429, 7 Ex. C. R. 181.

Fog — *Sailing Rules.*]—The defendant steamer bound for St. John, while steering in a dense fog, a N.-W. by N. course, heard three blasts of a fog horn from the plaintiff's vessel, a little before the beam on the port side. The steamer was then going at a speed of from 4 to 6 knots an hour, and kept on her course. The plaintiff's vessel continued sounding her horn at regular intervals, and was proceeding on a northerly course before a light wind barely sufficient to enable her to keep steerage way. Abourt 10 minutes after the horn was heard by the steamer, she struck the vessel on her starboard side, and sunk her:—Held, that the steamer was solely to blame, as she had infringed art. 16 of the regulations by not stopping after the horn was heard. *Roberts* v. *The "Pawnee,"* 7 Ex. C. R. 390. *The "Pawnee,"* 22 Occ. N. 129.

Fog — *Speed — Damages.*] — In an action for collision, where the Court found both vessels in fault for moving at an immoderate rate of speed in foggy weather, and that such immoderate speed was the chief, if not the sole, cause of the collision, the owner of the damaged ship was allowed to recover only half his loss. *Wineman* v. *The "Hiawatha,"* 7 Ex. C. R. 446.

In Foreign Waters — *Application of Foreign Rules — "Safe and Practicable"—"Narrow Channel"—Harbour.*] — Where a collision occurs in American inland waters and action is brought in the Exchequer Court of Canada for damages, the Court will apply

the rule of the road as it obtains under the American Sailing Rules for the purpose of determining the question of liability for the collision. Article 25 of the American Rules provides that "in narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fare-way or mid-channel which lies on the starboard side of such vessel:"—Held, that the words "safe and practicable" must be taken to imply that the vessel is only obliged to take this course when she can do so without danger of collision. The inner harbour of Boston, Mass., containing wharves and anchorage for ships on either side, where ships and steam-tugs are continually plying back and forth, is not a "narrow channel" within the meaning of article 25 of the above Rules, and the provisions of that article do not apply to cases of collision there. *Lovitt* v. *The "Calvin Austin,"* 9 Ex. C. R. 160; *The "Calvin Austin,"* v. *Lovitt*, 25 Occ. N. 78, 35 S. C. R. 616.

King's Ship — *Negligence—Public Work — Crown.*]—Where a collision occurs between a ship belonging to a subject and one belonging to the King, the King's ship is not liable to arrest for damages; and, in the absence of statutory provision therefor, no action will lie against the King for the negligence of his officers or servants on board of the ship. 2. In this case the steamship "Préfontaine," belonging to the suppliant, was damaged in a collision with a loaded scow which was fastened to the starboard side of the steam tug "Champlain," and which the latter was towing, from the dredge "Lady Minto," then working in the Contrecœur channel of the river St. Lawrence. The dredge, steam-tug, and scow were the property of His Majesty:—Held, that the facts did not disclose a case of negligence by the officers or servants of the Crown on a public work for which the Crown would be liable under clause (c) of s. 16 of the Exchequer Court Act, 50 & 51 V. c. 16. *Paul* v. *The King*, 24 Occ. N. 389, 9 Ex. C. R. 245.

Liability—*Imperial Regulations.*] — In a collision in Canadian waters between the steamship W. and the schooner M. A., the W. was found to be at fault in a matter that occasioned the collision. It was also found that the M. A. had contravened the regulations for preventing collisions in Canadian waters; but that such contravention did not contribute to the accident. In an action against the W. by the widow and universal legatee of the owner of the M. A.:—Held, that the W. alone was to blame, and that the plaintiff was entitled to recover. 2. Where a collision occurs on the high seas, and the provisions of s. 419 of the Merchants Shipping Act, 1894, and the Imperial regulations for preventing collisions at sea, are in force, the obligation is imposed on a vessel that has infringed a regulation which is prima facie applicable to the case, to prove, not only that such infringement did not, but that it could not, by any possibility, have contributed to the accident; but when the collision occurs in Canadian waters, and the Act respecting the navigation of Canadian waters, R. S. C. c. 79, and the regulations for the prevention of collisions made by the Governor-General in council, are in force, the vessel which contravenes one of them will not be held to be in fault unless such contravention has contributed to the collision. The "Cuba" v. McMillan, 26 S. C. R. 661, referred to. *Hamburg Packet Co.* v. *Desrochers*, 23 Occ. N. 214, 8 Ex. C. R. 263.

Narrow Channel — *Rule of the Road—Look-out — Meeting Ships — Harbour — Lights and Signals—Negligence—Evidence—Damages.*]—A pilot in charge of a ship, or a man at the wheel, is not a sufficient look-out within the rules of navigation for preventing collisions in narrow channels. Judgment of the Exchequer Court of Canada in Richelieu and Ontario Navigation Co. v. The "Cape Breton," 25 Occ. N. 57, 9 Ex. C. R. 67, affirmed. Where meeting ships are in collision, and one of them has neglected to observe the regulations, there must be evidence of gross dereliction of duty or want of skill in navigation in order to make out a case for apportionment of damages against the other ship. Where a ship navigating a narrow channel has no proper look-out, and neglects to signal her course, at a reasonable distance, thus perplexing and misleading a meeting ship, the former is alone responsible for all damages caused by collision, even if, in the agony of collision, a different manœuvre on the part of the other ship might have avoided the accident. Judgment below reversed, Girouard, J., dissenting. *The "Cape Breton"* v. *Richelieu and Ontario Navigation Co.*, 36 S. C. R. 564.

Navigation —*Narrow Channels—"White Law," Rule 24—Right of Way.*]—Rule 24 of the "White Law" governing navigation in United States waters provides "that in all narrow channels where there is a current, and in the rivers St. Mary, St. Clair, Detroit, Niagara, and St. Lawrence, when two steamers are meeting, the descending steamer shall have the right of way, and shall, before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take:"—Held, that this rule has no reference to the general course of vessels navigating the waters mentioned, but applies only to meeting vessels. Therefore a steamer descending the St. Clair with a tow was not in fault when she followed the custom of upgoing vessels to hug the United States shore. The "Shenandoah" with a tow was ascending the St. Clair river in a fog and hugging the United States shore; the "Carmona" was coming down the river; and they sighted each other when a few hundred yards apart. They simultaneously gave the port signal, which was repeated by the "Carmona." The "Shenandoah" then gave the starboard signal, and steered accordingly. The "Carmona," thinking there was no room to pass between the other vessel and one lying at the elevator dock, reversed her engines. She passed the "Shenandoah," but on going ahead again collided with the vessel in tow:—Held, reversing the judgment of a local Judge, 8 Ex. C. R. 1, that the "Shenandoah" was not in fault; but that, as the local Judge had found the "Carmona" not to blame, and as her captain's error in judgment, if it was such, in thinking he had not room to pass between the two vessels, was committed while in the agonies of collision, the judgment as to her should be affirmed. *Davidson* v. *Georgian Bay Navigation Co.*, 23 Occ. N. 79, 33 S. C. R. 1.

Negligence — *Harbour — Regulations.*] —Articles 11 and 15 (d) of the Collision Regulations of the 9th February, 1897, do not apply to the case of a ship made fast to a lawful wharf in a harbour:—Held, on the facts, that a vessel which ran into another so moored was guilty of negligence. *Bank Shipping Co.* v. *The "City of Seattle,"* 24 Occ. N. 363, 10 B. C. R. 513.

Negligence — *Ship at Wharf — Regulations.*]—Articles 11 and 15 (d) of the Imperial Collisions Regulations of 1897 do not apply to the case of a ship made fast to a lawful wharf in a harbour. On the evidence, a vessel which ran into another so moored was held not guilty of negligence. *Bank Shipping Co.* v. *The "City of Seattle,"* 9 Ex. C. R. 146.

Right of Way.]—In the case of a river traversed annually by thousands of vessels and used by two nations, a custom which in effect supersedes a statutory rule ought to be established by the most conclusive and cogent proof; and when it is sought to make it binding on foreign as well as domestic vessels, the proof should include some convincing evidence that a knowledge of the alleged custom existed among mariners generally, and extended to mariners sailing on vessels carrying a foreign flag and habitually traversing a busy river. *Georgian Bay Navigation Co.* v. *The "Shenandoah" and The "Crete,"* 8 Ex. C. R. 1.

Rules of Road — Signals — Liability. *Tucker* v. *The "Tecumseh,"* 6 O. W. R. 131.

Ship at Anchor — *Anchor Light—Look-out—Findings—Negligence.*] — Judgment appealed from, 7 Ex. C. R. 403, affirmed. *Dominion Coal Co.* v. *The "Lake Ontario,"* 23 Occ. N. 33, 32 S. C. R. 507.

Steamer and Sailing Vessel—*Collision Arts. 20, 22, 23, 25—Liability.*]—The J. M., a sailing vessel, was proceeding, in the day time, out of Charlottetown harbour by tacking, according to the usual course of navigation. The T., a steamship, was on her way into the harbour. When the T. was first seen by the J. M. the latter was on a course of W.S.W., standing across the harbour, towards, and to the northward and eastward of Rocky Point black buoy. From that time until a collision occurred between the two vessels, they were in full view of each other. While the J. M. was under way on the starboard tack and going about three knots an hour, the T. was coming straight up the harbour at nearly full speed. The latter did not change her course, nor execute any manœuvre, nor make any attempt by slackening speed or stopping or reversing to keep out of the way of the J. M. The bow of the T. struck the J. M. on the starboard side aft of the fore-rigging and nearly amidships, cutting her almost through from her hatches to her keel, and causing her to become a total wreck:—Held, that the T. had infringed the provisions of arts. 20, 22, 23, and 25 of the rules for preventing collisions at sea, and was responsible for the collision. *Brine* v. *The "Tiber,"* 6 Ex. C. R. 402.

Undue Speed—*Navigation During Fog.*] Judgment appealed from, 7 Ex. C. R. 390, 22 Occ. N. 129, varied; Girouard, J., dissenting. *The "Pawnee"* v. *Roberts,* 23 Occ. N. 33, 32 S. C. R. 509.

Vessel Moored to Another—*Negligence —Extraordinary Storm — Act of God.*] — While the plaintiff's tug-boat the "Vigilant" was tied to a wharf in Vancouver harbour, the defendant brought his tug-boat the "Lois" alongside and tied her to the "Vigilant." The next night a violent storm arose—a storm of which there were no indications and which was the severest ever experienced in the harbour — and the "Lois," whose crew were absent, bumped against the "Vigilant," and damaged her: — Held, in an action for damages for negligence, that it had not been shewn that the defendant's act of so mooring his tug was negligent, and that on the evidence the accident was due to the act of God. *Bailey* v. *Cates,* 24 Occ. N. 412, 11 B. C. R. 62.

Vessels Moored to Dock—Negligence—Inevitable accident. *Manley* v. *Rogers,* 2 O. W. R. 704.

IV. Judicial Sale.

Mortgage — *Judicial Sale — Rights of Mortgagee—Acquiescence.*] — Although a hypothec upon a ship does not make the hypothecary creditor owner of the ship, he can, nevertheless, dispose of it absolutely. 2. The sale of such a ship, even when effected judicially and with the authorization of the Court, upon an assignment of the property of the owner of the ship, but without the consent of the hypothecary creditor, is without effect as regards such creditor, and the purchaser may refuse to pay the purchase price so long as the hypothec is undischarged. 3. The fact that such creditor has been present at the sale and has even been a bidder does not constitute acquiescence, the proceeds of the sale being insufficient to indemnify him. *In re Robert and Lamarche,* Q. R. 18 S. C. 101.

Purchaser Refusing to Complete — *Resale — Liability of Purchaser for Difference in Price — Statute of Frauds.*]—A ship was sold at auction by the marshal under an order of Court in an action for seamen's wages. The ship was knocked down to J. for $2,000. J. refusing to complete the purchase, the ship was resold by the marshal for $1,900:—Held, that J. was liable for the difference in price and the costs occasioned by his default. 2. Judicial sales are not within the Statute of Frauds, and therefore no memorandum in writing of the sale to J. was necessary. Attorney-General v. Day, 1 Ves. Sr. 218, referred to. 3. For the purpose of establishing J.'s liability, an order for resale was not necessary. *Hackett* v. *The "Blakeley," In re Jones,* 8 Ex. C. R. 327, 9 B. C. R. 430.

Seizure by Ordinary Creditor—*Rights of Hypothecary Creditors—Sale Subject to Hypothecs—Consent — Order.*]—An hypothecated vessel cannot, to the prejudice of the hypothecated creditor and without his consent or the order of a competent Court, be seized at the suit of an ordinary creditor of the owner of the vessel. 2. The fact that an ordinary creditor has advertised the sale

of such a vessel subject to all registered hypothecs is not sufficient to relieve him from obtaining such consent or such order. *Daigneault* v. *Brulé*, Q. R. 22 S. C. 20.

V. Pilotage Dues.

Exemption—*Statute.*]—Under the terms of the Pilotage Act, R. S. C. c. 8, s. 59, as amended by the Acts of 1900, c. 36, s. 14, the following ships, called "exempted ships," are exempted from the compulsory payment of pilotage dues: "(c) Ships employed in trading . . . between any one or more of the provinces of Quebec, New Brunswick, Nova Scotia, or Prince Edward Island, and any other or others of them, or employed on voyages between . . . any port in any of the said provinces and any port in Newfoundland, etc.:—Held, that a ship employed on a sealing voyage from Halifax to the Newfoundland seal fisheries and back, calling on her outward voyage at Louisburg for coal, and at a port in Newfoundland for men and supplies, and again at Newfoundland, on her return, to dispose of her catch, was not an exempted ship within the terms of the Act. Semble, that what was contemplated by the Act, in providing for exemptions, was lines of steamers, or even one steamer, making regular periodical voyages, with termini as indicated in the Act, either throughout the year or during a certain season of the year. *Farquhar* v. *McAlpine*, 35 N. S. Reps. 478.

Liability of Barge—"*Every Ship which Navigates.*"]—Held, affirming the judgment of the local Judge for the Quebec Admiralty District, that the expression "every ship which navigates," found in s. 58 of the Pilotage Act, R. S. C. c. 80, means a ship that has in itself some power or means of moving through the waters it navigates, and not a ship that has no such power or means and which must be moved or propelled or navigated by another vessel. *Corporation of Pilots for the Harbour of Quebec* v. *The* "*Grandee*," 22 Occ. N. 428, 8 Ex. C. R. 54, 79.

VI. Salvage.

Arrest — *Payment into Court—Release—Appeal — Security — Foreign Owner—Extravagant Claim.*]—An application by the defendant for payment out of Court of money paid in by him to obtain the release of his ship arrested to answer a claim for salvage, will, if the defendant be a foreign resident, be stayed wholly or in part, pending an appeal to the Exchequer Court to increase the salvage award. Observations upon the scope of bail bonds and the retention of security pending appeal. It is an improper practice, and one which the Court will discourage, to arrest property to answer extravagant claims. *Vermont S. S. Co.* v. *The* "*Abby Palmer*," 8 Ex. C. R. 462, 10 B. C. R. 383.

Assessors — *Trial — Time.*]—Assessors will be appointed in salvage cases where necessary. The proper time to apply for assessors is on the application to fix the date of trial. *Vermont S. S. Co.* v. *The* "*Abby Palmer*," 8 Ex. C. R. 469, 10 B. C. R. 380.

Basis of Valuation.]—Where, in a case of salvage, there is no market value for the ship in the port where it is brought by the salvors, the res should be valued not on the basis of a forced sale, but as a "going concern" in the hands of a solvent owner, using it for the particular purposes of his trade at the sum for which the owner, as a reasonable man, would be willing to sell it. *Vermont S. S. Co.* v. *The* "*Abby Palmer*," 8 Ex. C. R. 446.

Maritime Lien—Agreement — Rights of salvor — Possession of salved goods — Removal — Purchaser for value — Conversion —Replevin — Costs. *Pearce* v. *Letherby*, 6 O. W. R. 77, 606.

Quantum of Remuneration — *Mail Steamer — Sailing Ship.*]—Salvage services were rendered a distressed sailing ship on the high seas by a mail steamer. At the time the latter performed the salvage services, she was valued at $100,000, and, besides passengers and mails, she carried a cargo estimated to be worth $7,000. The time occupied in the performance of such services was about two and one-half days, the weather being fine and no risk or danger threatening the steamer except some chance of collision with her tow through a narrow channel of some thirteen miles in length. On account of the delay occasioned by the services, the steamer was obliged to consume additional coal to the value of $390 in making up her schedule time on the voyage. The sailing ship was in a position of peril when sighted by the steamer, having been dismasted and at the time drifting broadside at the mercy of the seas. Her cargo was worth $13,727.23, and her freight, as per bill of lading, $1,332.26. The value of the salved ship when taken into port in her damaged condition was placed at $2,290. The amount of salvage in respect of cargo and freight was settled before action brought: —Held, that the sum of $400 was a fair salvage award in respect of the ship alone. *Pickford and Black S. S. Co.* v. *The* "*Foster Rice*," 9 Ex. C. R. 6.

VII. Seaman's Wages.

Actions in Rem—*Wages — Equality — Priority — Costs — Pro Rata Payment of Subsequent Claims.*]—Held, following The "Saracen," 6 Moo. P. C. 56, that when claimants against a fund in the registry are of equal degree, the Court will give priority to the diligent creditor. 2. Where the parties are not of equal degree, and one claiming subsequently has a legal priority over another, such priority will be protected if he make his claim before a decree has passed for distributing the fund, but not afterwards. 3. Where two claims for seamen's wages were prosecuted to judgment before two similar claims were allowed by the Court, the costs of the prosecution of the first two claims were ordered to be paid out of the fund in the registry in full in preference to the last two claims. In respect of the latter it was directed that they should be paid in full if the balance of the fund permitted it, if not they were to be paid pro rata. *Munsen* v. *The* "*Comrade*," *Saunders* v. *The* "*Comrade*," *Dickson* v. *The* "*Comrade*" 7 Ex. C. R. 331.

Amount—*Jurisdiction of Supreme Court, N. S.*]—An action for seaman's wages, where the amount claimed is under £50, cannot be brought in a Superior Court, except where the owner or master, neither is, nor resides, within twenty miles of the place where the seaman is discharged, or put on shore. *Watson* v. *Leukten*, 24 Occ. N. 26, 36 N. S. Reps. 412.

Arrest on Telegram — *Rescue—Contempt of Court—Ignorance of Law.*]—It is competent for a deputy-marshal to arrest a ship, in an action for wages, upon a telegram from the marshal of the Admiralty district, having jurisdiction of the action, informing him that a writ of summons and a warrant had been issued and sent to him by mail. 2. The master of the ship, although ignorant of the legal consequences of his act, was held guilty of contempt of Court in permitting the ship to be moved after the deputy-marshal had gone on board, read to the master a copy of the writ of summons, and of the marshal's telegram, informed him that the ship was under arrest, and tacked up a copy of the writ in the ship. *In re The "Ishpeming,"* 8 Ex. C. R. 379.

Contract—Correspondence — Desertion—Justification—Transportation money — Maintenance money — Action — Costs — Witness fees. *Porteous* v. *The "Lightning"* (Y.T.), 2 W. L. R. 199.

Jurisdiction of Exchequer Court to Entertain Claim for Wages under $200 — *Admiralty Act—Foreign Ship — Costs.*]—When the exceptions in s. 56 of the Seamen's Act, R. S. C. c. 74, do not apply, the Exchequer Court, on its Admiralty side, has no jurisdiction to entertain a claim for seamen's wages under the amount of $200, earned on a ship registered in Canada. The W. J. Aikens, 7 Ex. C. R. 7, decided under similar provisions in s. 34 of R. S. C. c. 75, criticized and not followed. 2. The Admiralty Act, 1891, being a general law, and enacting general provisions as to jurisdiction, does not repeal by implication the special provisions of s. 56 of R. S. C. c. 74, limiting the jurisdiction of this Court in proceedings for seamen's wages. 3. This Court has no jurisdiction to entertain a claim for seamen's wages under an amount of $200 earned on a ship registered in England, and to which the provisions of s. 165 of the Merchants Shipping Act, 1894, apply. 4. Costs in these actions were not allowed to the defendants because exception to the jurisdiction to entertain the claim sued for was not taken in limine litis. *Gagnon* v. *The "Savoy," Dion* v. *The "Polino,"* 25 Occ. N. 87, 9 Ex. C. R. 238.

Refusal to Pay — *Conviction — Jurisdiction—Criminal Offence — Seamen's Act (D.)—Shipping Act (Imp.)—Rescission of Contract.*]—J. M., the master of the S. S. "Wobun," a British ship of Canadian register, was convicted, before a stipendiary magistrate, for that he wrongfully and unlawfully refused to pay R., a seaman serving on board said ship, a sum of money claimed to be due him for wages, and, further, for refusing to discharge said M., he being then entitled to his discharge:—Held, quashing the conviction with costs, that the refusal to pay M. his wages, or to give him his discharge, was not a criminal offence, and that the proceedings taken were not warranted by the Seamen's Act of Canada, c. 74. That the ship being, at the time the proceedings were instituted, within the jurisdiction of the government of the British possession in which she was registered, the case was within the exception mentioned in s. 26 (d), and part 2 of the Imperial Shipping Act was not applicable. Semble, that if the magistrate had power to rescind the contract, and had undertaken to do so, the judgment would require to be in a different form. *Rex* v. *Meikle, Ex p. Ramsey*, 36 N. S. Reps. 297.

Seizure for Wages of Sailors—*Internal Navigation.*]—Save in the case provided for by cl. 2 of art. 955, C. P., a saisie conservatoire does not lie for the wages of sailors in respect of services rendered on ships employed in internal navigation. *Bertrand* v. *Anderson*, 4 Q. P. R. 387.

VIII. Other Cases.

Account—*Co-owners — Jurisdiction of Court of Equity.*]—The jurisdiction of the Court of Equity in a suit for account between co-owners of a ship has not been taken away by 54 & 55 V. c. 29 (D.), which confers a like jurisdiction upon the Exchequer Court in Admiralty; any discretion the Court of Equity may have as to the exercise of its jurisdiction must depend upon the circumstances of each suit. *Penry* v. *Hanson*, 21 Occ. N. 358, 2 N. B. Eq. Reps. 233.

Action in Rem — *Jurisdiction of Exchequer Court of Canada — Arrest—Account —Co-owners.*]—The Exchequer Court of Canada has, in admiralty, as large a jurisdiction as the High Court of Admiralty, and therefore in an action between the co-owners of a ship for an account, the ship may be arrested. *Cope* v. *The "Raven,"* 9 Ex. C. R. 404.

Arrest — Release — Re-arrest—Escape —Burden of proof — Bond — Pleadings. *Rex* v. *The "Tuttle,"* 5 O. W. R. 384.

Careless Mooring of Vessels — *Negligence — Extraordinary Storm — Vis Major.*] The plaintiff's tug "Vigilant" was moored at a wharf in Vancouver harbour, with another tug, the "Lois," belonging to the defendant, lying outside and moored there by a line attached to the "Vigilant." The "Lois" was left in that position all night, with no one in charge, and no fenders out on the side next the "Vigilant." During the night a heavy gale came up, and the "Lois" pounded the "Vigilant," causing her considerable damage:—Held, affirming the judgment of the Supreme Court of British Columbia, 11 B. C. R. 62, 24 Occ. N. 412, that, as the defendant was not a trespasser, he was not guilty of negligence, in the circumstances, in leaving his tug as he did, and that he was not obliged to observe extreme and unusual precautions to avoid injury by a storm of exceptional violence. *Bailey* v. *Cates*, 25 Occ. N. 28, 35 S. C. R. 293.

Contract by Master—*Effect of—Seizure of Vessel—Action against Master Alone—Particulars—Certificate.*]—A captain contracting in his own name for the needs of his vessel and its navigation, at a place where neither

the owner nor the agent of the vessel lives, binds himself, the vessel, and its owner. 2. The vessel may be seized for a debt contracted for the purpose of a voyage, or for the fees of a consul, in an action begun against a captain in his capacity as such, and without making the owners parties. 3. Among the principal provisions of the certificate of ownership which the proces-verbal of the seizure must contain, when production of the certificate is refused, are the number of the vessel and its tonnage engraved upon the main beam; and the bailiff may cause the hatchway to be opened in order to find out these particulars; and upon refusal an order for its opening may be made. *Fréchette* v. *Martin*, Q. R. 21 S. C. 417.

Contract to Sell—Co-owners—Partnership—Authority of one to bind the other—Ratification—Specific performance—Contract under seal—Co-owner not named—Principal and agent—Evidence of agency—Bill of sale—Possession. *Bentley* v. *Murphy*, 1 O. W. R. 273, 726, 845, 2 O. W. R. 1014.

Foreign Vessel — *Foreign Judgment — Comity of Courts—Account between Co-owners.*]—The ship was registered in an American port and owned by American citizens resident in the United States. The defendant S. advanced to the then capain of the ship at Brava, Cape de Verde Islands, the sum of $1,400 for necessaries, and took from the captain and V., a part-owner, what purported to be a bottomry bond, and a further instrument, purporting to be a charterparty, as security for such advance. By the last mentioned instrument, the control and possession of the ship were handed over to S. until the profits of the employment of the ship repaid the loan. S. thereupon took over the ship and brought her to a United States port, where she was arrested at the suit of R. for an amount due him for necessaries supplied to the ship on a previous voyage. By the judgment of a competent court in the United States the rights of S., under the instruments mentioned, were held to give him priority over the claim of R., and he was confirmed in his possession of the ship. The plaintiff herein was the owner of 1,764 shares of the ship and had notice of the American suit between S. and R., and subsequently took part in some negotiations for the settlement of the claims of both. By instituting proceedings on the Admiralty side of the Exchequer Court the plaintiff sought to obtain possession of the vessel while in a Canadian port, together with certain relief against the defendant V.:—Held, that as by the proceedings taken in the Exchequer Court the plaintiff sought to derogate from rights obtained by one of the parties under the judgment of a competent court in the United States,, the action should be dismissed. Castrique v. Imrie, L. R. 4 H. L. 414, referred to. Semble, that in so far as the plaintiff sought to obtain an account between the parties who were co-owners the Court would have directed an account if it had been shewn that S. had received from the earnings of the vessel sufficient to repay him the amount of his loan. *Michado* v. *The "Hattie and Lottie,"* 9 Ex. C. R. 11.

Foreign Vessel — *Illegal Fishing — Seizure of Vessel—Evidence of Vessel's Position.*]—The American vessel "Kitty D." was seized by the government cruiser "Petrel" for fishing on the Canadian side of Lake Erie. In proceedings by the Crown for forfeiture, the evidence was conflicting as to the position of both vessels at the time of seizure, and a local Judge in Admiralty held (2 O. W. R. 1065) that the vessel seized was not in Canadian waters at the time. On appeal by the Crown:—Held, that, as the "Petrel" was furnished with the most reliable log known to mariners for registering distances, and her compass had been carefully tested and corrected for deviation on the morning of the seizure; as the "Kitty D." and two tugs in her vicinity at the time, whose captains gave evidence to shew that she was on the American side, carried no log or chart and kept no log book; and as the local Judge had misapprehended the facts as to the course sailed by the "Petrel" and the rules of navigation; the evidence of the officers of the "Petrel" must be accepted; and it established that the "Kitty D." had been fishing in Canadian waters, and her seizure was lawful. *Rex* v. *The "Kitty D.,"* 24 Occ. N. 261, 34 S. C. R. 673, 2 O. W. R. 1065.

Foreign Vessel—Illegal fishing—Three-mile limit—Seizure by preventive cruiser — Continuous pursuit — Jurisdiction—Government of Canada — License—Forfeiture of vessel. *Rex* v. *The "North"* (B.C.), 2 W. L. R. 74.

Illegal Fishing—*Foreign Vessel — Evidence — Condemnation.*]—The method of catching fish has no bearing upon a violation of the provisions of R. S. C. c. 94. The fact of taking fish without a license in the territorial waters of Canada constitutes the offence. Semble, that coming into the territorial waters of Canada to cure fish caught outside the limits of such waters, will subject the offending vessel to forfeiture. *Rex* v. *The "Samoset,"* 25 Occ. N. 128, 9 Ex. C. R. 348.

Injury to Boom in River—Negligence—Right to moor boom along bank—Interference with navigation—Nuisance—Reasonable user—Action in rem—Delay in commencing—Change in ownership—Damages—Reference. *Kennedy* v. *The "Surrey"* (B. C.), 2 W. L. R. 550.

Injury to Raft from Swells—Negligence—Onus — Rules of navigation. *Adams* v. *British Yukon Navigation Co.* (Y.T.), 2 W. L. R. 476.

Materials used in Construction and Repair—*Lien—Continuance of.*]—One who furnishes materials which are used in the construction and repair of a vessel intended for inland navigation has a right to the "privèlège de dernier equipeur." The right is not limited to the last voyage, nor confined to the person who last furnishes such materials, but continues during the period that elapses between two seasons of navigation. *Cantin* v. *Brulé*, Q. R. 26 S. C. 40.

Medical Attendance — *Duty of Shipowner.*] — A ship-owner is under no duty either at common law or under s. 207 of the Merchants Shipping Act, 1894, to provide surgical or medical attendance for the ship's company. *Morgan* v. *British Yukon Navigation Co.*, 24 Occ. N. 38, 10 B. C. R. 112.

Necessaries — *"Owner"—"Domiciled"* — *Lien.*]—An action in rem for necessaries will

not lie against a ship if supplied to a charterer, who also engages the crew in a port other than her home port, if it is shewn that at the time the writ issued an owner or part owner was domiciled in Canada. 2. The word "owner" used in s. 5 of the Imperial Admiralty Act of 1861 (which is in force in Canada by virtue of the Colonial Courts of Admiralty Act, 1890, and the Canada Admiralty Act, 1891), means "registered owner" or "person entitled to be registered as owner," and not a pro hac vice owner; the word "Canada" is to be read in the place of "England and Wales;" and the word "domiciled" must be understood in its ordinary legal sense. Semble, that wherever a maritime lien is created in favour of any one against a ship, it is not essential to establish further personal liability against the owner. *Rochester and Pittsburg Coal and Iron Co.* v. *The "Garden City,"* 7 Ex. C. R. 34.

Necessaries—*Owner Domiciled in Canada — Jurisdiction.*] — No action will lie on the Admiralty side of the Exchequer Court against a ship for necessaries when the owner of the ship at the time of the institution of the action is domiciled in Canada. *Rochester and Pittsburg Coal and Iron Co.* v. *The "Garden City,"* 21 Occ. N. 283, 7 Ex. C. R. 94.

Personal Injury Done by—*Jurisdiction of Admiralty Court—Negligence—Sufficiency of Machinery—Fellow-workmen—Evidence—Hospital Expenses—Particulars—Summons.*] —An engineer while working on a steamer was injured by the breaking of a stop valve: —Held, that the Admiralty Court has jurisdiction to try a suit for damages done by a ship to a person. 2. Adequacy of construction is to be determined by the generally approved use at the time of manufacture; and the absence of the best possible construction is not of itself conclusive evidence of negligence. 3. The officers of the ship as well as the men are fellow-workmen and for the negligence of the one the steamer is not liable to the other. 4. Improving machinery after an accident is not evidence of insufficiency of its former state. 5. A seaman shipped in Canada and injured in Canada has no claim for hospital expenses under the Merchants Shipping Act, 1894. 6. A plaintiff's claim is confined to the particulars indorsed on the summons. *Wyman* v. *The "Duart Castle,"* 6 Ex. C. R. 387.

Towage—*Injury to Tow—Liability of Owners — Evidence — New Trial.*]—Appeal (pursuant to 62 & 63 V. c. 11, s. 7) from a judgment of Dugas, J., in the Territorial Court of the Yukon. The defendants' steamer, which previously had been employed carrying freight and passengers between White Horse and Dawson, had gone out of commission on the 23rd September, 1898, and on that day, and while on her way down Lake Lebarge to winter quarters, she took in tow the plaintiffs' scow loaded with goods. After proceeding some way the weather became bad, and in endeavouring to get into shelter the scow foundered, and the whole cargo was lost. In an action for damages against the owners of the steamer, evidence was tendered by the owners that those in charge of the steamer had been particularly warned not to do any towing, but this evidence (being objected to by the plaintiffs) was ruled out. Dugas, J., held that the defendants were common carriers and therefore liable. An appeal from the judgment was allowed with costs, but the plaintiffs were granted the option of a new trial upon payment of the costs of the first trial. *Courtnay* v. *Canadian Development Co.*, 21 Occ. N. 319, 8 B. C. R. 53.

SHOOTING WITH INTENT.

See CRIMINAL LAW.

SHOPS.

See MUNICIPAL CORPORATIONS.

SHORT FORMS ACT.

See MORTGAGE.

SIDEWALK.

See MUNICIPAL CORPORATIONS—WAY.

SINKING FUND.

See MUNICIPAL CORPORATIONS.

SLANDER.

See CRIMINAL LAW — DEFAMATION — INJUNCTION.

SMALL DEBT PROCEDURE.

Debt — *Conversion — Tort Waived — Goods Sold—Rule 602.*]—A claim for the value of goods converted by the defendant, the plaintiff expressly waiving the tort and suing as for goods sold and delivered, may be sued under the small debt procedure. The plaintiff, in his statement of claim under the small debt procedure, alleged that the defendant had wrongfully taken possession of a horse and converted it to his own use, and expressly waived the tort, and sued for goods sold and delivered, claiming $75, the value of the horse. An application to set aside the writ and service, upon the ground that the claim was not for one debt within the meaning of Rule 602, which brings "all claims and demands for debt whether payable in money or otherwise where the amount claimed does not exceed $100," within the small debt procedure, was refused. The word "debt" is not restricted to "a sum certain or capable of being reduced to a certainty by calculation," but includes claim for value of goods sold where no price is mentioned. *Henry* v. *Mageau*, 5 Terr. L. R. 512.

Judicature Ordinance—*Counterclaim—Costs.*]—In an action under the small debt procedure, the defendant may under Rule 612 set up a counterclaim, the amount of which exceeds the small debt jurisdiction. Where such a counterclaim is dismissed with costs, the plaintiff is entitled to tax a fee of 10 per cent., on the amount under Rule 617, which extends to counterclaims. *Cox* v. *Christie*, 5 Terr. L. R. 475.

See APPEAL—COURTS.

SMUGGLING.

See REVENUE.

SOCAGE.

See GUARDIAN.

SOLICITOR.

I. ADMISSION AND RIGHT TO PRACTICE, 1521.

II. AUTHORITY, 1523.

III. COSTS—

1. *Agreement as to*, 1524.
2. *Recovery of*, 1525.
3. *Taxation*, 1527.

IV. PARTNERSHIP, 1531.

V. RETAINER, 1531.

VI. OTHER CASES, 1532.

I. ADMISSION AND RIGHT TO PRACTICE.

Conviction for Usurping Functions of — *Resolution of Bar Council—Person Assuming to Act as Advocate—Accountant.*] — The defendant, a chartered accountant, sent out a notice, at the head of which were printed his name and description as chartered accountant, requesting payment of a sum of money due to an estate, and concluding in these words, "If I do not hear from you within three days, action will be taken for recovery without notice." At the foot of the letter, there was an entry "Charges, $1.50." He was adjudged to pay a fine of $25 under s. 3562a of R. S. Q. as amended by 61 V. c. 27, s. 5:—Held, reversing that judgment, that a resolution of the council of the Bar of the section, authorizing the syndic to institute a prosecution, under s.-s. b of s. 5, 61 V. c. 27, for usurping the functions of the profession, was insufficient to support a condemnation (apparently based on s.-s. f of the same section), for acting in such manner as to lead to the belief that he (the defendant) was authorized to fulfil the office of or to act as an advocate. 2. Even if the resolution were sufficient, the defendant, in the circumstances stated above, was not guilty of practising as an advocate or of usurping the functions of the profession, nor was he guilty of acting in such manner as to lead to the belief that he was authorized to act as an advocate. Chartered accountants are authorized by law to collect debts, and, although the demand of $1.50 for charges was illegal, it was not sufficient to shew an intention to lead the recipient of the letter to the belief that the writer was authorized to act as an advocate, his true description as a chartered accountant being printed at the head. *Montreal Bar* v. *Duff*, Q. R. 24 S. C. 478.

Legal Professions Ordinance — *Striking Off Roll—Suspension.*]—Under the provisions of the Legal Professions Ordinance, No. 9 of 1895, s. 16, which enacts that "the Supreme Court may strike the name of any advocate off the roll of advocates for default by him in payment of moneys received by him as an advocate," the Court has no power merely to suspend an advocate temporarily from practice. *In re Forbes* (No. 1), 2 Terr. L. R. 410.

Legal Professions Ordinance—*Advocate—Striking Off Rolls — Reinstatement—Grounds for Refusal.*]—The Legal Professions Ordinance, 1895, confers no jurisdiction on the Supreme Court of the N. W. T. to reinstate an advocate who has been struck off the rolls.—Semble, that in this case had there been jurisdiction the application must have been refused on the grounds: (1) that the applicant was in default in not paying the costs which by the order striking him off he had been ordered to pay; (2) that there was no evidence that the advocate was not liable to an application to strike off in respect of moneys other than those in respect of which he had been struck off; and (3) that the lapse of time since the misconduct charged was unusually short. *In re Forbes* (No. 2), 2 Terr. L. R. 423.

Legal Professions Ordinance — *Advocate — Striking off Rolls—Rescission of Order—Jurisdiction.*]—The Court, having no jurisdiction to reinstate an advocate struck off the rolls, cannot effect the same result by rescinding the order. *In re Forbes* (No. 3), 2 Terr. L. R. 447.

Readmission to Practice.]—A solicitor who had abandoned practice for more than five years was readmitted by the Court upon passing an examination to the satisfaction of the council of the barristers' society of New Brunswick. *In re Deacon*, 36 N. B. Reps. 3.

Right to Practise — *Non-payment of Fees—Suspension—Law Society.*]—A solicitor cannot, without paying his annual fees and taking out the certificate of the Law Society, practise as such, even in an isolated instance, or even where he is joined as plaintiff himself with another who holds his claim in the interest of and for the solicitor, without making himself liable to the provisions as to suspension of R. S. O. c. 174. *In re Clarke, a Solicitor*, 21 Occ. N. 30, 32 O. R. 237.

Uncertificated Attorney—*Void Proceedings—Waiver.*]—Proceedings by an attorney who has not paid the fee required by C. S. N. B. c. 34, s. 4, are void, and the right to set aside the proceedings is not waived by the opposite party contesting the suit to judgment. *Rex* v. *Sisk*. *Sisk* v. *Foley*, 35 N. B. Reps. 560.

Uncertificated Solicitor — *Right of Client to Party and Party Costs.*]—The plaintiff was deprived of costs on the ground that her solicitor had failed to take out a certificate, as required by the Nova Scotia Barristers and Solicitors Act, 1899, s. 27:—Held, that the procedure to enforce compliance with the provisions of the Barristers and Solicitors Act being by fine and suspension, under ss. 31 and 32 of the Act, and there being no provision enacting in express terms that attorneys who failed to take out certificates as required should be debarred from recovering their costs, or that parties employing such attorneys should be debarred from recovering, there was nothing to prevent the plaintiff from recovering her attorney's costs from the opposite party to the suit. *Wallace* v. *Harrington*, 34 N. S. Reps. 1.

Usurping Professional Functions—*Mercantile Agency—Collecting Letter.*]—A mercantile agency firm who sent a letter to a debtor demanding payment from him of a certain sum due by him to a third person, and intimating that legal proceedings would be immediately taken to recover the amount in default of payment, should be regarded as having exercised the profession of an advocate in violation of 61 V. c. 27 (Q.) *Montreal Bar Association* v. *Sprague's Mercantile Agency*, Q. R. 25 S. C. 383.

II. Authority.

Action in Name of Company—Determination of question—Stay or dismissal of action—Adding shareholders as parties: *Saskatchewan Land and Homestead Co.* v. *Leadley, Saskatchewan Land and Homestead Co.* v. *Moore*, 2 O. W. R. 916, 944, 1075, 1112, 3 O. W. R. 133, 191, 4 O. W. R. 39, 378.

Compromise Action after Judgment—Issue of execution—Ex parte order. *Norquay* v. *Broggio* (Y.T.), 2 W. L. R. 108.

Instructions—Imprisonment of plaintiff—Dismissal—Costs. *Pine* v. *McCann*, 2 O. W. R. 546.

Mortgage—*Collection.*]—In the absence of legal proceedings to enforce a mortgage security, there is nothing in the mere relation of solicitor and client from which an authority may be implied to the solicitor to receive interest or principal due the client on the mortgage, even though the solicitor arranged the mortgage loan. The solicitor must have either express authority for the purpose, or the course of dealing between the parties must have been such as to necessarily imply such an authority; and the onus of establishing that is upon the mortgagor. An authority to receive interest confers no authority to receive principal, and the possession of the mortgage securities is no evidence of authority to receive money due on them. *Foreman* v. *Seely*, 22 Occ. N. 67, 2 N. B. Eq. Reps. 341.

Power of Attorney in Favour of Another.]—The power of attorney or procuration of a plaintiff not residing in the province, need not necessarily be made in favour of the advocate of the plaintiff; it is sufficient if it is given to a person resident at the place where the action is begun. *Spencer* v. *Strathcona Rubber Co.*, Q. R. 24 S. C. 323.

Ratification—*Right to Recover Costs.*]—A piano belonging to the defendant having been seized in the possession of one H., the plaintiffs, advocates, upon instructions received from H., who alleged that he was authorized by the defendant, made, in the name of the latter, an opposition demanding the withdrawal of the piano from the seizure which had been made. The defendant's agent, having learnt that the opposition had been filed, went to the office of the plaintiffs and told them that he would not pay the costs of it, but did not order them to discontinue the proceedings, and, the opposition having been maintained, he re-took his piano:—Held, that, in these circumstances, the defendant was liable to pay the plaintiffs the costs of the opposition. Semble, that the defendant, if he wished to avoid the payment of the costs, should have disavowed the proceedings taken in his name. *Delisle* v. *Lindsay*, Q. R. 23 S. C. 313.

Retainer—Instructions—Annuity—Judgment—Assignment—Setting aside proceedings—Costs. *Quantz* v. *Quantz*, 2 O. W. R. 326.

III. Costs.

1. *Agreement as to*

Confession of Judgment — *Agreement with Counsel—Overcharge.*]—A solicitor may take security from a client for costs incurred, though the relationship between them has not been terminated and the costs not taxed, but the amount charged against the client must be made up of nothing but a reasonable remuneration for services and necessary disbursements. A country solicitor had an agreement with a barrister at Halifax for a division of counsel fees earned by the latter on business given him by the solicitor. The solicitor took a confession of judgment from a client for a sum which included the whole amount charged by the Halifax counsel, only part of which was paid to him:—Held, that, though the arrangement was improper, it did not vitiate the judgment entered on the confession, but the amount not paid to counsel should be deducted therefrom. *Knock* v. *Owen*, 24 Occ. N. 287, 35 S. C. R. 168.

Misrepresentation—*Pressure—Manitoba Law Society Act—Interest—Consideration.*]—Section 68 of the Law Society Act, R. S. M. c. 83, making it legal for a solicitor to bargain with his client, does not preclude the Court from determining the validity of any such agreement upon equitable principles, although it contains no express provision. In the course of negotiations leading up to such an agreement, the solicitor overstated the amount of his disbursements, and threatened to dispose of a judgment which had been assigned to him:—Held, that the misstatement and threat were such as to render the clients incapable of acting freely and independently, and therefore the agreement should be set aside. Forbearance to sue may be a sufficient consideration for an agreement by a client to pay interest to his solicitor upon an amount agreed on as due for costs, although there is no legal liability for such interest.

and although the client acted without independent advice. *Preston* v. *Nugent*, 21 Occ. N. 543, 13 Man. L. R. 511.

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2. Recovery of.

Acquiescence—*Revision.*]—A party who pays under protest a bill of costs, after having discussed it and obtained several reductions, will be held to have acquiesced in it, and cannot afterwards demand the revision of it. *Beaudoin* v. *Lamothe*, 5 Q. P. R. 358.

Action for Costs—*Lump Charge for Professional Services — Champerty—Agreement.*]—The plaintiffs, advocates in the Yukon, sued the defendant for a lump sum for professional services in obtaining a judgment for the defendants against one H., it being alleged by the plaintiffs that they were to charge $600 if the amount was collected, and by the defendant that they were to get ten per cent. if collected by them:—Held, in appeal, per Drake, J., that by Yukon law an advocate cannot legally obtain a lump sum for professional services under R. 524 of the North-West Territories Judicature Ordinance of 1893. Per Martin, J., that the plaintiffs failed to prove any agreement. *Robertson* v. *Bossuyt*, 8 B. C. R. 301.

Action for Costs—*Prescription—"Final Judgment"—Costs of Action—Plea Offering Judgment.*]—The words "final judgment," in art. 2260, C. C., which enacts that the action "for professional services and disbursements of advocates and attorneys is prescribed by five years, reckoning from the date of the final judgment in each case," mean final as opposed to interlocutory, and not final in the sense of being the judgment in the Court of last resort; and consequently prescription of an attorney's claim against his own client for the taxed costs in a cause commences to run from the rendering of the final judgment in the Court in which such costs are taxed, notwithstanding the fact that the case may have been taken to review and conducted by the same attorney in that Court. 2. Where the defendant, by his plea, offers judgment for part of the sum claimed, and the plaintiff does not accept such offer, but proceeds to proof and is unsuccessful in establishing any greater sum than that admitted, he is entitled only to costs up to plea filed, and will be condemned to pay the defendant's costs of contestation after plea filed. Poulin v. Prevost, summarized in Bertrand v. Hinerth, 25 L. C. J. 168, followed. *Gilman* v. *Cockshutt*, Q. R. 18 S. C. 552.

Against Opposite Party in Litigation.]—In the absence of any special provision of law, the advocate is not a party in the cause, but merely the agent of the party whom he represents. 2. There being no provision of law by which an advocate appearing in a cause before the Recorder's Court of Montreal, is granted distraction of costs awarded to his client, there is no lien de droit between him and the city of Montreal, the other party to the cause, and he, therefore, has no action in his own name against the city for the costs of a cause in which costs were awarded in favour of his client. *Beaudin* v. *City of Montreal*, Q. R. 20 S. C. 32.

Consolidation of Actions.] — *Re Wickett*, 1 O. W. R. 554.

Counsel Fees — *Action for—Liability of Solicitor or Client—Supreme Court of Canada —Quantum Meruit.*] — An advocate of the Territories (in whom are combined the functions of both barrister and solicitor) retained a member of the plaintiff firm (Ontario barristers and solicitors) as counsel, and the firm as solicitors, on an appeal for certain clients to the Supreme Court of Canada from a judgment of the Supreme Court of the North-West Territories:—Held, per Curiam, that the contract was to be spelled out of the correspondence which took place up to the time the services sued for were performed, and that for the purpose of ascertaining the terms of that contract, the subsequent letters should not be looked at. 2. That if the clients were liable by virtue of the original contract, the plaintiffs charging the advocate in mistake of their legal rights would not release the clients. 3. That the advocate's letters were merely of such character as an advocate engaging counsel in the ordinary course would naturally write, and were not such as, under Armour v. Kilmer, 28 O. R. 618, would render the advocate personally liable; but, held, McGuire, J., dissenting, and the majority of the Court declining to follow Armour v. Kilmer, that on the retainer of counsel by an advocate, the advocate, and not the client, is prima facie liable:—Held, also, per Curiam, that an action lies for counsel fees. McDougall v. Campbell, 41 U. C. R. 332, and Armour v. Kilmer (on this point) followed. 2. That, inasmuch as the tariff of the Supreme Court of Canada does not apply as between solicitor and client, the plaintiffs were entitled to recover on a quantum meruit. O'Connor v. Gemmill, 29 O. R. 47, 26 A. R. 27, followed. *Armour* v. *Dinner*, 4 Terr. L. R. 30.

Distraction of Costs — *Foreign Law — Code of Civil Procedure in Quebec—Recovery of Costs—Interest.*]—"Distraction of costs," as provided for in s. 553 of the Code of Civil Procedure in the Province of Quebec, is the deverting of costs from the client or party who in the ordinary course would be entitled to them and their ascription to his attorney or other person equitably entitled. The plaintiffs were the attorneys on the record for one R., against whom an action was brought in the Province of Quebec by the defendant, and an interlocutory motion therein had been dismissed with costs, taxed at $238.20, and judgment entered therefor in the Superior Court at Montreal:—Held, that the plaintiffs were entitled to recover such costs from the defendant in their own names in Ontario, without the intervention of their client. Quære, as to interest on the account. *Hutchinson* v. *McCurry*, 23 Occ. N. 111, 5 O. L. R. 261.

Lien—*Charging Order—Lands in Question in Redemption Suit—Registry of Lis Pendens —Discharge of.*]—Rule 1129, which empowers the Court or a Judge to declare that a solicitor, who has been employed to prosecute or defend any case, etc., shall have a lien on the property recovered or preserved through his instrumentality, is construed liberally, so as not to deprive the solicitor of his lien. A lis pendens registered by the solicitor against land, the subject matter of a redemption action, wherein costs were incurred by the soli-

citor, will not be discharged on a motion therefor in Chambers, but will be left for the decision of the trial Judge after the hearing of the evidence. *O'Flynn* v. *Middleton*, 23 Occ. N. 230, 5 O. L. R. 621.

Lien—*Money Paid into Court as Security for Costs—Priority of Execution Creditor.*]—Money paid into Court by a plaintiff in an action, as security for costs, is not property "recovered or preserved" by the solicitor for the plaintiff within the meaning of Con. Rule 1129 on which the solicitor's lien for costs will attach as against an execution creditor who has obtained a stop order. *Gibson* v. *Le Temps Publishing Co.*, 10 O. L. R. 434, 6 O. W. R. 410.

Lien on Fund in Court — Charging order—Priority over garnishing orders—Costs—Taxation. *Murray* v. *Royal Ins. Co.* (B. C.), 1 W. L. R. 8.

Lien on Title Deeds — Relationship of solicitor and client—Proceedings for partition—Conveyancing charges — Assault — Costs. *Daivard* v. *Macnee*, 2 O. W. R. 284.

Remuneration for Services Out of Court — *Quantum Meruit — Percentage.*] — The services of an attorney in procuring an option on and the purchase of an immovable, for a client, are purely a matter of quantum meruit, which the Court will fix at 5 per cent. upon the price. *Aylen* v. *Lindsay*, Q. R. 23 S. C. 345.

Solicitor-Trustee—*Profit Costs—Lien.*]—Held, that, notwithstanding the provision in s. 40 of the Manitoba Trustee Act, R. S. M. c. 146, the rule of English law that a sole trustee who is a solicitor cannot charge against the trust estate profit costs for acting as solicitor for the estate, still prevails to the extent that he is not entitled as of right to have such costs taxed to him as a solicitor. Meighen v. Buell, 24 Gr. 503, followed. Cradock v. Piper, 1 Macn. & G. 664, distinguished. Held, also, that neither the Imperial Act 23 & 24 V. c. 127, nor the Ontario Rule 1129 founded upon it, gives a solicitor an absolute right to a lien for his costs upon property recovered or preserved through litigation, but only a discretionary power in the Court to charge the property. *Turriff* v. *McDonald*, 21 Occ. N. 545, 13 Man. L. R. 577.

Taxed Costs—*Additional Charges.*]—The solicitor can recover from the client only the amount of the bill of costs taxed, unless under agreements to the contrary or for extraordinary services rendered necessary in a cause. *Surveyer* v. *Drainville*, Q. R. 18 S. C. 527.

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3. *Taxation.*

Allowance of Lump Sum—*Work Done Out of Court—Power of Taxing Officer.*]—A solicitor employed by the assignee of a number of life insurance policies to collect $82,000 from eleven different insurance companies, of which payment was resisted on the ground that they were gambling policies, while the widow of the insured set up a trust for herself and her family, subject only to a lien for premiums paid and interest, after long negotiations, collected from nine of the companies, in all, $70,000, without suit, and also compromised the widow's claim, leaving $60,000 to his client, who by another solicitor then sued unsuccessfully upon the remaining policies. The former solicitor rendered a bill shewing in detail the negotiations, and charging disbursements and ordinary costs in connection with an action by the widow and for drawing claim papers and affidavits, and a further lump sum to cover the negotiations out of Court. On taxation of the bill the taxing officer allowed $3,200 in respect of the lump sum charged, having first, with the acquiescence of the parties, conferred with various referees, officers of the Court, and solicitors, as to charges usually made in such matters, and then determined the amount to be allowed in the light of his own general knowledge and experience: — Held, that the ruling of the taxing officer should be affirmed; and that, after himself issuing the order for taxation, the client could not claim to have the solicitor's remuneration assessed in an action. In re Attorneys, 26 C. P. 495, followed. *In re Johnston*, 21 Occ. N. 561, 22 Occ. N. 24, 3 O. L. R. 1.

Collection of Moneys—*Commission.*]—A bill of costs was 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, and this was allowed on taxation:—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. *In re Solicitor*, 21 Occ. N. 561.

Counsel Fees — *Allocatur — Tariff — Notice.*]—The Judicature Ordinance (R. O. 1888 c. 58), s. 462, enacted: "In all causes and matters in which duly enrolled advocates holding certificates as such and resident in the Territories are employed, they shall be entitled to charge and be allowed the fees in the 'Advocates' Tariff' appended to this Ordinance, or as the same may be from time to time varied by the Judges of the Supreme Court in banc." In view of this provision, on a taxation of a bill of costs by an advocate against his client it was held: — 1. That counsel fees are on the same footing as other fees allowed by the tariff, and an advocate can recover them from a client by action. 2. That an allocatur can be granted for such fees only as are prescribed by the tariff. 3. That any Judge of the Court may grant an allocatur for counsel fees before the Court in banc, and the giving of notice to the client of application for an allocatur for fees is discretionary. *Hamilton* v. *McNeill* (No. 2), 2 Terr. L. R. 151.

Delivery and Taxation of Bill of Costs — Præcipe order — Agreement with clients—Special order. *Re Solicitors*, 3 O. W. R. 771, 4 O. W. R. 217.

Delivery of Unsigned Bill—*Amended Bill after Order.*] — Solicitors having delivered an unsigned bill of costs, the clients

applied for and obtained an order that the solicitors should deliver a bill and for taxation of the same when delivered. Under this order the solicitors delivered a bill in which certain charges were made larger than they had been in the previous unsigned bill, and some new items were charged. Objection was taken on the part of the clients that nothing more should be allowed on taxation in respect to any item appearing in the new bill than was charged in respect of it in the first bill, nor should new items be allowed:—Held, that by applying for an order for delivery of a bill the clients must be considered to have consented to the old bill being withdrawn; and the objection could not prevail. *In re Solicitors*, 24 Occ. N. 57, 7 O. L. R. 41, 2 O. W. R. 220, 268, 400, 618, 1082, 3 O. W. R. 1, 4 O. W. R. 137, 302.

Expiry of Year—*Special Circumstances—Receipt of Client's Moneys—Commission.*]—An order for the taxation of an advocate's bill of costs ought not to be granted on the ex parte application of the client, where the bill has been rendered more than twelve months before the application to tax. Orders of course defined. Semble, (1) on an application to set aside an ex parte order to tax, if special circumstances are shewn by the client which would, in the opinion of the Judge, have warranted an order to tax on a special application, the ex parte order will be allowed to stand. (2) The receipt by the advocate from time to time of moneys belonging to his client, does not constitute such special circumstances, nor, although overcharges would, in certain circumstances, constitute such special circumstances, does the mere fact that a commission of 5 per cent. is charged on the collection of a sum of $1,200. On the trial of an action on an advocate's bill, the trial Judge may, without special circumstances appearing, and notwithstanding the lapse of twelve months from delivery, direct a reference or inquiry as to any disputed items, although no application to tax has previously been made. *Re McCarthy. McCarthy* v. *Walker*, 2 Terr. L. R. 346.

Order for Taxation — *Effect of Client Obtaining—Judgment—Certificate of Taxation Review — Time — Extension.*] — Where a client has obtained an order in the usual form for the taxation of an advocate's bill of costs upon which he has been sued, and for a stay of the action pending the taxation, although he has made no submission to pay the amount found due, the advocate, after the taxation is ended and the clerk's certificate signed, is entitled to an order giving him leave to sign judgment against the client for the amount found due. The certificate of the clerk is final and conclusive as to the amount due to the advocate unless an application be made for a review of the taxation under s. 529 of the Judicature Ordinance, 1893. That section applies to taxations between solicitor and client, as well as between party and party. There is no necessity for an application on behalf of the advocate to confirm the certificate of the clerk as a report. The clerk's certificate is not a report, and need not first be set aside before the application for a review, and the intention of s. 529 is, that a review thereunder should be had after the clerk's certificate has been signed. Since the repeal of s.-s. 7 of s. 491 of the Judicature Ordinance, 1893, there is no provision in our Rules as to the time within which a review of taxation can be made, and therefore the provisions of English Order 65, Rule 27 (41), so far as they relate to the time within which an application to a Judge for a review shall be made, are now in force in the Territories by virtue of s. 556 of the Judicature Ordinance, 1893. Where the time for review has expired, the Judge has power under s. 555, in a proper case, to extend the time for making the application for review. *In re McCarthy—McCarthy* v. *Walker* (No. 2), 4 Terr. L. R. 1.

Tariff.]—A charge in a bill of costs, although not justified by the item under which it is framed, may nevertheless be allowed if it can be sustained under any other item of the tariff. *In re Cowan*, 7 B. C. R. 353.

Terms of Bill—*Multiplicity of Proceedings—Postponement of Mortgage Sale—Retainer—Counsel Fees—Commission on Collections.*] — Where separate proceedings were taken by plaintiff's advocate upon two mortgages, one made to the plaintiff in her personal capacity, and the other made to a deceased person of whose will the plaintiff was executrix, and the plaintiff, on taxation at her instance of the advocate's bill of costs, failed to shew that the claim upon the first mentioned mortgage arose with reference to the deceased's estate, the advocate was held entitled to charge his client, the plaintiff, with separate bills of costs in respect of each of the separate proceedings. Where proceedings for the sale of property in question in mortgage actions were postponed from time to time upon the solicitation of the mortgagor, and without instructions or consent of the plaintiff, the mortgagee, for the purpose of enabling the mortgagor to raise the necessary money to pay off the mortgage debt, and where these successive postponements resulted in securing for the mortgagee a larger sum than could have been realized by a forced sale, and the mortgagee accepted the benefit thus secured for her, she was held liable to pay to her advocate the costs and expenses incurred in connection with the various postponements. Where the order for taxation of an advocate's bill of costs, obtained at the instance of the client, did not reserve to the client the right to dispute retainer:—Held, that the retainer must be taken to be admitted; and where in such a case the advocate had stated in writing that he did not intend to charge anything for certain proceedings taken without special instructions, but it appeared that the statement was made without consideration, the advocate was allowed his costs of such proceedings. Upon the taxation of an advocate's bills of costs no counsel fee should be allowed in respect to an application made by a clerk of the advocate, and evidence should be given on the taxation that the applications for which a counsel fee is asked were in fact made by an advocate. An application to postpone a sale is a common application for which $2 only should be allowed. Upon the taxation of his bill, the advocate will not be allowed a lump sum as commission upon a collection made for his client, unless such evidence is produced before the taxing officer as will enable him to ascertain that the commission represents reasonable and proper charges for services actually rendered. *In re McCarthy—McCarthy* v. *Walker* (No. 3), 4 Terr. L. R. 9.

IV. Partnership.

Death of Partner—*Motion for Peremption.*]—Where one member of a firm of advocates has died, and there has been no substitution of attorney, the remaining mambers of the firm continue to represent the party for whom the firm was acting, and are entitled to make a motion for peremption of suit, but a motion signed with the old firm name "by A. B. one of the said firm," is illegal and will be rejected. (Gill, J., diss.). *Wright* v. *Canadian Pacific R. W. Co.*, Q. R. 19 S. C. 105.

Departure of Partner from Province—*Notice of Peremption—Service on Remaining Partner.*]—Where a member of a firm of solicitors and advocates has notoriously ceased to be a member of the Bar or profession in the province, the service of a motion for peremption made on the remaining partner in the firm is valid service, the firm being the plaintiff's solicitors of record. *Chouinard* v. *Thompson*, 3 Q. P. R. 476.

Dissolution of Firm—*Effect on Subsequent Proceedings—Peremption.*]—When one member of a firm of solicitors dies or ceases practice, in consequence of a public appointment incompatible with the exercise of his profession, a party to an action represented by the firm is sufficiently represented by the remaining member or members of the firm. 2. If two solicitors have dissolved partnership, but have both continued to practise their profession, the client's mandate is held by both of them, and not by either of them acting alone, and therefore a motion for peremption served on one only of the the then partners is irregular and illegal. *Glass* v. *Eveleigh*, 21 Occ. N. 51, 3 Q. P. R. 357, Q. R. 18 S. C. 531.

Dissolution of Firm—*New Partner—Mandate—Pending Suit—Notice of Motion—Peremption.*] — The defendant was represented in this case when it was first instituted, by a firm of three solicitors, one of whom was subsequently raised to the Bench. Another solicitor then became a partner in the firm. The defendant presented a motion for peremption of the suit signed by the new firm. The plaintiff opposed the motion, on the ground that it was not shewn that the new firm, although containing two members of the former firm, had any mandate from the defendant to act for him in the case, in so far at least as the new member of the firm was concerned:—Held, dismissing motion for peremption with costs, that a member of a firm of solicitors who joins the firm after the institution of an action must shew that he is authorized to act therein. 2. If he does not do so, the subsequent proceedings must be signed by the remaining members of the firm alone. *Landry* v. *Pacaud*, Q. R. 19 S. C. 171.

V. Retainer.

Evidence of.]—A commencement of proof by writing is not necessary in order to allow an advocate to prove a retainer. *Mircault* v. *Bissonnette*, Q. R. 24 S. C. 25.

Termination of — *Costs Subsequent to Judgment—Limitation of Actions.*]—The employment of a solicitor to bring or defend an action, subject possibly to his right to claim payment of his costs on judgment being given, does not terminate on the giving of judgment, so long as anything remains to be done which it is the solicitor's duty under his retainer to do for his client's protection; and even, in the absence of such duty, where he does not elect to treat the contract as then at an end, but under his client's instructions acts for him thereafter in subsequent proceedings consequent upon the judgment, there is a continuation of such original contract. Where, therefore, after the giving of judgment in an interpleader issue, the solicitor for the defendant, against whom judgment had been given, continued, with the client's knowledge, to act for him in the taxation of the plaintiff's costs, and in the preparation and taxation of certain bills which the defendant was entitled to set off, his appointment continued until the completion of those proceedings, so that as against a claim for the amount of his bill of costs, the Statute of Limitations began to run only from the date of such completion. *Millar* v. *Kanady*, 5 O. L. R. 412.

VI. Other Cases.

Affidavit — *Scandal — Confidential Communication by Client—Privilege.*]—The plaintiff's claim was for payment of $6,000 which she alleged the defendant had received for her as the purchase money of certain real estate belonging to her, which she had employed the defendant to sell for her. She alleged that he had only paid over $500 of the money. The defendant, who was a solicitor, applied for an order for security for costs, on the ground that the plaintiff was permanently resident out of Manitoba, and, in support of the application, filed his own affidavit in which he set forth certain communications alleged to have been made by the plaintiff to him as her solicitor, and which, if true, shewed that she was not legally married to her alleged husband, and stated in effect that the plaintiff had returned to and was living with such alleged husband, who was a non-resident. On the plaintiff's application to have the affidavit taken off the files of the Court, it was argued on behalf of the defendant that the facts thus sworn to were relevant to the question whether the plaintiff was permanently resident out of the jurisdiction or not, as tending to shew that she was greatly under the influence of the alleged husband, and therefore likely to remain permanently with him:—Held, that the affidavit should be ordered off the files as containing matter which the plaintiff was entitled to have treated as privileged from disclosure and which was scandalous and irrelevant to the application. *A. v. B.*, 24 Occ. N. 249, 14 Man. L. R. 249.

Bar Council—*Appeal from Rulings of—Excess of Jurisdiction — Prohibition.*] — Although the law (61 V. c. 27, s. 2), forbids all appeals from rulings of sectional Bar councils pronounced against their members on complaints lodged against them, the Superior Court has, by virtue of art. 50, C. P., a right of control and surveillance over the tribunals formed by these sectional councils in such cases. This right and control will be exercised by a writ of prohibition, but only when the council dealing with the complaint exceeds

its jurisdiction and not otherwise. Semble, that informalities so grave that they amount to an excess of jurisdiction would justify the issue of a writ of prohibition, in spite of the wording of art. 1003, C. P., which seems to deny this right. Thus a writ of prohibition would not be granted when its object was an indirect appeal from the ruling of the council acting within the limits of its powers in inquiring into a complaint. In the case in hand the advocate against whom the complaint was lodged could not prevent the council hearing the complaint because there is an action for damages pending between the same parties based on the same facts before the Superior Court, the jurisdiction of the two tribunals being absolutely distinct; and, therefore, the Bar tribunal, in investigating such complaint, is not guilty of contempt of Court; and, besides, it is not for the member against whom a complaint is made to raise this objection. *Vidal* v. *The Bar of Quebec*, Q. R. 27 S. C. 115.

Client Acting for Himself — *Discontinuance.*] — The solicitor being merely the agent of the party to the action whom he represents, and the principal being at liberty to act without the concurrence of the agent, the former may personally file a discontinuance of the action, without the knowledge or consent of his solicitor. *Levasseur* v. *Town of Levis*, Q. R. 19 S. C. 212.

Client Acting for Himself — *Discontinuance—Settlement of Action by Parties—Rights of Solicitor, in Absence of Fraud.*]—The parties to a suit have a right to settle the same as they see fit, without the presence or assistance of their attorneys, provided such settlement be not made in fraud of their attorneys' rights. 2. Where an action was settled by the parties themselves without fraudulent intent, and in the settlement no mention was made of costs, a general inscription by the defendant on the whole of the issue as joined was held to be irregular; but the Court reserved the right of the defendant's attorney to proceed for his costs, and also the plaintiff's right to file a discontinuance of the action upon such terms as he might be advised. *Delaney* v. *Lionais*, Q. R. 19 S. C. 288.

Investment of Money — Liability to client—Guaranty. *Lewis* v. *Ellis*, 1 O. W. R. 356.

Maintenance and Champerty—*Action on Bill of Costs—Defence — Agreement of Solicitor to Conduct Action without Remuneration—Cross-action — Consolidation.*] — The bill of costs sued upon was incurred in respect of an action brought by plaintiff as solicitor for defendant. At the end of the litigation plaintiff rendered a bill for $1,755.89. He gave credit for $1,473.23. This left a balance of $282.66. For this, as well as for an $82.50 note, which was not paid, an action was brought. The bill was rendered more than a year previous, and no order for taxation was taken out, because negotiations were pending for settlement, it was said. On motion for summary judgment, defendant also denied that he ever consciously signed a retainer; and further alleged that plaintiff "took up the case on condition that he was to get his costs out of defendants; that if they failed all he would have to pay was the defendants' costs:"—Held, the agreement alleged was not champertous, nor in any way within the prohibition against maintenance. "It was never doubted that a solicitor might lay out his own moneys, as disbursements on his client's account, and a solicitor can conduct a case gratuitously out of charity or friendship towards his client." *In re Solicitor, Clark* v. *Lee*, 5 O. W. R. 631, 9 O. L. R. 708.

Misconduct — *Accepting Transfer of Client's Property after Judgment—Defeating Anticipated Execution—Fraud on Plaintiffs—Summary Jurisdiction.*]—Before the trial of an action for damages for tort the defendant's solicitor wrote to one of the defendants warning him of a possible judgment against him and advising him to make disposition of his property in anticipation of it. After verdict against the defendants, and pending argument on the motion for judgment, counsel (who was also one of the solicitors) for the defendants, obtained a transfer to himself of certain property belonging to the defendant union, which he credited with $500 on account of costs; subsequently judgment was entered for the plaintiffs for $12,500 and costs, and the plaintiff obtained the appointment of a receiver and issued executions, but nothing was realized: — Held, reversing the decision of Irving, J., Martin, J., dissenting, that the solicitor in obtaining the transfer to himself of the property was guilty of a fraud on the plaintiffs; and upon a summary application in the original action he was ordered to restore it or pay its value into Court, under penalty of attachment. *Centre Star Mining Co.* v. *Rossland Miners' Union, No. 38 Western Federation of Miners*, 11 B. C. R. 194, 1 W. L. R. 244.

Negligence—*Advice — Established Jurisprudence — Territories Real Property Act—Charge on Land — Execution—Sheriff—Tort—Pleading—Interpleader — Counterclaim — Bill of Costs.*]—Where a sheriff and an execution creditor are sued together in respect of an alleged irregular levy, the sheriff is not obliged to interplead, but may defend with the execution creditor. 2. A solicitor who advises his client according to the established jurisprudence is not guilty of actionable negligence if the decision upon which he relies is overruled. 3. Neither a solicitor nor a sheriff becomes a tort-feasor, as against a transferee whose transfer is unregistered, by registering, in the discharge of his duty, an execution of a judgment against lands of the judgment debtor. 4. The delivery of an execution with a requisition to the sheriff to charge and levy upon lands apparently belonging to the execution debtor does not give rise to any implied or express obligation on the part of the solicitor of record to indemnify the sheriff against loss or damage in consequence of irregular levy. 5. In an action by the sheriff against a solicitor for office fees and charges, the solicitor cannot counterclaim for overcharges in former bills paid to the sheriff by him in respect of matters in which the solicitor may have acted for the parties interested, because such overcharges, if recoverable, do not belong to the solicitor, but to his clients. In such an action, however, the solicitor may counterclaim for costs in a former suit in which he acted for the sheriff, notwithstanding his omission to render a signed bill of the costs prior to the filing of the counterclaim. Judgment in 21 Occ. N. 270, 4 Terr. L. R. 474, reversed. *Taylor* v. *Robertson*, 22 Occ. N. 80, 31 S. C. R. 615.

Payment of Bill—*Bailiff's Fees — Action for.*]—A bailiff has no recourse against a client who has paid his solicitor the amount of a bill of costs taxed, including the fees of such bailiff. *Decelles* v. *Paquette*, Q. R. 18 S. C. 124.

Right to Commission on Sale—Disclosure of agency. *McCullough* v. *Hull*, 1 O. W. R. 451.

Service on Defendant's Solicitor — *Dismissal of Action—Default of Plaintiff—Application by Plaintiff for Relief—Duration of Retainer—Absent Defendant.*]—Owing to a change in the plaintiffs' firm of solicitors an order for security for costs was not complied with and an order was made under Rule 1203 dismissing the action with costs, but no judgment was entered or costs taxed. When the order came to the knowledge of the plaintiffs' solicitors they at once moved under Rule 358 to be allowed to put in security and proceed with the action. Notice of this motion was served on the defendant's solicitor who, however, did not consider himself any longer entitled to act as his client had left the province when the action was dismissed and had left no address. The Master in Chambers held that so long as Rule 358 can be invoked, the action is still pending, and the solicitor on the record is still solicitor. *Muir* v. *Guinane*, 5 O. W. R. 324, 9 O. L. R. 324.

SPEAKER OF LEGISLATIVE ASSEMBLY.

See ASSAULT — CONSTITUTIONAL LAW.

SPECIAL CASE.

Forum.]—Quære, whether a special case stated under 53 V. c. 4, s. 139 (N.B.), should not be first heard by the Judge in Equity. *Ward* v. *Hall*, 34, N. B. Reps. 600.

See COURTS.

SPECIAL DAMAGE.

See DEFAMATION—PLEADING—SEDUCTION.

SPECIAL INDORSEMENT.

See WRIT OF SUMMONS.

SPECIAL JURY.

See TRIAL.

SPECIAL OCCUPANT.

See WILL.

SPECIALTY.

See LIMITATION OF ACTIONS.

SPECIFIC PERFORMANCE.

Agent — Fraud — Amendment — Delay. *Aitcheson* v. *McKelvey*, 1 O. W. R. 51, 355.

Contract — *Option — Purchase of Land —Time — Ejectment — Injunction to Restrain.*]—Time is of the essence of unilateral agreement, such as an option to purchase land. On an application for an injunction order, in a suit for the specific performance of an agreement for the sale of land, to restrain an action of ejectment by the vendor to recover possession of the land, the Court ordered that, on the defendant confessing the action of ejectment, the plaintiff should be restrained until further order from taking possession; otherwise the application should be dismissed. Semble, that relief by specific performance cannot be obtained under s. 283 of 60 V. c. 24. Freeman v. Stewart, 2 N. B. Eq. Reps. 365; *Stewart* v. *Freeman*, 22 Occ. N. 211.

Contract for Sale and Purchase of Land — *Agent of Purchaser — Action by Agent—Delay of Purchaser — Resale—Right of Sub-Purchaser to Join Vendor as Party.*]—Where an agent makes a contract for the purchase of land in his own name, the vendor knowing that the agent is acting for another person, whose name is not disclosed, the agent cannot maintain an action in his own name against the vendor for specific performance of the contract. Where the value of land is uncertain and speculative, the purchaser thereof must act upon his rights with reasonable diligence and promptitude, upon pain of losing them. The owner of land of that character on the 1st May, 1900, contracted to sell it to H., but was never paid anything upon the purchase money, although $50 was to be paid down, and $200 in six months, to be secured by H.'s note, which never was given. On the 29th August, 1900, H. contracted to sell the land to the plaintiff acting for an unnamed principal, and the owner was willing to carry out the resale:—Held, that the whole course of proceedings on the part of the plaintiff's principal (set out in the case) shewed that he had been endeavouring to keep alive his claim to the land as long as possible in order that he might take it if it increased in value, without committing himself actually to buy it, in case it should depreciate, and the action should be dismissed as against both defendants:—Held, that the owner was properly joined as a defendant: the foundation of the right against him being that the plaintiff or his principal was the equitable owner under his contract with H. of H.'s rights against the owner of the land, and might join the latter upon offering to perform H.'s contract. *Smith* v. *Hughes*, 23 Occ. N. 108, 5 O. L. R. 238, 2 O. W. R. 19.

Contract for Sale and Purchase of Land — *Bill of Complaint — Allegation of Tender — Demurrer — Evidence.*]—Where in a suit for specific performance of an agreement for the sale of land, the question whether the plaintiff had made a tender of

the purchase money within the time limited by the agreement was one of evidence, a demurrer to the bill on the ground that it did not allege a tender in time was overruled. *Stewart* v. *Freeman*, 22 Occ. N. 369, 2 N. R. Eq. Reps. 408.

Contract for Sale and Purchase of Land—*Judgment for Payment of Price — Extension of Time—Payment on Account—Liquidated Damages—Forfeiture — Relief Against.*]—After judgment in an action by the vendors of land for specific performance, and before issue of the same, the vendors agreed to extend the time for the payment of the purchase money for three months, upon the terms of the purchaser paying down $500; which extension was embodied in the judgment, and it was agreed between the parties as follows: "If the defendant shall pay the balance of the purchase money within the time limited by the judgment, the plaintiffs shall give credit to the defendant upon the said balance for the said sum of $500, but, if the defendant shall fail to make payment of the said balance within the time limited by the said judgement, then the plaintiff shall not be bound to give credit to the defendant upon the said balance for the said sum of $500, and in this respect time shall be of the essence of the contract." A few days after the expiry of the time limited by the judgment, the defendant tendered the purchase money, less $500, which the plaintiffs refused to accept:—Held, that the above provision was in the nature of a forfeiture, and not of liquidated damages, and the purchaser was entitled to be relieved from the terms of the judgment and to have a conveyance of the property upon paying the balance due after credit given for the $500. *Empire Loan and Savings Co.* v. *McRae*, 23 Occ. N. 229, 5 O. L. R. 710, 2 O. W. R. 325, 405.

Contract for Sale and Purchase of Land — *Oral Contract—Statute of Frauds —Part Performance — Possession—Note or Memorandum — Delivery of Deed in Escrow.*]—Specific performance of an oral contract for the sale and purchase of land was adjudged at the suit of the vendee, who had gone into possession of the land on the faith of the contract and openly and continuously for some time remained in visible possession by his tenants, to the knowledge of the vendors and without objection on their part. It was considered that, under the circumstances, possession should be assumed to have been taken with the assent of the vendors, and the possession was of such a character as to exclude the operation of the Statute of Frauds. Quære, whether a conveyance of land defectively executed and delivered in escrow and retained in the vendor's own possession, to be handed to the vendee on payment of the purchase money, can be regarded as a note or memorandum in writing of a previous parol contract between the parties for a sale of the land on the terms mentioned in the deed. *McLaughlin* v. *Mayhew*, 23 Occ. N. 277, 6 O. L. R. 174, 1 O. W. R. 308, 2 O. W. R. 10, 590.

Contract for Sale and Purchase of Land — *Taking Possession—Acts Constituting Part Performance.*]—Possession is part performance of a contract for the sale and purchase of land both by and against a

stranger and the owner. On negotiations for the purchase of land the agent of the plaintiff, vendor, told the defendant, purchaser, that the lot was his. The defendant went on and set in the ground a number of stakes to mark out the foundation of a proposed house, and then changed his mind and refused to carry out the purchase:—Held, that what he had done constituted such a taking of possession as to constitute part performance, and that the plaintiff was entitled to the usual judgment for specific performance. *Bodwell* v. *McNiven*, 23 Occ. N. 107, 5 O. L. R. 332, 1 O. W. R. 841.

Contract for Sale of Land—Alteration of written offer — Onus — Damages — Pleading — Division Court — Claim within jurisdiction of—Costs—Solicitor. *Prittie* v. *Laughton*, 1 O. W. R. 185.

Contract for Sale of Land — Correspondence — Statute of Frauds—Agent. *White* v. *Malcolm*, 1 O. W. R. 302.

Contract for Sale of Land—*Fraudulent Scheme—Costs.*]—The plaintiff brought his action against P., R., and H., for specific performance of an agreement for sale of land by H. to the plaintiff, and alleged that both P. and R. had notice of his claim as a bona fide purchaser from H., and that they had dealt with the land in pursuance of a fraudulent scheme and device to deprive him of his interest. P. set up that he was a bona fide purchaser for value, without notice. R. set up that the plaintiff was in default under the covenants in the agreement, and that as assignee he had cancelled the same and declared it void:—Held, that the circumstances shewed a dishonest and fraudulent design, devised and carried out by R., to get the land of the plaintiff; to have the benefit of the $200 the latter had paid to H. and all the improvements, including a good house, without any compensation, all in violation of the promise made and in fraud of the undertaking given in his (R.'s) name, so that the plaintiff was entitled to relief against R. The plaintiff having omitted to register his agreement, P. was not shewn to have had knowledge of his interest in the land; there was not against him any proof of actual notice, and the evidence of constructive notice through one Haney was far from being conclusive. As to R. he was guilty of fraud in dispossessing the plaintiff of his land, after promising and undertaking to protect him. The plaintiff should recover by way of damages what he paid to H. as purchase money, with interest. Verdict for the plaintiff for $200 with interest from the 1st December, 1902. R. to pay all costs of suit, those incurred by his co-defendants as well as those of the plaintiff. *Cusack* v. *Parker*, 24 Occ. N. 272.

Contract for Sale of Land—Possession. *Abbott* v. *Gusin*, 1 O. W. R. 482.

Contract for Sale of Land—Possession—Waiver — Improvements—Account — Title by possession — Costs. *Rankin* v. *Sterling*, 3 O. L. R. 646, 1 O. W. R. 243.

Contract for Sale of Land—Shortage —Statement of Vendor — Laches. *Reilly* v. *McDonald*, 1 O. W. R. 196, 721, 723, 784, 849.

Contract for Sale of Land—Time — Essence of—Delay—Waiver. *Long* v. *Eby*, 1 O. W. R. 420.

Contract for Sale of Land by One Executor without Authority—*Personal Liability of Executor for Misrepresentation—Statute of Frauds.*]—An offer in writing was made on behalf of the plaintiff to R., one of three executors of S., for the purchase of land belonging to the estate. This offer was accepted by R., and a formal agreement of sale by the executors to the plaintiff was drawn up in R.'s office on the form used by the executors, which embodied the full terms and conditions of the sale. This agreement was forwarded to be executed by the plaintiff, the letter accompanying it being signed by R. The plaintiff executed the agreement and returned it to R. with a cheque for $250, being the cash payment on the sale. The agreement and cheque were received by R., but were almost immediately returned by him, upon the ground that he had previously offered the property to another person:—Held, that there was an agreement for the sale of the land in question sufficient to satisfy the requirements of the Statute of Frauds, entered into between the executors and the plaintiff, but R. had on the evidence no power to bind his co-executors. R. was liable for the misrepresentation of authority; where a man pretends to act on behalf of others, he impliedly promises that he is what he represents himself to be, and he must answer for any damage which directly results from confidence being given to his representation: Halbot v. Lens, [1901] 1 Ch. 344; Starkey v. Bank of England, [1903] A. C. 114. *Mancer* v. *Sanford*, 24 Occ. N. 70, 15 Man. L. R. 181, 1 W. L. R. 128.

Contract for Sale of Land by Trustees—Evidence of concurrence by all—Statute of Frauds — Correspondence. *Gibb* v. *McMahon*, 3 O. W. R. 645.

Contract for Sale of Mining Land—Formation of company—Construction of contract — Rectification—Shares — Breach — Time — Forfeiture — Waiver — Counterclaim — Work and labour — Assignment of chose in action — Notice — Part performance. *Clark* v. *Walsh*, 1 O. W. R. 228, 2 O. W. R. 72.

Contract to Convey Land—Consideration—Satisfaction of indebtedness to plaintiff's husband—Statute of Frauds — Correspondence — Offer to convey—Failure to comply with terms—Contract with husband —Laches—Concealment of facts. *Osment* v. *Blount* (N.W.T.), 1 W. L. R. 497.

Contract to Convey Land — *Description — Quantity of Land — Measurements —Occupation—Abatement of Price.*]—In an action for specific performance of a contract to convey lands, it appeared that the lands were described in the contract as "the house and premises on P. street, now occupied by Mrs. L., 32 feet more or less frontage on P. street and 67 more or less in depth," and that such lands did not possess a uniform depth of 67 feet, a piece 13 feet by 14 having been taken out of one side at the rear:—Held, that the implication as to the uniform depth of the lot, which would arise from the measurements given ought not to prevail, there being a certain description expressed in the agreement, viz., the occupation by L.; also, assuming that the distance to the rear line, from the measurements given, must be assumed to be equal, that the case was one in which the maxim falsa demonstratio non nocet applied, it being absolutely necessary to take the occupancy of L. in order to obtain the base line; and also, that the description answering to the holding ought to prevail ever the implied description, or subsequent addition, which would be false. *MacEchen* v. *MacDonald*, 37 N. S. Reps. 59.

Judgment—Extension of time—Payment —Forfeiture — Relief—Final order of sale. *Empire Loan Co.* v. *McRae*, 5 O. L. R. 710, 2 O. W. R. 325, 405.

Lease—Possession — Verbal agreement for purchase—Acts referable to agreement. *Howard* v. *Quigley*, 1 O. W. R. 96, 2 O. W. R. 694.

Lease — *Undertaking to Build — Non-performance in Lifetime of Lessor—Devise to Lessee — Damages.*]—By an instrument dated 29th January, 1901, a father leased a farm to his son for five years from the 1st March, 1901, at a yearly rental of $200 payable in October of each year, and undertook to build on the farm, during the first year of the term, a house of certain expressed dimensions. There was a provision in the instrument for the determination of the lease at the end of any year by notice to that effect given in October previous. The father died on the 19th June, 1902, after the expiry of the first year of the term, but had not built nor done anything towards building the house. By his will, dated the 7th February, 1901, he devised the farm to his son, but made no reference to the lease:—Held, that (the father having died after breach of the undertaking) the son was not entitled to have the house built at the expense of the father's personal estate, but at most was entitled to damages for non-performance of the agreement to build. Cooper v. Jarman, L. R. 3 Eq. 98, and In re Day, [1898] 2 Ch. 510, distinguished. *In re Murray*, 22 Occ. N. 373, 4 O. L. R. 418, 1 O. W. R. 576.

Timber Limits—Contract for sale of — Correspondence—Completed contract — Statute of Frauds — Misunderstanding — Title —Judgment — Reference. *Burton* v. *Playfair*, 1 O. W. R. 599.

See CHAMPERTY AND MAINTENANCE — CONTRACT — MORTGAGE — MUNICIPAL CORPORATIONS — PARTIES — STREET RAILWAYS—TRIAL—VENDOR AND PURCHASER —WAY.

SPEEDY TRIAL.

See TRIAL.

STAMP ACT.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

STATED CASE.

See ARBITRATION AND AWARD.

STATEMENT OF CLAIM.

See PLEADING.

STATEMENT OF DEFENCE.

See PLEADING.

STATUTE LABOUR.

See ASSESSMENT AND TAXES.

STATUTE OF FRAUDS.

See CONTRACT — CONVERSION — EXECUTORS AND ADMINISTRATORS — MASTER AND SERVANT — PATENT FOR INVENTION — PARTNERSHIP—SALE OF GOODS —SPECIFIC PERFORMANCE — TRUSTS AND TRUSTEES — VENDOR AND PURCHASER.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STATUTES.

Amending Act — *Retroaction — Sale of Land — Judgments and Orders — County Courts.*]—Until 1897 it was the practice in Manitoba for the Court of Queen's Bench to grant orders for the sale of lands on judgments of the County Court under Rules 803 et seq. of the Queen's Bench Act, 1895. In that year the Court of Queen's Bench decided that this practice was irregular, and in the following year the Legislature passed an Act providing that "in the case of a County Court judgment an application may be made under Rule 803 or Rule 804, as the case may be. This amendment shall apply to orders and judgments heretofore made or entered, except in cases where such orders or judgments have been attacked before the passing of this amendment;"—Held, Sedgewick, J., dissenting, that the words "orders and judgments" in said clause refer only to orders and judgments of the Queen's Bench for sale of lands on County Court judgments, and not to orders and judgments of the County Courts. Held, further, reversing the judgment of the Queen's Bench, 13 Man. L. R. 419, 21 Occ. N. 396, Davies, J., dissenting, that the clause had retroactive operation only to the extent that orders for sale by the Queen's Bench on County Court judgments made previously were valid from the date on which the clause came into force, but not from the date on which they were made. Held, per Sedgewick, J., that the clause had no retroactive operation at all. *Ritz* v. *Schmidt*, 22 Occ. N. 79, 31 S. C. R. 602.

Bills and Notes — *Place of Payment — Abrogation of Right to Elect Domicil—Current Instrument.*] — Although the provision of art. 85, C. C.—by virtue of which the indication of a place of payment in a bill or note or other writing, whatever be the place where it is dated, is equivalent to an election of the place so indicated as a domicil—has been abrogated by 63 V. c. 36 (Q.), such abrogation does not affect the election of domicil so made in a note signed before such abrogation. Therefore, it was open to the plaintiff in this case to sue the defendant at Montreal upon a promissory note dated at Montreal and payable there, although such note was really signed by the defendant in the Province of Ontario, where he was domiciled. *Merchants Bank of Halifax* v. *Graham*, Q. R. 19 S. C. 319.

Construction — *Expropriation of Private Property.*]—Statutes which encroach upon the rights of the subject in respect of his private property, or which enable public corporations to take his property without his consent, must be construed with the greatest strictness. *Smith* v. *Public Parks Board of Portage La Prairie*, 15 Man. L. R. 249, 1 W. L. R. 237.

Construction—*Limitation of Monopoly —Bridge.*]—Every limitation imposed by the legislature in creating a privilege, in this case a monopoly in favour of the owner of a bridge, must be interpreted as having for its object the diminishing as far as possible of the public inconvenience or the burden imposed by such monopoly. *Rouleau* v. *Pouliot*, Q. R. 25 S. C. 88.

Construction — Repeal—City charter— —Revocation—Change in governing body — Preamble of statute—Inconsistency with enacting parts. *Rex* v. *Pickering* (Y.T.), 1 W. L. R. 521.

Construction — *Toll-bridge — Franchise — Exclusive Limits—Measurement of Distance — Encroachment — 58 Geo. III. c. 20 (L.C.)*]—The Act 58 Geo. III. c. 20 (L. C.), authorized the erection of a toll-bridge across the river Etchemin, in the parish of Ste. Claire, "opposite the road leading to Ste. Thèrese, or as near thereto as may be in the county of Dorchester," and by s. 6 it was provided that no other bridge should be erected or any ferry used "for hire across the said river Etchemin, within half a league above the said bridge and below the said bridge:"—Held, Nesbitt and Idington, JJ., dissenting, that the statute should be construed as intending that the privilege defined should be measured up-stream and down-stream from the site of the bridge as constructed. Per Nesbitt and Idington, JJ., that there was not any expression in the statute shewing a contrary intention, and, consequently, that the distance should be measured from a straight line on the horizontal plane. But, per Idington, J.: In this case, as the location of the bridge was to be "opposite the road leading to Ste. Thèrese," and there was no proof that the new bridge complained of was within half a league of that road, the plaintiff's action should be maintained. *Rouleau* v. *Pouliot*, 25 Occ. N. 122, 36 S. C. R. 224.

Division Courts—4 Edw. VII. c. 12, s. 1 (O.) — Application to pending action. *Re Thom* v. *McQuitty*, 4 O. W. R. 522.

Error in Printing — *Effect of Amending Statute — Retroactivity — Assessment and Taxes — "Exempted."*]—The Assessment Act, R. S. N. S. 1900 c. 73, s. 4 s.-s. (p), by the accidental insertion of the word "exempted," rendered liable to assessment property of the plaintiffs previously exempted. It was admitted that the word imposing the liability was not contained in the manuscript revision of the statutes, but was inserted, by error, in the printed copy, deposited in the office of the Provincial Secretary, which, it was declared by the Act respecting the Revised Statutes, Acts of 1900, c. 44, s. 5, should be held to be the original. By an Act of the following year (Acts of 1902, c. 25), the error was corrected, by striking out of s. 4 (p) the word "exempted:"—Held, that, by this amendment, the Court was precluded from coming to the conclusion that the insertion of the word "exempted," in the chapter of the Revised Statutes amended, was a mistake, and inserted and printed accidentally, it being assumed, in the amending Act, that the section amended was in full force and effect from the time it came into operation, the amendment being one that would be out of place if the legislature had intended from the first that the word should not be there; that, in the absence of words giving the amendment a retrospective effect, it could not be so read, and that the Act, as amended, would only apply to future assessments; and that the liability of the plaintiffs having been fixed by c. 73, and there having been no appeal, the amendment would not have the effect of preventing the collection of the rate complained of. *Dominion Iron and Steel Co.* v. *McDonald*, 37 N. S. Reps. 1.

Imperative Provisions — *"Is Hereby Authorized" — "May" — Boys' Industrial Home—Warrant of Chairman—Custody of Boy Convict—Establishment of Home as Prison—Dominion Statute—Intra Vires—Certificate of Sentence.*]—In an application for a mandamus to the chairman of the Boys' Industrial Home to compel him to issue his warrant to deliver to the custody of the superintendent a boy sentenced to a term of imprisonment in the home under 56 V. c. 33 (D.), it appeared that s. 6 of the Act authorizes the gaoler to retain the boy "until there is presented to such gaoler a warrant from the chairman of the governing board (which warrant the chairman is hereby authorized to issue under his official seal) requiring the sheriff or constable or other officer to deliver such boy to the superintendent of such industrial home;" and that s. 9 of 56 V. c. 16 (N. B.) says "the said chairman may thereupon (referring to what shall precede the issuing of the warrant) issue his warrant," etc.:—Held, that the words "is hereby authorized" in s. 6, and "may" in s. 9, are not only enabling words but imperative as well, and the chairman has no discretionary power as to the issue of the warrant. That the Dominion Act establishing the home as a prison, is not ultra vires. That the chairman was not justified in refusing to issue the warrant because the certificate of sentence did not contain all the items of information specified in schedule A of the Provincial Act. *Ex p. The Attorney-General, In re Goodspeed*, 36 N. B. Reps. 91.

Inadvertent Use of Word—*Intention of Legislature—Way—Municipal Corporations—Property Fronting on Street.*]—1. Where it is clear on the face of a statute that it was intended to govern and provide for a particular state of facts, the Court will modify the ordinary meaning of words so as to permit such intention to have effect. Therefore, in 57 V. (Q.) c. 57, s. 1, the word "widening," in reference to Milton street, being used evidently by inadvertence for "opening," the statute should be read in connection with other statutes relating to the same subject, and should be interpreted so as to give effect to the intention of the legislature. Joseph v. City of Montreal, Q. R. 10 S. C. 531, referred to. 2. The clause "properties fronting" on the line of a street includes properties adjoining or contiguous to the line of the street on any side, although the buildings thereon front on a street intersecting the other, and the properties are only bounded on the side line by the street first mentioned. Judgment in Q. R. 15 S. C. 268 affirmed. *Watson* v. *Maze*, Q. R. 17 S. C. 579.

Interpretation—*Dual Language—Different Versions.*]—Where the text of one version of a statute appears to be in conformity with the intention of the Legislature, such version may be followed in the interpretation of the statute, notwithstanding that an ambiguity exists in the text of the other version. *Town of Coaticook* v. *People's Telephone Co.*, Q. R. 19 S. C. 535.

Interpretation—*Reference to Prior Statute—Amendments — Incorporation—Declaratory Act—Expropriation of Land—Charter of Montreal.*]—Where a statute declares that proceedings for expropriation shall be taken in conformity to a previous statute, it is the latter, with all its subsequent modifications, and notably that allowing an appeal from an award fixing the compensation to be paid for the lands expropriated, which regulates the proceedings for expropriation, and that in spite of the fact that the legislature has only indicated that statute, without mentioning the amendments which have been made to it. 2. A statute in its nature declaratory, adopted at the session following the passing of the statute in question, adding to the mention of the previous statute that of the statute which had amended it so as to allow an appeal from an award, applies to expropriations commenced during the time allowed for such purpose. *City of Montreal* v. *Poulin*, Q. R. 25 S. C. 364, 6 Q. P. R. 457.

Jurisdiction of Court—*County Court Judgment—Judicial Sale of Land.*]—Rule 807 (a), added to the King's Bench Act by 60 V. c. 4, is retrospective, and was intended to apply not only to orders which had been previously made and which had not been attacked, but also to the proceedings which had been taken under them, so as to validate judicial sales of land that had been made under orders to realize County Court judgments without the bringing of a separate action, which it had been held in Proctor v. Parker, 11 Man. L. R. 485, 18 Occ. N. 128, there was no jurisdiction before 60 V. c. 4 to make. *Ritz* v. *Schmidt*, 21 Occ. N. 396, 13 Man. L. R. 419.

Parliamentary Elections — *Controverted Election — Petition — Trial—Time—Amendment — Retroaction — Public Act.*]—The Quebec statute respecting controverted

elections, 1 Edw. VII. c. 7, enacting that "the trial of every election petition now pending, or which shall be pending in the future, must be commenced within the three months which follow the publication, pursuant to art. 213 of the Quebec Elections Act, 1895, in the Quebec Official Gazette, of the notice of the election of the member, given by the Clerk of the Crown in Chancery, and in default the petition shall be absolutely extinguished, perempted, void and of no effect," extinguishes and nullifies an election petition pending at the time of its coming into force, where the trial has not been commenced within the three months; and this although the petitioner has proceeded with all the diligence required by the previous statute. 2. If a party may derogate from and renounce certain statutes having the character of public order, which confer private rights upon him, he may not, by his mere act and will, hinder and arrest the effect of a statute of public order. 3. The statute respecting controverted elections, being a law politic, has a retroactive effect. *Sweeney* v. *Lovell*, Q. R. 19 S. C. 558.

Quebec Pharmacy Act — *Retrospective Legislation—Suit for Joint Penalties—Second Offences—Unlicensed Sale of Drugs.*]—The amendment of the Quebec Pharmacy Act by 62 V. c. 35, s. 2 (Q.), adding art. 4039 (b), R. S. Q., has no retroactive effect upon proceedings instituted for penalties under the Act before the amendment came into force. Penalties for several offences under the Act may be joined in one action, and, when the aggregate amount is sufficiently large, the action may be brought in the Superior Court as a Court of competent jurisdiction under the statute. Such action may properly be taken in the name of the Pharmaceutical Association of the province of Quebec. It is improper in such an action to describe subsequently charged offences as second offences under the statute, as a second offence cannot arise until there has been a condemnation for a penalty upon a first offence charged. The sale in the Province of Quebec by an unlicensed person of drugs by retail, whether or not such drugs be poisonous, or partly composed of poison, or absolutely free from poison, is a violation of the prohibition contained in art. 4035, R. S. Q., and whether or not the articles sold be enumerated in the Quebec Pharmacy Act as poisons or as containing an enumerated poison. Judgment in Q. R. 2 Q. B. 243 reversed; Taschereau and Gwynne, JJ., dissenting. *Pharmaceutical Association of Quebec* v. *Livernois*, 21 Occ. N. S. 31 S. C. R. 43.

Retroactivity—*Ultra Vires Act — Validating Act of Dominion Parliament—Construction — Execution — Exemption—Homestead.*]—The Exemption Ordinance, c. 45, R. O. 1888, s. 1, s.-s. 9, exempted from seizure under execution the homestead, to the extent of 160 acres, of the execution debtor. This sub-section having been declared ultra vires of the Legislative Assembly in In re Claxton, 1 Terr. L. R. 282, the Dominion Parliament, by 57 & 58 V. c. 29, declared that the territorial legislation on this subject "shall hereafter be deemed to be valid, and shall have force and effect as law:" —Held, that an execution filed against the homestead of the defendant prior to the passing of the validating statute constituted—but that an execution against the lands of the defendant filed subsequently to the passing of the said Act, did not constitute—a charge upon the homestead. Rules for construction of statutes considered. *Massey* v. *McClelland*, *Baker* v. *McClelland*, 2 Terr. L. R. 179.

Right of Appeal.] — A new statute giving a right of appeal which the previous statute denied is not applicable to an action begun under the operation of the old statute, even when such action is adjudicated upon after the coming into force of the new statute, which cannot be invoked in a cause begun while the previous statute was in force unless it merely changes the form of an already existing appeal. *Renecault* v. *Gagnon*, Q. R. 18 S. C. 127.

See ASSESSMENT AND TAXES — CHURCH —COMPANY — CONSTITUTIONAL LAW— CONTRACT — COPYRIGHT — COUNCIL OF CONCILIATION — CROWN — DISCOVERY —EXECUTION — INSURANCE — MUNICIPAL CORPORATIONS — PARLIAMENTARY ELECTIONS — RAILWAY — REVENUE — SCHOOLS — STREET RAILWAY—WAY.

STATUTORY DECLARATIONS.

See EXECUTORS AND ADMINISTRATORS.

STAY OF PROCEEDINGS.

Action in Foreign Court — *Reasons for Bringing — Judicature Act, s. 57 (10).*] —Where there are substantial reasons for the double litigation, the Court will not stay proceedings in an action in Ontario until after the determination of another action for the same cause pending in a foreign Court. The power to stay proceedings under s. 57, cl. 10, of the Judicature Act, R. S. O. 1897 c. 51, is a discretionary one, and the English cases are authorities as to the exercise of the discretion, although there is no similar statutory provision in England. Where the defendant, resident in Ontario, was sued there upon a promissory note, the Court refused to stay the action until after the determination of an attaching proceeding in a foreign Court, the effect of which, if successful, would be to make available towards payment of the note certain stock in a company domiciled in a foreign country. *First Natchez Bank* v. *Coleman*, 21 Occ. N. 437, 2 O. L. R. 159.

Agreement to Refer — *Application to Stay Action — Time.*]—An application under s. 11 of the Common Law Procedure Act, 1854, to stay proceedings in an action for the purpose of compelling the plaintiff to carry out an agreement to submit the matters in dispute to arbitration, must, under the practice now in force in Manitoba, be made before the filing of the statement of defence. *Northern Elevator Co.* v. *McLennan*, 22 Occ. N. 302, 14 Man. L. R. 147.

Claims in Contestation — *Payment by Defendant.*]—A motion by the defendant to stay the proceedings because of claims in contestation, in order that he may pay them, will be dismissed with costs; art. 1198, R. S. Q., indicates how, in such circumstances, the defendant should dispose of the sums which he owes. *Montambault* v. *Brien*, 4 Q. P. R. 328.

County Court Action — *Injunction Against — Declaratory Judgment — Jurisdiction—Practice.*]—Where no consequential relief is claimed, the Court's jurisdiction to make a declaratory order will be exercised with great caution. A declaration that the defendant is not entitled to proceed on a judgment recovered by him in another action against the plaintiff, will not be granted if, on a proper case being made out, the proceedings could have been stayed in the original action, except in special circumstances. A County Court Judge has jurisdiction to stay proceedings on a judgment in his Court, on a proper case for a stay being made out, such, for instance, as that the judgment has in effect been satisfied. In such a case an action in the Supreme Court to restrain the defendant from proceeding with his action in the County Court will be dismissed. *Williams* v. *Jackson*, 11 B. C. R. 133.

Former Action Pending—Identity — Consent judgment. *Campbell* v. *Baker*, 2 O. W. R. 504.

Injury to Person — Negligence — Accident — Evidence — Misdirection — Damages — New trial. *Witty* v. *London Street R. W. Co.*, 1 O. W. R. 228, 2 O. W. R. 578.

Injury to Person — Negligence — Collision — Contributory negligence — Proximate cause. *O'Hearn* v. *Town of Port Arthur*, 4 O. L. R. 209, 1 O. W. R. 373.

Injury to Person — Negligence—Duty —Jury — Damages — Reduction of. *Ford* v. *Metropolitan R. W. Co.*, 4 O. L. R. 29, 1 O. W. R. 318.

Jurisdiction of Local Master. *McAllister* v. *McEachren*, 3 O. W. R. 509, 641.

Litispendence — *Identity of Demands.*] —To afford reason for an exception on the ground of litispendence, there must be identity of demands in the terms of art. 1241, C. C. *Canada Industrial Co.* v. *Roddick*, 3 Q. P. R. 468.

Municipality — Agreement with — Specific performance — Bond—Injunction — Reference as to Damages — Transportation of freight — Resolution of Council — Statutes. *City of Ottawa* v. *Ottawa Electric R. W. Co.*, 1 O. W. R. 830, 2 O. W. R. 719.

Principal Demand — *Recours en Garantie.*]—A defendant who is sued for a debt as the principal debtor cannot, by dilatory exception, stay the principal demand by alleging that he is entitled to recours en garantie against a third person who has engaged to pay such debt for him to the plaintiff. *Rocher* v. *David*, Q. R. 18 S. C. 156.

Release of Plaintiff's Claim — Payment to plaintiff — Pleading — Fraud—Delay in applying. *Doyle* v. *Diamond Flint Glass Co.*, 3 O. W. R. 320, 356, 921.

Several Actions by Different Plaintiffs against Same Defendant — *Consolidation.*] — Twenty-nine actions having been brought by different persons against the defendant company for damages caused by the death of relatives in an explosion in the company's coal mine, and twenty-nine summonses for better particulars of the plaintiffs' claims having been dismissed, the defendants appealed:—Held, that the Court, by virtue of its inherent jurisdiction to prevent the abuse of its process, could and would, on the application of the defendants, stay proceedings in twenty-eight of the actions (upon defendants consenting to be bound in all the appeals by the result of one) until after the decision of the appeal in the remaining action—proper provisions being made in case that appeal did not properly dispose of the questions in all. The proper practice would have been to have applied to have the actions consolidated. *Bodi* v. *Crow's Nest Pass Coal Co.*, 9 B. C. R. 332.

Vexatious Action—*Security for Costs.*] —A special assignment for the benefit of creditors had been made by the plaintiff and his then partner to the defendant, who realized the assets and wound up the estate. The defendant's accounts were, after notice to the plaintiff, passed by a Surrogate Judge. The plaintiff then brought this action asking for an account and complaining of certain items of expenditure and compensation:—Held, on the evidence, that there were grave doubts as to the bona fides of the action; that an order to stay proceedings would be justified; but that in the exercise of discretion the action might be preceded with upon security for costs being given. *Smith* v. *Clarkson*, 24 Occ. N. 235, 317, 7 O. L. R. 460, 8 O. L. R. 131, 3 O. W. R. 593, 4 O. W. R. 55.

See APPEAL — ARREST — COURTS — EXECUTION — INFANT — JUDGMENT — NEW TRIAL — PARTIES — SCHOOLS.

STENOGRAPHERS.

See COURTS.

STIFLING PROSECUTION.

See MORTGAGE.

STIPENDIARY MAGISTRATE.

See CANADA TEMPERANCE ACT—CRIMINAL LAW.

STOCK SPECULATIONS.

See BROKER — BILLS OF EXCHANGE AND PROMISSORY NOTES.

STOLEN PROPERTY.

Bank Notes—Rights of finder—Proof of ownership — Inference from facts—Action against finder—Costs. *Union Bank of Canada* v. *Sheridan*, 3 O. W. R. 714.

STOP ORDER.

See PAYMENT OUT OF COURT.

STORAGE.

See BAILMENT.

STREAM.

See WATER AND WATERCOURSES.

STREET.

See WAY.

STREET RAILWAYS.

Board of Railway Commissioners—*Jurisdiction—Railway Act, 1903, ss. 23, 184—Use of Highway—Consent of Municipality—By-law.*]—In the case of a street railway, or of any railway to be operated as such upon the highways of any city or incorporated town, the consent of the municipal authority required by s. 184 of the Railway Act, 1903, must be by a valid by-law, approved and sanctioned in the manner provided by the provincial municipal law, and, in the absence of evidence of such consent having been so obtained, the Board of Railway Commissioners for Canada have no jurisdiction to enforce an order in respect to the construction and operation of any such railway. *Montreal Street R. W. Co.* v. *Montreal Terminal R. W. Co.*, 25 Occ. N. 121, 36 S. C. R. 369.

By-law — *Intra Vires* — "*Workmen's Tickets*" — *Amendment*—"*School Children's Tickets*"—*Action to Enforce Contract—Parties—Attorney-General—Specific Performance—Injunction—Declaration of Right.*]—Held, upon the proper construction of the defendants' Act of incorporation, 36 V. c. 100 (O.), the amending Act, 56 V. c. 90, and the contract and by-law contained in the schedule to the latter Act, that the defendants were bound to sell the tickets called "workmen's tickets" upon their cars to the public and to receive them in payment of fares at the hours mentioned in the by-law, not from workingmen only, but from the public generally; and that the provision of the by-law in that behalf was not ultra vires of the plaintiffs. 2. The aforementioned contract was modified, in accordance with a subsequent by-law of the plaintiffs, by requiring the defendants, in addition to the other limited tickets, to "give to any child between 5 and 14 years of age, when going to school, a ticket to go and return on the date of issue, for five cents:"—Held, that there was nothing in this amendment to prevent children, when going to school, from paying their fares by using workmen's tickets, within the prescribed hours. 3. That the plaintiffs could maintain an action for a mandamus or mandatory injunction to compel the defendants to continue to sell workmen's tickets, without adding the Attorney-General as a party representing the public. 4. The defendants, having refused to sell certain classes of tickets upon their cars, or to accept them from persons from whom they were bound to accept them in payment of fares, were restrained from running cars upon which these tickets were not kept for sale, and this restraint was coupled with a declaration that they were bound to sell them on their cars to all persons desiring to buy them, and to receive them from all persons in payment of fares during the hours mentioned in the by-law. City of Kingston v. Kingston, etc., Electric R. W. Co., 28 O. R. 399, 25 A. R. 462, distinguished. *City of Hamilton* v. *Hamilton Street R. W. Co.*, 25 Occ. N. 15, 8 O. L. R. 642, 4 O. W. R. 311, 411, 10 O. L. R. 594, 6 O. W. R. 207.

Construction of Contract—*Operation of Railway—Right of Municipality to Direct—Service—New Lines—Extension of Municipal Boundaries—City Engineer—Specific Performance—Special Case.*]—Under the agreement between the corporation of the city of Toronto and the Toronto Railway Company, which is set out in 53 V. c. 99 (O.), the right to determine what new lines shall be established and laid down, is vested in the city, and applies as well to the streets within the city, as it existed at the time of the making of the agreement, as to the streets in the territory from time to time brought within it, and for the company's failure to establish and lay down such new lines, the city is not limited merely to the right provided for in the agreement of granting such privilege to others. The right, under such agreement, to settle the time tables, and to fix the routes of the cars, to determine when open cars should be taken off in the autumn or resumed in the spring, and as to when and how cars should be heated, is for the city engineer, subject to the approval of the city council; but the city have no power to compel the company to continue to run, after mid-night, any car which, having started before midnight, cannot in due course finish its route by that time. On a special case stated in an action only such questions will be answered as must necessarily arise in the action. The Court, therefore, in view of 63 V. c. 102, ss. 1 and 5 (O.), being made applicable to the city, declined to answer a question raised in a special case as to the right of the city to have specifically performed those provisions of the agreement found in its favour; and an expression of opinion previously given against granting such specific performance, following Kingston v. Kingston Electric R. W. Co., 25 A. R. 462, was withdrawn. *City of Toronto* v.

Toronto R. W. Co., 25 Occ. N. 72, 9 O. L. R. 333, 4 O. W. R. 339, 44, 6 O. W. R. 677, 10 O. L. R. 657.

Contract with Corporation — *Construction of Contract—Snow and Ice.*]—The city council of Montreal being bound as the road authority to remove the ice and snow on the street from curb to curb, including the snow thrown or falling thereon from the roofs of houses and removed thereto from the sidewalks: — Held, that the respondent street railway company, having contracted with the city to keep their track free from snow and ice, did not, having regard to the surrounding circumstances, and in the absence of words expressly forbidding it, commit a nuisance by sweeping their snow into the street. Ogston v. Aberdeen District Tramways Co., [1897] A. C. 111, distinguished:—Held, also, that the city having granted to the company all rights and privileges necessary for the proper and efficient use of electric power to operate cars in the streets in the manner successfully in use elsewhere, the latter could not be prevented from using the electric sweepers. Judgment in Q. R. 11 K. B. 458 affirmed. *City of Montreal* v. *Montreal Street R. W. Co.*, [1903] A. C. 482.

Contract with Municipality—*Specific Performance—Damages—Impossibility—Railway Committee of Privy Council—Bond—Substituted Agreement.*]—Specific performance of an agreement by a street railway company with a municipal corporation to construct, equip, and operate a line of rails along certain streets in the municipality, cannot be enforced, nor can damages be awarded for non-performance of the contract, if the construction of the street railway has been rendered impossible, through the action of the Railway Committee of the Privy Council in refusing to sanction a crossing, or by reason of the occupation of the street by another railway company, whether with or without lawful authority, the duty of the municipality in the case of unlawful occupation being to restore the street to a condition to permit of the construction. When the obligor in a bond agrees, if required by the obligee, to perform certain work, and subsequently, by agreement between the successors in law of the obligor and the obligee, an absolute obligation to do the work is substituted, the effect of the later agreement is, to discharge the obligation created by the bond. *City of Ottawa* v. *Ottawa Electric Street R. W. Co.*, 21 Occ. N. 289, 1 O. L. R. 377, 1 O. W. R. 830, 2 O. W. R. 719.

Establishment of New Lines — Territory added to municipality—By-law—Notice — Electric Railways Act — Application of — Proclamation—Statutes—Specific performance —Special order—Mandamus—City engineer —Judicial powers—Notice—Option to grant powers to other persons—Places for stopping cars—"Service" — Determination — Recommendation—Approval by council—Resolution instead of by-law. *City of Toronto* v. *Toronto R. W. Co.*, 6 O. W. R. 871, 11 O. L. R. 103.

Extension of Lines—*Municipal By-laws —Changes in Lines — Validity — Mandatory Order—Injunction—Estoppel — Resolution.*] —The city of London council passed certain resolutions authorizing the extension of the lines and changing the routes of the plaintiffs' railways. The plaintiffs relied upon a by-law being passed later to affirm the resolution and went on with certain work and incurred expense. The by-law No. 2083 was afterwards passed, read a first, second and third time at one meeting of the council, signed by the clerk, sealed with the municipal seal, but the mayor refused to sign it. An action was brought to compel the mayor to sign the by-law and to compel the defendants to accept the agreement: — Held, that the company took the risk of the by-laws being carried, and that they were not misled; and it was incomplete and invalid without the mayor's signature:—Held, also, that two by-laws as to the routes and speed of the plaintiffs' cars were, under the circumstances valid as being within the defendants' power and authority under 59 V. c. 105 (O.), which validated a by-law of the defendants and an agreement between plaintiffs and defendants under which the plaintiffs built and operated their railway. By the original by-law, under which the road was authorized to be built and operated, as set out in the judgment of McMahon, J., 2 O. W. R. 44, the defendants were bound to establish new lines, as might be directed by by-laws of defendants, in the proportion of one mile of track to every 2,000 inhabitants of the city then existing or thereafter extended, the population to be ascertained as mentioned in the by-law, and that in the event of any local municipality being annexed, the railways of the company within the annexed municipality, and the company, in relation thereto, should have all the rights and be subject to the terms of the by-law. A local municipality, London West, was annexed to the defendants' municipality in 1898, and at the time of annexation had a street railway trackage of 5,900 feet. The population of the city in 1901 was 39,183, being an increase of 4,183, and the proportion of additional trackage to population was 11,043 feet. By a subsequent by-law defendants were directed to construct 7,380 feet of additional track: — Held, Maclennan, J.A., dissenting, that under the original by-law when the population was raised by the absorption of the municipality of West London, the track mileage in that municipality could not be treated for the purposes of by-law 916 as extension quoad the increased population. It was the increase of the population of the city, no matter how its borders were extended, which gave the council the right under the prescribed conditions to require the extension of the existing track mileage, whatever that might be. *London Street R. W. Co.* v. *City of London*, 3 O. W. R. 123, 9 O. L. R. 439.

Grading Street — *Liability for Loss of Support.*] — A street railway company in grading a street in Vancouver, in accordance with an agreement entered into with the corporation, pursuant to the Vancouver Incorporation Act and amendment of 1895, are not liable for damages for loss of support caused to lands adjoining the street. *Macdonell* v. *British Columbia Electric R. W. Co.*, 9 B. C. R. 542.

Injury to Child Crossing Track — Negligence—Failure of motorman to look—Contributory negligence. *Mitchell* v. *Toronto R. W. Co.*, 5 O. W. R. 128.

Injury to Passenger — *Contributory Negligence—Onus.*] — The plaintiff alighted

from a car of the defendants in which he was a passenger, and attempted to cross the street, when he was, while the car from which he had alighted was standing still, struck by another car going in the opposite direction, and injured. A rule of the defendants required that a motorman when passing another car should slacken speed and ring his gong continuously until car passed: — Held, upon the evidence, that the gong was not rung when the east-bound car was approaching and passing the standing car; that the car was running past the standing car at a rate of speed which was, under the circumstances, excessive and dangerous to the passengers alighting from the other car; and negligence was thus established. The onus of proving contributory negligence on the part of the plaintiff rested on the defendants in the first instance, and, in the absence of evidence tending to that conclusion, the plaintiff was not bound to prove the negative in order to entitled him to a verdict: Wakelin v. London and South-Western R. W. Co., 12 App. Cas. 41. To prove contributory negligence it is necessary for the defendant to shew that the plaintiff could, by the exercise of such care and skill as he was bound to exercise, have avoided the consequence of the defendant's negligence: Dublin and Wicklow R. W. Co. v. Slattery, 3 App. Cas. 1207. Upon the whole circumstances as detailed in the evidence, there was no proof of contributory negligence on the part of the plaintiff to disentitle him to recover. There was not a want of due care on the plaintiff's part as a proximate cause of the injury, which could alone constitute negligence sufficient to deprive him of his remedy against the defendants for their negligence. *Bell* v. *Winnipeg Electric Street R. W. Co.*, 24 Occ. N. 155.

Injury to Passenger — Damages — Release of claim—Validity of—Mental incapacity of plaintiff — Knowledge of defendants — Absence of fraud—Failure to notify plaintiff's solicitor—Costs. *Begg* v. *Toronto R. W. Co.*, 3 O. W. R. 517.

Injury to Passenger—*Dangerous Condition of Steps of Car—Climatic Conditions—Necessity for Care.*]—The steps of an electric car, owned and operated by the defendants, were in a slippery condition in consequence of exposure, while in use, to snow followed by rain, sleet, and cold. The evidence shewed that the car had been thoroughly cleaned in the morning, before being sent out, and that it would not have been practicable to operate it in such weather as that which prevailed at the time and to send it back constantly to the barn to have the snow and ice removed:—Held, that passengers boarding and leaving the car at such a time were bound to exercise more than ordinary caution, and that it would not be reasonable to hold the defendants accountable for injuries sustained by the plaintiff, a passenger on one of their cars, who, in getting off the car, slipped and fell. *McCormack* v. *Sydney and Glace Bay R. W. Co.*, 37 N. S. Reps. 254.

Injury to Passenger—Findings of jury — Proximate cause — Nonsuit — New trial. *Collins* v. *London Street R. W. Co.*, 3 O. W. R. 212, 553.

Injury to Passenger—*Negligence—Contributory Negligence — Passenger Alighting from Car run over by Another.*]—The plaintiff, a passenger on a crowded car of the defendants going westwards, being near the front of the car when it stopped at the street where he wished to alight, made his way past a number of persons in the passage and in the front vestibule to the steps at that end, on which another man was standing, and stepped off the car in the direction of the parallel track of the railway. Almost instantaneously upon alighting, he was struck by another car of the defendants (of whose approach he was not aware) proceeding eastwards on the other track, knocked down, and very seriously injured. The distance between the sides of two cars, when passing one another on the two tracks, was 44 inches, and the height of the lowest step of the car from the ground was 15½ inches. It was the custom of the company to permit passengers to alight at the front entrance, and they had no rule against it. It was, however, a rule of the company that motormen, when approaching another car, should slacken speed and ring the gong continuously until the car had been passed, which, however, was not done in this case:—Held, that the motorman on the car by which the plaintiff was struck was guilty of negligence, rendering the defendants liable in damages for the injury done to plaintiff, and that the plaintiff had not been guilty of contributory negligence. There is no binding authority for the proposition that from the moment a passenger's foot touches the ground, a street railway company's liability for injuries to him by their other cars ceases. *Bell* v. *Winnipeg Electric Street R. W. Co.*, 15 Man. L. R. 338, 1 W. L. R. 405.

Injury to Passenger—New trial—Questions for jury. *Stitt* v. *Town of Port Arthur*, 3 O. W. R. 126.

Injury to Passenger — Scope of conductor's authority—Attempt to pull person on moving car. *Dawdy* v. *Hamilton, Grimsby, and Beamsville Electric R. W. Co.*, 1 O. W. R. 364, 781.

Injury to Pedestrian—*Negligence—Excessive Speed—Means of Escape—Burden of Proof.*]—The plaintiff, proceeding along the track of the defendants, on a public street in the city of Sydney, was overtaken, struck, and severely injured by an electric car, driven at an excessive and dangerous rate of speed. At the time of the accident the plaintiff was prevented from escaping by a car of another line, which was obstructing the crossing in front of him, and by banks of snow, which had been thrown up by the defendants' plough at the side of the track upon which he was standing:—Held, that the burden of shewing that the plaintiff had means of escape, was upon the defendants; and that the plaintiff having the right to be where he was, and the whole event, from the moment he discovered his danger to the time he was struck, having happened in the course of a few seconds, he was not to be held to the obligation of selecting the best possible means of escape. *Ricketts* v. *Sydney and Glace Bay R. W. Co.*, 37 N. S. Reps. 270.

Injury to Person—Collision with vehicle —Contributory negligence—Proximate cause —Jury. *Cohen* v. *Hamilton Street R. W. Co.*, 4 O. W. R. 19.

Injury to Person — Negligence — Car running backwards. *Balfour* v. *Toronto R. W. Co.*, 2 O. W. R. 671, 5 O. L. R. 735.

Injury to Person — Non-repair of highway—Actionable breach of duty—Statute—Agreement with municipalities. *Stuart* v. *Metropolitan R. W. Co.*, 6 O. W. R. 255.

Injury to Person Bicycling on Highway—Crossing behind car—Approach of car from opposite direction — Failure to sound gong—Negligence—Contributory negligence — Nonsuit—New trial. *Preston* v. *Toronto R. W. Co.*, 6 O. W. R. 786, 11 O. L. R. 56.

Injury to Person Crossing Track — Collision — Negligence — Excessive speed—Warning — General verdict — Conflicting evidence—Excessive damages—New trial. *Furlong* v. *Hamilton Street R. W. Co.*, 2 O. W. R. 1007.

Injury to Person Crossing Track — *Collision — Rate of Speed—Negligence—Contributory Negligence—Proximate Cause—Appeal—New Point.*] — The plaintiff's waggon was struck and plaintiff injured by an electric tram car of the defendants, while attempting to cross the defendants' track, at a place known as Grand Lake Crossing, near which there was a down grade for a distance of about 3,000 feet, and then an up gradé for 1,000 feet, terminating at a siding near which the crossing was situated. On the down grade it was usual to run cars at a speed of from 20 to 25 miles an hour, but when half way down the power was shut off and the speed on reaching the siding was 10 miles an hour. When the plaintiff's team was first seen it was at a distance of from 35 to 40 feet from the crossing, and the car was distant from 50 to 75 feet. The motorman promptly applied the brakes and reversed the current, but was unable to avert the collision. The whistle had been blown when 300 yards distant from the crossing, and the car was provided with suitable appliances for stopping it within a reasonable time. The rate of speed at which the car was proceeding was reasonable considering the time and place. The plaintiff heard a whistle blown, which he supposed to be that of a Sydney and Louisburg train, but did not see the car until his horse's head was distant about 20 feet from the crossing. There was also evidence to shew that he failed to exercise proper care in approaching the crossing, as the reins were lying loose, and one witness called for the plaintiff testified that, at the time, the horse was being whipped and was galloping: — Held, that the proximate cause of the accident was negligence on the part of the plaintiff. A point not raised by the statement of claim, or at the trial, where evidence might have been given to displace the contention, should not be raised on appeal. *Livingstone* v. *Sydney and Glace Bay R. W. Co.*, 37 N. S. Reps. 336.

Injury to Person Crossing Track — Contributory negligence — Failure to look twice—Nonsuit. *Gosnell* v. *Toronto R. W. Co.*, 4 O. W. R. 213.

Injury to Person Crossing Track — Contributory negligence—Nonsuit. *Gallinger* v. *Toronto R. W. Co.*, 4 O. W. R. 522.

Injury to Person Crossing Track — *Negligence — Contributory Negligence — Nonsuit.*] — The plaintiff, in returning home at two o'clock in the morning, alighted from a west-bound car of the defendants on the north track of a street in a city, and proceeded to cross the north and south tracks on the street, in front of an approaching east-bound car on the south track, then about one hundred feet away. He was struck by the car and injured. There was evidence that it was going at the rate of 8 to 10 miles an hour; that there was a bright electric light near by; that the plaintiff, if careful, could have seen the approaching car; but that the motorman did not apply the brakes or sound the gong before the plaintiff was struck:—Held, that a nonsuit was properly directed in an action brought against the defendants for negligence. *Gallinger* v. *Toronto R. W. Co.*, 25 Occ. N. 10, 8 O. L. R. 698, 4 O. W. R. 522.

Injury to Person Crossing Track — Negligence — Findings of jury — New trial. *Taylor* v. *Ottawa Electric Co.*, 5 O. W. R. 564.

Injury to Person Crossing Track — Negligence — Evidence for jury — Neglect to give warning. *Daldry* v. *Toronto R. W. Co.*, 6 O. W. R. 62.

Injury to Person Walking on Track —Negligence—Cause of injury—Contributory negligence—Findings of jury—Neglect to give warning—Neglect to look for car. *Small* v. *Toronto R. W. Co.*, 6 O. W. R. 97.

Injury to Vehicle by Collision — *Negligence—Use of Tracks—Nuisance—Piling Snow at Sides of Tracks—Contributory Negligence.*]—A car of the defendants, driven at an excessive rate of speed, ran into the plaintiffs' waggon, which was proceeding along the track, from which the defendants had removed the snow accumulated there during a heavy snow storm, and deposited it on the highway in such a way as to make it impassable for waggons, which, to the knowledge of the defendants, were forced, in consequence, to make use of the defendants' tracks. The driver of the waggon made repeated efforts to attract the attention of the motorman, but failed though there was sufficient light and an unobstructed view for 400 yards:—Held, in an action for damages for negligence, that the plaintiff was entitled to recover; that the blocking of the highway by the defendants constituted in fact as well as in law a nuisance, and, the common law having been infringed, there was no burden cast upon the plaintiff to shew a requirement by the local authorities to level the snow to a certain depth over a certain area, and that such requirement had not been complied with; that if contributory negligence was relied on, the case was one in which the defendants must not only prove such negligence, but also that it was of such a character that they could not by the exercise of ordinary care and diligence have averted the mischief which happened; and that the restrictions in the company's charter in relation to the levelling of snow placed upon the highway, amounted to a condition. *Bell* v. *Cape Breton Electric Co.*, 37 N. S. Reps. 298.

Laying Double Track on Street — Injury to abutting land—Injunction—Permission of municipality—Resolution—By-law—Altering grade — Compensation—Obstruction

— Nuisance — Special injury. *Johnston* v. *London Street R. W. Co.*, 2 O. W. R. 1003.

Mortgage—*Future Property—Fixtures—Rolling Stock—Execution—Company.*] — An electric street railway company, incorporated under the Ontario Joint Stock Companies Letters Patent Act, R. S. O. 1887 c. 157, and subject to the provisions of the Street Railway Act, R. S. O. 1887 c. 171, gave to trustees for holders of debentures of the company a mortgage upon the real estate of the company, together with all buildings, machinery, appliances, works, and fixtures, etc., and also all rolling stock and all other machinery, appliances, works, and fixtures, etc., to be thereafter used in connection with the said works. The by-laws of the directors and shareholders (who were the same persons, and only five in number) authorizing the giving of the mortgage, directed it to be given upon all the real estate, plant, franchises, and income of the company, and the debentures stated that they were secured by mortgage of the real estate, franchises, rolling stock, plant, etc., acquired or to be acquired:—Held, that s. 38 of R. S. O. 1887 c. 157 does not restrict the power of mortgaging to the existing property of the company, and that a company is invested with as large powers to mortgage its ordinary after-acquired property as belong to a natural person; that the mortgage in terms covered future property, and, even if not authorized in this respect upon a strict reading of the by-laws, had been acquiesced in and ratified, and was binding:—Held, also, that the rolling stock, poles, wires, etc., formed an essential part of the corpus of what must be regarded as an entire machine, and were, therefore, fixtures and not seizable under execution to the prejudice of the mortgagees. *Kirkpatrick* v. *Cornwall Electric Street R. W. Co.*, *Bank of Montreal* v. *Kirkpatrick*, 21 Occ. N. 368, 2 O. L. R. 113.

Municipal By-law — *Conviction—Operating Car without Proper Vestibules—Persons Operating Car.*]—Conviction of a street railway company for that they did run and operate a street car which was not provided with proper and sufficient vestibules to protect the motormen and persons in charge of such car from exposure to cold, snow, rain, and sleet, while engaged in operating such car, contrary to the by-law of the municipality passed on the 24th September, 1894, numbered 3280, and intituled "A by-law to provide for the construction of vestibules for the shelter of motormen and others upon the cars of electric railway companies:" — Held, on motion to quash, that the conviction was valid upon its face, being in the terms of the by-law, and that the offence was sufficiently stated; also that the by-law was warranted by the statute. Semble, per Armour, C.J.O., that the conductor, unless he is acting instead of the motorman, is not a person engaged in operating the car; but that point would only arise upon the evidence, which the Court would not look at where the conviction was valid on its face and the magistrate had jurisdiction. *Regina* v. *Toronto R. W. Co.*, 21 Occ. N. 120.

Municipal By-law—*Highway—Removal of Snow—Indemnity.*]—By the provisions of a municipal by-law, to which a street railway company were bound to conform, the company were obliged to remove snow from their tracks in such a manner as not to obstruct or render unsafe the free passage of sleighs or other vehicles along or across the street. After a heavy snow-fall the company removed the snow from their tracks, the result being that there was a bank of several inches at each side of the tracks to the level of the snow-covered portions of the street:—Held, that the company had not discharged their obligation, and that they were liable to indemnify the city against damages recovered against the city by a person who had, in consequence of the bank, been upset while driving along the street. *Mitchell* v. *City of Hamilton*, 21 Occ. N. 372, 2 O. L. R. 58.

Negligence — *Collision — Contributory Negligence.*]—The plaintiff, who was driving a horse and waggon very slowly along a street on the left side of a car track, turned to the right to cross the track, and the waggon was struck by a car which was coming behind, at what was held to have been a reasonable rate of speed. The plaintiff said that one hundred feet from the point at which he had tried to cross he looked back and that no car was to be seen, and he did not look again before trying to cross:—Held, that it was his duty to have looked, and that his not having done so constituted contributory negligence on his part, which disentitled him to recover damages. Danger v. London Street R. W. Co., 30 O. R. 493, applied. *O'Hearn* v. *Town of Port Arthur*, 22 Occ. N. 255, 4 O. L. R. 209, 1 O. W. R. 373.

Negligence—*Danger to Public — Avoidance of — Notice of Action.*] — An electric tramway company ought to avoid everything which, without being absolutely necessary for its service, constitutes a danger to the public, and if the company does not do so it is guilty of actionable negligence. 2. The fact that a cause of danger can be suppressed only by means of an increase of labour or expense, is not an excuse for allowing it to subsist. 3. A provision of the charter of the Montreal Street Railway Company which obliges those who wish to sue it for damages to give a thirty days' notice, does not make of such notice a condition of the right of action against the company; it is but one of those prejudicial obligations the non-observance of which must be invoked by a dilatory exception. *Mattice* v. *Montreal Street R. W. Co.*, Q. R. 20 S. C. 222.

Negligence—*Evidence — Misdirection — Foreign Commission—New Trial.*]—The Supreme Court of New Brunswick, in banc, granted a new trial for misdirection, but this decision was reversed by the Supreme Court of Canada. *Hesse* v. *St. John R. W. Co.*, 35 N. B. Reps. 1, 20 Occ. N. 113, 30 S. C. R. 218.

Negligence — *Injury to Passenger — Car Running Backwards — Jury — Answers to Questions.*]—The plaintiff was injured by a waggon in which he was being driven being struck by an electric car of the defendants which was runing backward in a southerly direction on the easterly track in a street, which track, according to the usual custom of the defendants, should have been used only by cars running in a northerly direction. The motorman was at the northerly end of the car, and no special precautions were being observed. The jury were asked, by the Judge

presiding at the trial, to say, in the event of their returning a verdict for the plaintiff, what negligence they pointed to. The jury found that the defendants were responsible for the accident, for the reasons that the car was on the wrong track and the motorman at the rear end, and judgment was entered in the plaintiff's favour for the damages assessed:—Held, that this was a general verdict, which there was evidence to support, in the plaintiff's favour, with a statement of reasons which might be disregarded, and was not merely a specific finding in answer to a question. Per Armour, C.J.O.: Questions to the jury must be in writing. Per Osler, J. A.: While it is more convenient that questions to the jury should be in writing, the Judge is not bound to adopt that course. *Balfour* v. *Toronto R. W. Co.*, 23 Occ. N. 241, 5 O. L. R. 735, 2 O. W. R. 671.

Negligence — *Injury to Passenger—Conductor Attempting to Pull Passenger on Moving Car—Scope of Authority—Question for Jury—New Trial.*]—The plaintiff came to a platform station of the defendants and signalled an approaching car to stop. The car slowed down, but did not stop, and, as it was passing, the conductor seized the plaintiff's hand, and, while attempting to help her on board, signalled the car to go on again, which it did, and she was injured. The jury found that the plaintiff was injured by the conductor seizing her hand and trying to pull her on the car, and that he acted negligently:—Held, that it was the duty of the conductor to assist people in getting on and off the car, and that it might be within the line of his duty to assist those apparently about to get on a car while it is slowing up; that the question as to the scope of the conductor's authority is one of evidence; that there was evidence to go to the jury, and the effect of it was for them to consider; and that it should have been left to them to pass upon the circumstances of the case as to the scope of the conductor's authority. *Dawdy* v. *Hamilton, Grimsby, and Beamsville R. W. Co.*, 23 Occ. N. 44, 5 O. L. R. 92, 1 O. W. R. 364, 781, 2 O. W. R. 789.

Negligence—*Injury to Person — Failure to Give Warning.*]—The plaintiff, travelling by electric railway along a country road on a dark night, got off at a regular stopping place. He then turned back along the road, and, after walking for some distance, the car by which he had travelled, backing up, struck and injured him. There was a light at both ends of the car, but the current was very weak at the time, and the light given very slight, and the motorman came within four or five feet of the plaintiff before seeing him. The car was going along at the rate of only three or four miles an hour. The motorman did not sound the gong nor give any other warning of his approach:—Held, that the case could not properly have been withdrawn from the jury; that the accident was fairly and properly attributable to the defendants' negligence; and that there had been no misdirection, but that the sum awarded by the jury as damages, $1,800, was largely in excess of what had been given in cases of much more serious injury, although it cannot be said that there is a standard of damages in such cases. New trial directed unless the plaintiff would consent to the reduction of his verdict to $900. *Ford* v. *Metropolitan R. W. Co.*, 22 Occ. N. 227, 4 O. L. R. 29, 1 O. W. R. 387.

Operation — *Municipal Franchise—Construction of Contract — Suburban Lines — Percentages upon Earnings Outside City Limits.*]—The corporation of the city of Montreal called for tenders for establishing and operating an electric passenger railway within its limits in accordance with specifications, and subsequently entered into a contract with a company then operating a system of horse tramways in the city, which extended into adjoining municipalities. The contract, dated the 8th March, 1893, granted the franchise to the company for the period of 30 years from the 1st August, 1892. A clause in the contract provided that the company should pay to the city, annually during the term of the franchise, "from the 1st September, 1892, upon the total amount of its gross earnings arising from the whole operation of its said railway, either with cars propelled by electricity or with cars drawn by horses," certain percentages specified according to the gross amounts of such earnings from year to year. Upon the first annual settlement, on the 1st September, 1893, the company paid the percentages without any distinction being made between their earnings arising beyond the city limits and those arising within the city, but subsequently they refused to pay the percentages except upon the estimated amount of the gross earnings arising within the limits of the city. In an action by the city to recover percentages upon the gross earnings of the lines of tramways both inside and outside of the city limits:—Held, reversing the judgment below, Taschereau, C.J.C., and Killam, J., dissenting, that the city corporation were entitled to the specified percentages upon the gross earnings of the company arising from the operation of the tramway both within and without the city limits. *City of Montreal* v. *Montreal Street R. W. Co.*, 24 Occ. N. 165, 34 S. C. R. 459.

Operation — Right of municipality to direct — Service — New lines—Extension of municipal boundaries — Time tables and routes — City engineer — Details as to cars —Specific performance — Private statute— Special case — Hypothetical question — Refusal to answer — Costs. *City of Toronto* v. *Toronto R. W. Co.*, 4 O. W. R. 330, 446.

Operation of Cars — Sunday cars — Injunction. *Township of Sarnia* v. *Sarnia Street R. W. Co.*, 6 O. W. R. 367.

Payment of Proportion of "Gross Receipts" — *Intra Vires.*]—A covenant by the defendants to pay to the plaintiffs a certain proportion of the defendants' gross receipts was held to be not beyond the powers of the plaintiffs, a city corporation, and the defendants, a street railway company. Upon the proper construction of the covenant, the term "gross receipts" was held to include fares paid by passengers without the corporate territorial limits of the plaintiffs, where the passengers began their journey upon the defendants' railway beyond such limits; and also to include traffic receipts not yet earned, such as receipts from the sale of passengers' tickets still outstanding. *City of Hamilton* v. *Hamilton Street R. W. Co.*, 24 Occ. N. 372, 8 O. L. R. 455, 4 O. W. R. 47, affirmed. 6 O. W. R. 206, 10 O. L. R. 575.

Penalty—Breach of statutory duty — Fencer at "front" of car—Car moving reversely. *City of Toronto* v. *Toronto R. W. Co.*, 6 O. W. R. 574, 10 O. L. R. 730.

Sale of Workmen's Limited Tickets —Specific performance — Mandatory injunction — Interim order — Convenience. *City of Hamilton* v. *Hamilton Street R. W. Co.*, 4 O. W. R. 207.

Sale of Workmen's Limited Tickets —School children's tickets—Specific performance—Mandatory injunction — Parties — Attorney-General. *City of Hamilton* v. *Hamilton Street R. W. Co.*, 4 O. W. R. 311, 411.

Sunday Cars — Breach — Forfeiture—Injunction — Damages — Liability of plaintiffs for costs. *Township of Sarnia* v. *Sarnia Street R. W. Co.*, 6 O. W. R. 478.

STYLE OF CAUSE.

See WRIT OF SUMMONS.

SUBPOENA.

Absence of Signature of Prothonotary — *Nullity.*]—An original subpœna not signed by the prothonotary or his deputy is absolutely void. *Tapley* v. *Irving*, 4 Q. P. R. 319.

See DISCOVERY—WITNESSES.

SUBROGATION.

Essentials of — *Creditor — Volunteer.*] —The doctrine of subrogation is part of the law of the province of Nova Scotia. 2. Subrogation arises either upon convention or by law, but in the province of Nova Scotia the creditor must be a party to the convention. It is not sufficient that it be with the debtor only. 3. Subrogation by operation of law is recognized not only by the civil law, but it has been adopted and followed by courts administering the law of England. 4. It is an incident of the doctrine of subrogation that an obligation extinguished by a payment made by a third party is treated as still subsisting for his benefit. 5. Where one is entitled to be subrogated to the rights of a judgment creditor, he is to be subrogated to all and not to part only of the latter's rights in such judgment. Semble, that a mere stranger or volunteer, who pays the debt of another, without an assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own, cannot invoke the benefit of the doctrine of subrogation. *Regina* v. *O'Bryan*, 21 Occ. N. 278, 7 Ex. C. R. 19.

Hypothec — *Payment — Tiers-de-tenteur —Registration — Mistakes of Registrar.*]—F. on the 13th May, 1893, hypothecated to O. lots 87, 119, 130, and 132. Subsequently A. became tiers-de-tenteur of 87 and half of 132. Later J. became tiers-detenteur of 119 and 130 and other half of 132. Neither A. nor J. was bound to pay the claim of O. On 22nd April, 1899, and 12th February, 1900, J. borrowed $500 from E. and hypothecated to him the lands of which he was tiers-detenteur. On the 9th November, 1901, in order to obtain legal subrogation, E. paid the claim of O., who gave him a quittance and granted him conventional subrogation. On 23rd November, 1901, A. sold the lands of which he was tiers-detenteur to M., and charged upon the purchase price the payment of O.'s claim, to which E. was subrogated. On 26th November, 1901, to comply with this obligation, M. paid to E. the O. claim and obtained a quittance, which stated that the payment was made out of the purchase money due to A. and in accordance with the terms of the sale, and that it was a general and final quittance and for radiation of the hypothec. The lands of which J. was the tiers-detenteur were sold by the sheriff, and the proceeds were to be distributed:—Held, that the right and interest of A. (or of M.) to obtain legal subrogation was superior to those of E., for A. was interested in paying off the debt to free his land from the hypothec. 2. That A., by this payment made by his purchaser out of the purchase money to E., had obtained legal subrogation in the O. claim, in spite of the terms of the quittance signed by E. 3. But that the lands of A. (sold to M.) being equally affected by the claim of O., A. could claim out of the proceeds of the sale of J.'s lands only a deduction of that portion of the O. claim which these lands should bear in proportion to their value; and such was the extent of the legal subrogation obtained by A. 4. That E., not being an assignee nor a subsequent subrogate, could not complain of the want of registration of the legal subrogation obtained by A. 5. That the registrar's mistakes or irregularities or erroneous interpretation of documents regularly produced before him could not injuriously affect the rights of A. 6. That to obtain registration of the quittance granted by E., it was sufficient to produce a copy of it to the registrar, which had been done, and the quittance shewed the legal subrogation. *Bélanger* v. *Boissonnault*, Q. R. 22 S. C. 53.

SUBSEQUENT INCUMBRANCERS.

See MORTGAGE.

SUBSIDY.

See RAILWAY.

SUBSTITUTION.

Restraint on Alienation—*Substituted Property — Right to Alienate—Creditors' Rights.*]—A restraint upon alienation provided for in a substitution pure and simple, being confirmative of the substitution, does not hinder the alienation of the property substituted subject to the rights of those in remainder if the substitution is opened. Therefore, the creditors of the tenant for life may,

in spite of the restraint upon alienation, procure a seizure and sale of the immovable substituted, subject to the opening of the substitution. *Turcot* v. *Charters*, Q. R. 18 S. C. 24.

See PLEADING.

SUBWAY.

See RAILWAY.

SUCCESSION.

Claims on — *Alimentary Allowance for Widow.*]—A widow, as such, has no right to an alimentary allowance from the succession of her deceased husband. *Peloquin* v. *Brazeau*, 5 Q. P. R. 128.

Claims on — *Widow's Mourning.*] — A widow who sues to obtain from her husband's succession a provision for the expense of her mourning, has a right herself to choose what she regards as proper to buy, and the person who is obliged to pay for the mourning must pay such a sum as is fitting, having regard to the estate and fortune of the deceased; a detailed account of the cost of the mourning cannot be claimed. *Peloquin* v. *Brazeau*, 5 Q. P. R. 129.

Heritier Beneficiaire — *Seisin — Liability for Debts — Account.*] — An héritier bénéficiaire is, like an héritier pur et simple, seised of the succession as soon as it is opened, with this difference, that he is not personally liable for the debts of the succession. He may be sued for such debts, and the creditors, before bringing action, are not obliged to demand and await an account. *Picard* v. *L'Hôpital Général de Quebec*, Q. R. 26 S. C. 159.

Renunciation of — *Mandate of Attorney — Execution — Registration.*]—In the absence of proof of express mandate, an allegation of renunciation of a succession made by an attorney ad litem, in an action claiming rights under a substitution, is absolutely void and ineffective as a renunciation, the same not being made by a notarial deed or by a judicial declaration which has been recorded, as required by art. 651, C. C., and an attorney ad litem having no presumed mandate to renounce a succession. 2. A document purporting to be a renunciation of a succession in this province, executed in a foreign country before witnesses and a justice of the peace, and recorded on the same day by the town clerk of the place, is also void and ineffective as a renunciation, the forms prescribed by art. 651 C. C., not having been thereby complied with, and the document, moreover, not having been registered, as required by art. 2126, C. C. *Legrand* v. *Legrand*, Q. R. 20 S. C. 521.

See EXECUTION — PARTITION — WILL.

SUCCESSION DUTY.

See REVENUE.

SUMMARY APPLICATION.

See PARTITION — WILL.

SUMMARY CONVICTION.

See CRIMINAL LAW—JUSTICE OF THE PEACE.

SUMMARY EJECTMENT ACT, N.B.

See LANDLORD AND TENANT.

SUMMARY INQUIRIES.

See EXECUTION.

SUMMARY JUDGMENT.

See JUDGMENT — WRIT OF SUMMONS.

SUMMARY PROCEDURE.

Action — *Amendment.*]—When an action is summary in its nature, the plaintiff will be allowed, on motion, to add to the fiat, writ, and declaration the words "summary procedure." *Sessenwein* v. *Schwartz*, 4 Q. P. R. 393.

Municipal By-law—Offence against — Defects on face of conviction — Keeping billiard room open in prohibited hours—Uncertainty. *Village of Carman* v. *Fisher* (Man.), 1 W. L. R. 276.

See AMENDMENT — ATTACHMENT OF DEBTS —BANKRUPTCY AND INSOLVENCY—CONCILIATION — MASTER AND SERVANT — MECHANICS' LIENS—TRUSTS AND TRUSTEES — WATER AND WATERCOURSES.

SUMMARY TRIAL.

See CONSTITUTIONAL LAW—CRIMINAL LAW.

SUMMONS.

Chambers Summons — *Place of Return —Place of Issue.*] — The action was commenced in the Rossland registry, and the defendants issued a summons out of that registry, but returnable in Vancouver, asking that the writ of summons be set aside. Section 32 of the Supreme Court Act, as amended in 1901 (c. 14, s. 13), provides that in proceedings commenced in any registry other than Victoria, Vancouver, or New Westminster, any application may be made in Victoria, Vancouver, or New Westminster:—Held, that a summons under this section must be issued out of the registry at which it is returnable.

Centre Star Mining Co. v. *Rossland and Great Western Mines, Ltd.*, 24 Occ. N. 46, 10 B. C. R. 136.

SUNDAY.

Exercising Calling on—*Municipal By-law—Ultra Vires—Closing of Shops—Vancouver Incorporation Act, 1900.*]—The Vancouver Incorporation Act, 1900, empowered the city to pass a by-law to prohibit "the keeping open of barber shops on Sunday," and the city thereupon passed a by-law enacting that all barber shops should be closed on Sunday and that no person should exercise the trade of a barber on Sunday within the city. The appellant was charged with an offence under the by-law, and before the magistrate he admitted he had shaved customers on Sunday, and the magistrate thereupon convicted him of having "kept open:"—Held, that a barber by shaving customers on a Sunday does not necessarily "keep open:"—Held, also, that the city has no power to pass a by-law prohibiting a barber from exercising his trade or calling on Sunday. *In re Lambert*, 7 B. C. R. 396.

Lord's Day Act — *Conviction — Farmer —Ejusdem Generis Rule.*]—The Ordinance to Prevent the Profanation of the Lord's Day, C. O. 1898 c. 91, provides:—(1) No merchant, tradesman, artificer, mechanic, workman, labourer, or other person whatsoever, shall on the Lord's Day sell or publicly shew forth or expose or offer for sale or purchase any goods, chattels, or other personal property, or any real estate whatsoever, or do or exercise any worldly labour, business, or trade of his ordinary calling, travelling or conveying travellers or Her Majesty's mails, selling drugs and medicines and other works of necessity and works of charity, only excepted:—Held, that the words "or other persons whatsoever" are applicable only to persons who are ejusdem generis with those specifically named, and do not include a farmer engaged in farm work. *Hamren* v. *Mott*, 5 Terr. L. R. 400.

SUPERIOR COURT, QUEBEC.

See APPEAL—COURTS.

SUPREME COURT OF BRITISH COLUMBIA.

See APPEAL.

SUPREME COURT OF CANADA.

Powers of Judge of as to Habeas Corpus—*Effect of Judgment in Provincial Court.*] — An application for a writ of habeas corpus was referred by the Judge to the Supreme Court of the province, where it was refused. On application subsequently made for a habeas corpus to a Judge of the Supreme Court of Canada:—Held, that, under the circumstances, it would be improper to grant the writ. *In re Patrick White*, 31 S. C. R. 383.

See APPEAL—COSTS.

SUPREME COURT OF NEW BRUNSWICK.

See APPEAL—COURTS.

SUPREME COURT OF THE NORTH-WEST TERRITORIES.

See APPEAL.

SUPREME COURT OF NOVA SCOTIA.

See APPEAL.

SURETY.

See PRINCIPAL AND SURETY.

SURGEON.

See DISCOVERY — MEDICINE AND SURGERY.

SURGERY.

See MEDICINE AND SURGERY.

SURPLUS.

See COMPANY.

SURRENDER.

See CONSTITUTIONAL LAW—LANDLORD AND TENANT.

SURROGATE COURTS.

Jurisdiction — *Accounting—Falsifying Inventory of Assets.*]—The jurisdiction of the Ecclesiastical Court as to accounting was of a very restricted character, and no greater measure of jurisdiction in scope, though there may be in details, is now vested in the Surrogate Courts of Ontario. For full inquiry and accounting resort must be had to the administrative powers of the High Court. Review of English authorities. Where upon an accounting by executors before a Surrogate Court Judge it was objected by the residuary legatees that a certain sum of money not included in the executors' inventory of the assets of the estate, should have been included,

and it appeared that the widow of the testator, who was one of the executors, claimed this sum as a gift from the testator in his lifetime:—Held, Meredith, J., dissenting, that the Judge had no jurisdiction to pass upon the question thus raised; all that he could do was to report that a claim had been made that there was another asset of the estate, stating what it was, which he was unable to investigate, and could therefore only approve of the rest of the accounts submitted to him. *In re Russell*, 24 Occ. N. 398, 8 O. L. R. 481, 3 O. W. R. 926.

See ADMINISTRATION—EXECUTORS AND ADMINISTRATORS.

SURROGATE GUARDIAN.

See INFANT.

SURVEY.

Village Lots — *Authorization — Statutory Requirements — Order in Council—Resolutions of Municipal Council—By-law — Cost of Survey—Assessment for — Proprietors Interested.*]—After a resolution of the council of an incorporated village in favour of a survey of certain streets and lots, and correspondence with the Crown Lands Department, an order in council was passed, by which C. was instructed to survey the village lots of the Bailey estate and to plant durable monuments at the front angles of each of these lots, on Joseph street, Bailey street, and a street south of Bailey street, unnamed in the original survey, and he did as he was instructed. The village council then passed a by-law directing that the sum of $290.77 should be levied on the proprietors of the lands surveyed, being the village lots of the Bailey estate:—Held, that the survey directed was not authorized and was illegal, the requirements of the statute (R. S. O. 1887 c. 152, s. 39) not having been complied with so far as to give the Lieutenant-Governor in council jurisdiction to authorize the survey. 2. That the survey being illegal, the municipal council had no power to pass a by-law to levy the cost of it. 3. That if there was jurisdiction to authorize the survey, it could only be at the cost of the proprietors of the lands in each range or block interested, and not of all the proprietors, whether interested or not. In re Scott and County of Peterborough, 26 U. C. R. 36, followed. Regina v. McGregor, 19 C. P. 69, distinguished. *Sutton v. Village of Port Carling*, 22 Occ. N. 139, 3 O. L. R. 445, 1 O. W. R. 67.

See MINES AND MINERALS.

SURVEYOR.

Services—*Rate of Remuneration.*]—If a surveyor is appointed by the Court, as in this case, to do certain acts in his capacity of surveyor, he has a right, according to the tariff of surveyors, to $6 a day of six hours of work, and $1 for every additional hour, and, besides, to his travelling expenses. *Jutras v. Mercure*, 5 Q. P. R. 6.

SURVIVAL OF ACTION.

See MASTER AND SERVANT — REVIVOR.

SURVIVORSHIP.

See REVENUE — WILL.

SUSPENDED SENTENCE.

See CRIMINAL LAW.

SWAMP LANDS.

See CROWN.

SYNDIC.

See CHURCH.

TACKING.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

TARIFF.

See CHARTERED ACCOUNTANTS — COSTS.

TAX COLLECTOR.

See MUNICIPAL CORPORATIONS.

TAX SALE.

See ASSESSMENT AND TAXES.

TAXATION OF COSTS.

See COSTS—SOLICITOR.

TAXES.

See ASSESSMENT AND TAXES.

TAXING OFFICERS.

See SOLICITOR.

TELEGRAMS.

See PARLIAMENTARY ELECTIONS.

TELEPHONE COMPANY.

Rights over Streets of City—Control of municipal corporation—Underground wires—Injunction—Declaration of right—Construction of statutes. *City of Vancouver* v. *British Columbia Telephone Co.* (B.C.), 1 W. L. R. 461.

See APPEAL — CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS.

TENANCY BY THE CURTESY.

See ARREST — HUSBAND AND WIFE.

TENANT.

See LANDLORD AND TENANT.

TENANT AT WILL.

See LIMITATION OF ACTIONS.

TENANT BY SUFFERANCE.

See RAILWAY.

TENANT FOR LIFE.

Insurance of House by — *Right to Insurance Moneys.*]—S. C., the tenant for life of a house and lot of land, insured the house against loss or damage by fire, paying the insurance premiums out of her own funds, and taking the policy in her own name. S. C. was not in any way bound to repair, or rebuild, or insure. The house was totally destroyed by fire, and the amount of the insurance paid over to S. C., who placed it in the bank, on deposit receipt, to her own credit:—Held, that the amount received from the insurance company belonged exclusively to S. C., and that her executors were entitled to judgment for the amount of the deposit receipt, with interest from date, and costs, against the devisee of W. C., to whom the lot and house were devised subject to the life estate of S. C. *In re Curry Estate*, 33 N. S. Reps. 392.

Waste—Cutting timber — Remainderman — Injunction — Mortgage — Subrogation. *Whitesell* v. *Reece*, 1 O. W. R. 516, 2 O. W. R. 160.

See CROWN—MONEY IN COURT—WILL.

TENANTS IN COMMON.

Erection of Wharf by One—*Ouster—Trespass — Burden of Proof.*]—The defendants erected a wharf on a portion of a water lot in the town of L., of which they were tenants in common with the plaintiff:—Held, that the wharf was a permanent structure, and that the defendants by erecting it ousted the plaintiff, their co-tenant, from the portion of the lot which it covered; that a claim by the plaintiff for damages for cutting logs, and a counterclaim by the defendants for the erection of the logs so cut, must both be dismissed, neither party having satisfied the burden of proof by shewing ownership of the land upon which the trespasses complained of were committed. *Zwicker* v. *Morash*, 34 N. S. Reps. 555.

Possession of One—*Statute of Limitations—Fiduciary Capacity—Acquiescence — Partition.*]—An action for partition of land was resisted by the heirs, etc., of D., on the ground that she had acquired title by exclusive possession against the other tenants in common. The trial Judge found, and the evidence supported such finding, that D. acted throughout in a fiduciary capacity, as administratrix for the benefit of her father's estate, and those interested in it:—Held, that it was not open to a person in the position of D. to avail herself of the Statute of Limitations. As the plaintiffs believed that D. was acting within her rights as administratrix, there was nothing in their conduct that would operate as a bar to the relief sought on the ground of acquiescence. The acts of D., leasing the property, collecting rents, etc., which were relied upon as giving her an exclusive title, were perfectly consistent with the rights of the plaintiffs as tenants in common. *Brown* v. *Dooley*, 36 N. S. Reps. 56.

TENDER.

Bank Notes.]—A tender in bank notes is good, though the notes are not legal tender, if the tender is not objected to on that account. *Stewart* v. *Freeman*, 23 Occ. N. 157, 2 N. B. Eq. Reps. 451.

See CONSTITUTIONAL LAW — LIQUOR LICENSE ACT—MORTGAGE — SPECIFIC PERFORMANCE — VENDOR AND PURCHASER.

TERRITORIAL COURT OF DISTRICT OF YUKON.

See APPEAL.

TERRITORIAL REAL PROPERTY ACT.

See REGISTRY LAWS.

TEST ACTION.

See CONSOLIDATION OF ACTIONS—PARTICULARS.

TESTAMENTARY CAPACITY.

See WILL.

THEFT.

See CRIMINAL LAW—MALICIOUS PROSECUTION.

THIRD PARTIES.

See PARTIES.

THREATS.

See CONTRACT — INJUNCTION — WAY.

THRESHER'S LIEN.

See LIEN.

THRESHING.

See CONTRACT.

TIMBER.

Agreement for Sale—What passes under—Trespass — Injunction — Reference — Damages. *Kent* v. *Orr*, 2 O. W. R. 799.

Crown Lands—Issue of patent—Consent of timber licensee—Agreement as to timber—Ownership of land—Estoppel. *McWilliams* v. *Dickson Co.*, 6 O. W. R. 702.

Dispute as to Ownership — Crown lands — Location — Cancellation — Timber licenses — Settlement — Purchase — Cheque—Acceptance on account—Accord and satisfaction — Injunction—Consent order in action afterwards dismissed for want of prosecution — Binding Agreement—Title—Possession—Jus tertii—Assignment of location — Regulations of department—Ultra vires — Settlement duties—Forfeiture—Ruling of department—Reference. *McWilliams* v. *Dickson Co.* (No. 2), 6 O. W. R. 706.

Driving Logs—*Injury to Land—Damages—Misdirection — Employment of Contractor — Vis Major.*]—In an action for damages for injuries to the plaintiffs' land by logs which the defendant had neglected to confine within his boom, and which were suffered to be driven up and down stream by the tide, the trial Judge instructed the jury that in assessing damages they were not restricted to the actual damage referred to in the statute (R. S. N. S. c. 95, s. 17), but, at the same time, the amount allowed ought to be reasonable:—Held, that the jury should have been told, at the same time, that the actual damage was, as a rule, the measure in common law actions of this kind; but, as the amount awarded by the jury was small, and as there was evidence to support it, the misdirection, if any, occasioned no substantial wrong or miscarriage, and was, therefore, within O. xxxvii., r. 6. Quære, whether the defendant could escape liability by employing a contractor to bring down his logs, when, in the ordinary course of things, they would necessarily come in contact with the plaintiffs' land. Semble, that he could not. In respect to a portion of the damage done, the defendant relied upon a plea of vis major:—Held, that this was not a defence unless the defendant could shew that the damage would equally have happened if he had done his duty:—Held, that, in this case, the excuse was insufficient, a larger quantity of logs having been brought down the stream in the expectation that, before the high tides came, a sufficient quantity could be sawed to enable the remainder to be confined within the boom, and the high tides having occurred two or three days earlier than the defendant expected, as the result of which the logs not confined in the boom were carried up the stream and stranded on the plaintiffs' land. *Campbell* v. *Dickie*, 36 N. S. Reps. 40.

Sale — *Contract — Time for Removal.*]—In 1899 the plaintiff contracted with the defendant B., by an instrument under seal, to sell to the latter certain kinds of timber from the plaintiff's land, "now upon" the lots described, and so much thereof as the purchaser might see fit to cut and remove, with the right of entry "at all times" until removed, the timber removed to be paid for at certain specified prices:—Held, that the agreement being silent as to the duration of the right to cut and remove, it must be exercised within a reasonable time; and B. and his assigns, not having attempted to exercise the right until 1903, should be enjoined from doing so. *Dolan* v. *Baker*, 10 O. L. R. 259, 5 O. W. R. 229.

Sale of—Contract—Re-sale of tree-tops—Right of purchaser after time expired — Extension — Trespass—Costs. *Wilcox* v. *Johnson*, 4 O. W. R. 9.

Sale of—Contract—Time of removing not specified—Attempt to remove after ten years—Construction of contract—Reasonable time — Injunction — Damages. *Dolan* v. *Baker*, 3 O. W. R. 833.

Sale of—*Interest in Land—Severance—Identification — Vendor's Lien—Injunction.*]—St. G., the owner of land, by an agreement in writing sold all the timber on it to E., taking promissory notes in payment. E. assigned all his interest in the agreement to S., his principal, who made the notes; E. indorsed them to St. G. S. cut and removed timber from the land, and cut and piled on the land a lot of cordwood, which he sold to the defendant, but did not pay the notes. St. G. sold the land and all her interest in the timber and the notes to the plaintiff. The defendant sought to remove the wood, but the plaintiff obtained an injunction restraining him, and claimed a vendor's lien:—Held, that the sale of the timber to be removed in three years by the purchaser was of an interest in land, in respect of which

a vendor's lien arose by operation of law, which was not displaced by the cutting or sale of the timber, as long as it could be identified and remained on the land; and the remedy was by an injunction and enforcement of the lien. Summers v. Cook, 28 Gr. 179, followed. *Ford* v. *Hodgson*, 22 Occ. N. 177, 3 O. L. R. 526, 1 O. W. R. 121.

Sale of Standing Timber — Contract —Construction—Quantity of timber — Measurements — Estimates — Conflicting evidence. *McAlister* v. *Brigham*, 6 O. W. R. 812.

Tolls — *Application to Fix—Rivers and Streams Act—Improvements.*]—Proper sum fixed by a County Court Judge as a toll to be paid by one lumber company to another for the use of the constructions and improvements made by the latter upon a creek so as to make it floatable, upon an application by one of the companies under R. S. O. c. 142, taking into account the original cost of the constructions and improvements, the amount required to maintain the same, the interest upon the original cost, and other matters. Fire-ranging was not considered part of the original cost nor a proper charge for maintenance. A sum of $100 was allowed for book-keeper's time. The Judge refused to divide the constructions and improvements into sections and assign different tolls to the different sections according to the amount of saw logs and timber floated over each of such sections. He also refused to take into consideration the sum expended in increasing the efficiency of the improvements for the convenience of the respondents. *In re South Creek*, 21 Occ. N. 344.

TIME.

Exchequer Court — *Standards of Time —Service of Process—Sittings of Court.*]—In the service of its process, as well as in its sittings and in the public hours of its registry, the Exchequer Court of Canada will be guided by the civic time in use in the town where the Court sits, unless it is made to appear that such time is in fact incorrect. *Vermont S. S. Co.* v. *The "Abby Palmer,"* 8 Ex. C. R. 470, 10 B. C. R. 381.

See APPEAL — ARREST — ASSESSMENT AND TAXES—BANKRUPTCY AND INSOLVENCY —BOND — CERTIORARI — COMPANY — —CONTRACT—COSTS — CRIMINAL LAW —DISCOVERY — DISMISSAL OF ACTION— EXECUTION — HUSBAND AND WIFE — INSURANCE — JUDGMENT — LIEN — LIQUOR LICENSE ACT—MASTER AND SERVANT — MECHANICS' LIENS — MINES AND MINERALS — MUNICIPAL CORPORATIONS — OPPOSITION — PARLIAMENTARY ELECTIONS — PARTICULARS — PEREMPTION — PLEADING — RAILWAY — RULE NISI — SALE OF GOODS — SHIP — TIMBER — TRIAL — WILL.

TITLE TO LAND.

Quebec Law — *Possessory Action — Nature and Period of Possession.*]—The possession necessary to entitle a plaintiff to maintain a possessory action must be continuous and uninterrupted, peaceable, public, and as proprietor, for the whole period of a year and a day immediately preceding the disturbance complained of. *Conture* v. *Conture*, 34 S. C. R. 716.

Registered Title—Appurtenances. *Greisman* v. *Fine*, 1 O. W. R. 479.

Registered Title—Real Property Limitation Act. *Central Canada L. & S. Co.* v. *Porter*, 1 O. W. R. 482, 2 O. W. R. 137.

Statute of Limitations — Declaration —Pleading — Possession — Tenancy by the Curtesy — Devolution of Estates Act—Improvements. *Chevalier* v. *Trepannier*, 1 O. W. R. 847.

Sheriff's Sale — *Effect of Annulment — Possession in Good Faith—Rents and Profits —Compensation for Improvements—Liability for Deterioration.*]—One who is in possession of land by virtue of a title acquired at a sheriff's sale is the possessor in good faith up to the moment at which his title is declared void by the Court, and such title is valid although its subsequent annulment deprives it retrospectively of its effect. 2. A contract set aside as absolutely void is considered as never having had a legal existence and as incapable of producing any juridical effect, past or future; but a contract or a title in virtue of which action has been taken and which has been declared void later, is, notwithstanding art. 412, C. C., a sufficient basis to establish the good faith of the possessor. 3. Such a possessor has a right to retain the profits which he has received and to be compensated for the improvements which he has made, as he will be responsible for any deterioration which he has caused to the property. *Savoie* v. *Gastonguay*, Q. R. 10 K. B. 459.

Trespass — *Overhanging Roof — Right of View—Evidence—Boundary Line — Waiver.*]—In 1844 the defendants constructed a toll-house close to or on the boundary of their land, with windows overlooking the adjoining lot and a roof projecting over it by about three feet. This was done with the knowledge and consent of persons who were then proprietors, and was not objected to by them or any subsequent owner till after the purchase of the adjoining lot by the plaintiff in 1895, when he complained that the overhanging roof interfered with the gable of a house he was building upon it. He cut the roof to permit of the construction of the gable to his house, and the defendants paid the cost of the necessary alteration. In 1900 the plaintiff instituted the present action against the defendants to have the remainder of the projection of the roof demolished and the windows closed up. There was no evidence that there had ever been a division line established between the properties, and the actual width of the land purchased and taken possession of by the plaintiff in 1895 was left in uncertainty:—Held, Strong, C.J., dissenting, that the plaintiff had not satisfied the onus that was upon him of proving title to the strip of land in dispute, and consequently that his action could not be maintained. Held, further, per Girouard, J., following Delorme v. Cusson, 28 S. C. R. 66, that, as the plaintiff and his auteurs had waived objection to the manner in which the toll-house had been constructed, and permitted the roof and windows

to remain there, the demolition could not be required, at least so long as the building continued to exist in the condition in which it had been so constructed. *Parent* v. *Quebec North Shore Turnpike Trustees*, 22 Occ. N. 46, 31 S. C. R. 556.

See CROWN—COURTS—PLEADING—TRUSTS AND TRUSTEES—VENDOR AND PURCHASER.

TOLL ROAD.

See RAILWAY AND RAILWAY COMPANIES.

TOLLS.

See WATER AND WATERCOURSES.

TORT.

See HUSBAND AND WIFE—LUNATIC.

TOWAGE.

See SHIP.

TRACTION ENGINE.

See WAY.

TRADE COMBINATION.

See DISCOVERY.

TRADE MARK AND TRADE NAME.

Assignment—*Execution—Right of Property.*]—The right of property in a registered specific trade-mark is not saleable by itself under a writ of execution. Such a right can be sold, if at all, only as appurtenant to the business in which it has been used. *Gegg* v. *Bassett*, 22 Occ. N. 114, 3 O. L. R. 263.

Corporate Name — *Conflict—Fraud—Intent to Deceive.*]—In the absence of fraud or bad faith, a body corporate may use its own name on goods of its own manufacture, although such use may tend to confuse its goods with goods of the same kind bearing the trade-mark of another manufacturer. 2. Where the defendants, a corporate body, had obtained their name before a trade-mark with which such name was said to conflict had been registered in Canada by the plaintiffs, a foreign corporation, and it was not shewn that the defendants had adopted such name with intent to deceive the public, nor to sell their goods as those of the plaintiffs, the Court refused to restrain the defendants from using their corporate name upon goods manufactured by them. *Boston Rubber Shoe Co.* v. *Boston Rubber Co. of Montreal*, 21 Occ. N. 517, 7 Ex. C. R. 187.

"Cream Yeast"—*Validity—Trade Name—"Passing-off."*]—Held, that the plaintiff's trade mark for a certain kind of yeast, consisting of a label bearing the representation of the head and bust of a woman, with the words "Day" and "Hop" on either side, and the words "Cream Yeast" below was properly registerable and valid. Provident Chemical Works v. Canada Chemical Co., 1 O. W. R. 488, 4 O. L. R. 545, followed. 2. That the defendants, by selling yeast in packages labelled "Jersey Cream Yeast Cake," the words "Jersey Cream" at the top and "Yeast Cake" at the bottom, with the representation of two Jersey cows and a milkmaid between, were not infringing the plaintiff's mark. Cochrane v. MacNish, 13 R. P. C. 100, distinguished. 3. That the defendants were not, upon the evidence, guilty of passing off their goods in such manner as to induce the belief that they were goods manufactured by the plaintiff. Judgment of a Divisional Court, 6 O. L. R. 66, 2 O. W. R. 497, 23 Occ. N. 259, affirmed. *Gillett* v. *Lumsden*, 24 Occ. N. 345, 8 O. L. R. 168, 3 O. W. R. 851.

Criminal Law — *Forging or Falsely Applying Trade-Mark—Prosecution for—Defence—Invalidity of Registration—Title to Exclusive Use of Registered Words—Descriptive Words.*]—The defendant was convicted by a magistrate of the offence of forging a trade-mark, to wit, the registered trade-mark "Glyco-Thymoline," and falsely applying to certain goods a trade-mark or mark so nearly resembling a trade-mark as to be calculated to deceive, contrary to s. 447 of the Criminal Code. The trade-mark "Glyco-Thymoline" consisted solely of these words, applied to a medical compound sold by a company, in the form of a solution in bottles. The defendant made and sold a solution, of which the chief ingredients were thymol and glycerine, which he named "Glyco-Thymol." The company and the defendant labelled their respective bottles in much the same way. Before the magistrate the case was virtually dealt with as a case of passing off the defendant's goods for those of the company, but this, the Court of Appeal pointed out, was not the offence charged, and could only be the subject of a civil action for an injunction and damages. The words registered as the company's trade-mark were merely descriptive and incapable of registration, and that was a defence open to the defendant. The conviction was therefore quashed. *Rex* v. *Cruttenden*, 25 C. L. T. 455, 6 O. W. R. 249, 10 O. L. R. 80.

Descriptive Words.]—Where a word is merely descriptive of a natural product, it cannot be appropriated and form part of a trade-mark. Hence, the word "asbestic" prefixed to "wall plaster" being merely descriptive of the material used in the plaster, the sale by other persons of plaster under that name is not an infringement of a registered trade-mark for "asbestic wall plaster." *Asbestos and Asbestic Co.* v. *William Sclater Co.*, Q. R. 18 S. C. 360.

Descriptive Words.] — A trade-mark bearing the words "asbestic wall plaster" was registered by the plaintiffs on the 3rd February, 1896. The particular words were applied to a compound of asbestic and the ordinary well-paper. The defendants alleged that they

had been selling this compound before the registration of the trade-mark by the plaintiffs; that the words were merely descriptive of the articles of which the compound consisted; and that they could not be compelled to invent a new name:—Held, that the words were merely descriptive, and that the appellants could not acquire an exclusive right to their use. *Asbestos and Asbestic Co.* v. *William Sclater Co.*, 21 Occ. N. 130, Q. R. 10 Q. B. 165.

Descriptive Words — *Pleading — Prior User.*]—In an action for infringement of the plaintiffs' trade-mark for "asbestic wall plaster," the defendants were entitled to allege in their plea, without having taken steps to have the plaintiffs' mark annulled, that they had sold asbestic wall plaster long prior to and since the registration of plaintiffs' trade-mark, and that by law they had the right to make use of the words "asbestic wall plaster," the word "asbestic" being merely an indication and description of the article sold by the defendants and referring to the character and quality of the article. *Asbestos and Asbestic Co.* v. *William Sclater Co.*, Q. R. 18 S. C. 324.

Fancy Name — *Descriptive Letters — Forum—Exchequer Court.*]—The letters "C. A. P.," standing for the words "cream acid phosphates," a fancy name for acid phosphates manufactured by the plaintiffs, were held to constitute a valid trade-mark, and an injunction was granted against the use thereof by the defendants, who had used these letters in the sale of goods of the same class, but ostensibly as standing for the words "calcium acid phosphates." Judgment of Meredith, C.J., 2 O. L. R. 182, 21 Occ. N. 467, reversed. The amendments to the Exchequer Court Act since the decision in Partlo v. Todd, 14 A. R. 444, 17 S. C. R. 196, have not had the effect of giving that Court exclusive jurisdiction to adjudicate as to the validity of a registered trade mark, and in answer to an action in the High Court of Justice for Ontario to restrain the infringement of a registered trade-mark, its invalidity may be shewn. *Provident Chemical Works* v. *Canada Chemical Mfg. Co.*, 22 Occ. N. 381, 4 O. L. R. 545, 1 O. W. R. 612.

Geographical Description — *Alien — Competition.*]—An alien has an action in the province of Quebec to prevent unfair competition in trade. 2. An unregistered trade-mark is only entitled to protection where there is unfair or fraudulent competition, and damage is caused to the proprietor of such mark. 3. Unfair competition does not exist where confusion of marks is not possible. So, in the present case, the adoption by the defendants of the name "Milwaukee" to describe their lager beer, made in Montreal, having preceded by ten years the introduction of the plaintiffs' lager beer in the Canadian market, and there being no proof of deception or damage, the defendants using a different label containing the word "Montreal," the plaintiffs were not entitled to an injunction to restrain the use of the word "Milwaukee" in connexion with the sale, etc., of the Canadian article. Judgment in Q. R. 20 S. C. 20 reversed. *Pabst Brewing Co.* v. *Ekers*, Q. R. 22 S. C. 545.

Geographical Designation.] — Apart from any consideration as to registered trade-marks, an action lies at common law to restrain a trader from applying to his goods the name of a place in which they were not manufactured, and where the adoption of such name tends to confuse his goods in the eyes of the public with those of a rival trader who has made his goods known to the public under a designation including the name of their place of origin or manufacture. *Pabst Brewing Co.* v. *Ekers*, Q. R. 20 S. C. 20.

Geographical Designation—"*Caledonia Water*"—"*Caledonia Mineral Water.*"] — The plaintiffs for many years had been the owners of mineral springs in the township of Caledonia, respecting the waters of which they had caused to be registered certain trade-marks, and the names "Caledonia water" and "Caledonia mineral water." The water, which was used medicinally and as a beverage, had through the plaintiffs' exertions and the expenditure of large sums of money, become very widely known as water from Caledonia springs, and near the springs a village, laid out on the ground many years before, had actually come into existence, where the plaintiffs had erected an hotel, and had procured a railway station and post office to be erected under the name "Caledonia Springs." In 1898 L. & Co., who had purchased a lot about a quarter of a mile distant from the plaintiffs' place, had, by sinking an artesian well, tapped springs, from which water flowed, similar in some respects to the plaintiffs', which they supplied in barrels to their agents, as "water from the new springs at Caledonia," which these agents bottled and sold. The bottles used were similar in shape and size to the plaintiffs'. One of the agents, T. & Co., had, at the time of the commencement of the action, been using labels thereon resembling the plaintiffs', and selling the water as Caledonia water, but this had never been sanctioned by L. & Co., and was at once abandoned:—Held, reversing the judgment in 21 Occ. N. 524, 2 O. L. R. 322, 1 O. W. R. 785, that the defendants could not be restrained from using the word "Caledonia" as they did in designating the water sold by them, and that the injunction granted herein should be dissolved with costs, except as to T. & Co., and as against them the plaintiffs should only be allowed the costs of entering judgment by default. *Grand Hotel Co. of Caledonia Springs* v. *Wilson, Grand Hotel Co. of Caledonia Springs* v. *Tune*, 23 Occ. N. 82, 5 O. L. R. 141. Affirmed, 1904, A. C. 103.

"Hall Mark"—*Right to Register.*]—If by the laws of any country the makers of certain goods are required to put thereon certain prescribed marks to denote the standard or character of such goods, and goods bearing the prescribed marks are exported to Canada and put upon the market here, it is not possible thereafter, and while such goods are to be found in the Canadian market, for any one to acquire in Canada a right to the exclusive use of such prescribed marks to be applied to the same class of goods, or to the exclusive use of any mark so closely resembling the prescribed marks as to be calculated to deceive or mislead the public. The fact that such marks were not trade-marks, but marks used to comply with the statutes of the country of origin would not in that respect in any way alter the case. Quære, whether any one would, in such a case, be precluded from acquiring a right in Canada

to the exclusive use of such a trade-mark, where there was no importation into Canada of goods bearing the prescribed foreign marks. 2. The plaintiffs brought an action for the infringement of their registered specific trade-mark to be applied to the goods manufactured by them from sterling silver which, it was thought, so resembled a "British hall mark," or a hall mark, as to be calculated to deceive or mislead the public, and it appeared that during the time that the plaintiffs' goods, bearing such mark, were upon the Canadian market, goods bearing a "British hall mark" were also upon the market:—Held, that the plaintiffs could not, under the circumstances, exercise the exclusive right to the use of such mark as a trade-mark. *Gorham Manufacturing Co.* v. *Ellis*, 24 Occ. N. 119, 8 Ex. C. R. 401.

Incorporated Company — Infringement —Passing off goods — Injunction—Scope of. *Sovereign Mitt, Glove, and Robe Co.* v. *Simcoe Mitt, Glove, and Robe Co.*, 3 O. W. R. 681.

Industrial Design — *Cook-stove—Imitation—Infringement—Injunction—Cancellation of Conflicting Design.*] — The plaintiffs were registered owners of an industrial design for a cook-stove, called the "Royal Favourite, 9-25," which, as a special article of their manufacture, had become well known to the trade. The defendants procured one of such stoves, caused a model to be made from it, and, with some minor alterations chiefly in the ornamentation, manufactured a stove called the "Royal National, 9-25," and subsequently registered it as an industrial design. In an action by the plaintiffs for infringement, and for an order to expunge the defendants' design from the register, the weight of evidence established that the defendants' design was an obvious imitation of that of the plaintiffs: — Held, that the defendants should be enjoined from infringing the plaintiffs' design, and that the registration of the defendants' design should be expunged from the register. *Findlay* v. *Ottawa Furnace and Foundry Co.*, 22 Occ. N. 200, 7 Ex. C. R. 338.

Injunction—*Security.*]—The owner of a trade-mark, who complains that his orders for sales of an article covered by the trade-mark are filled by the sending of an article covered by the defendant's trade-mark, and that the resemblance between the two marks is such that it may induce error in purchasing, has the right to an interlocutory injunction upon furnishing security. *Lefebvre* v. *Landry*, 5 Q. P. R. 341.

License—Option—Agreement—Declaration of rights—Specific performance — Injunction —Misconduct—Equitable relief—Counterclaim —Reservation of rights—Res judicata. *McAvity* v. *James Morrison Brass Mfg. Co.*, 2 O. W. R. 156, 1018.

Pleading — *Registration — Prior User — Superiority of Product—False Representations —Scire Facias.*]—In an action for infringement of a trade-mark, the defendant may, in answer to an allegation that the trade-mark was obtained by the plaintiff's firm, deny such allegation and state that the plaintiff was, at that time, doing business under another name. 2. It is immaterial whether the interdict or the curator who sues es-qualité upon a trade-mark, obtained the registration of the trade-mark. 3. In such an action it is a valid defence to say that the label constituting the trade-mark in question had been used by the defendant and others prior to the registration of the trade-mark by the plaintiff. 4. Although it matters not which of the two products is superior, the defendant may meet an allegation of the plaintiff's declaration stating that his trade-marked product is superior, by denying the statement and affirming the superiority of his own product. 5. False representations regarding the ownership of a trade-mark constitute no ground for the voiding of it. 6. A defendant may plead in answer to conclusions demanding that he be ordered to cease to use a trade-mark, that he had ceased to use it before the institution of the action. 7. That the nullity of a trade-mark can be pleaded against an action based upon such trade-mark, without the issuing of a scire facias by the Crown. *Fafard* v. *Ferland*, 6 Q. P. R. 119.

Pleading — *Statement of Claim — Sufficiency of.*]—In an action for infringement of a trade-mark, it is a sufficient allegation that the trade-mark used by the defendants is the registered trade-mark of the plaintiffs, to allege in the statement of claim that the registered trade-mark of the plaintiffs and the mark used by the plaintiffs and the mark used by the defendants are in their essential features the same. 2. It is not necessary in such statement of claim to allege that the imitation by the defendants of the plaintiffs' trade-mark is a fraudulent imitation. 3. It is not necessary to allege that the defendant used the mark with intent to deceive, and to induce a belief that the goods on which their mark was used were made by the plaintiffs. *Boston Rubber Shoe Co.* v. *Boston Rubber Co. of Montreal*, 21 Occ. N. 278, 7 Ex. C. R. 9.

Prior Use—*Application to Rectify Register—Counterclaim—Title.*]—A manufacturer or dealer in cigars cannot acquire the right to an exclusive use, and be entitled to registration, of a specific trademark, of which the term "King" forms the leading feature, and is used in combination with the representation of some particular king, while other manufacturers or dealers use the same term with the likeness of other kings. Spilling v. Ryall, 8 Ex. C. R. 195, 23 Occ. N. 102, explained. 2. An application to rectify the register of trade-marks cannot be made by counterclaim. (Secus now, under General Order of the 7th March, 1904.) 3. In an action for the infringement of a trade-mark the defendant may attack the legal title of the plaintiff to the exclusive use of the trade-mark he has registered. Partlo v. Todd, 17 S. C. R. 196, referred to. Provident Chemical Works v. Canadian Chemical Manufacturing Co., 4 O. L. R. 548, approved. *Spilling* v. *O'Kelly*, 24 Occ. N. 119, 8 Ex. C. R. 426.

Registration—*Petition to Cancel—Similarity to Established Name—Company.*] — The firm name of persons doing business as "The Laing Canning and Preserving Company" is not so nearly similar to that of "The Laing Packing and Provision Company, Ltd.," as to come within the prohibition of R. S. Q. c. 4697, paragraph 1, and entitle the latter company to have the registration of the former set aside, and the further use of such

name prohibited, particularly in the absence of proof of damage caused by such similarity. *Laing Packing and Provision Co.* v. *Laing*, Q. R. 25 S. C. 344.

Registration — *Words—Device—Resemblance — First User—Declaration—Truth of — Expunging Mark.*] — Registration of a trade-mark to be applied to the sale of whisky was refused, on the ground that it too closely resembled trade-marks previously registered. The earlier ones consisted in the representation of a maple leaf and such words as "Old Red Wheat," "Early Dew." The later one consisted of the words "Maple Leaf" and the device of a maple leaf on which was impressed the figure of a beaver, used separately or in conjunction with the words "Fine Old Rye Whisky,' etc. 2. A declaration made by the respondents that they believed a certain trade-mark was theirs on account of their having been the first to use it, being true when made, and they having afterwards, when they learned of one J. C.'s registered trade-mark, purchased it from him, the petitioners were not entitled to have the respondents' trade-mark expunged, on the ground that their declaration was untrue. 3. In 1902, after the controversy between the parties had arisen, and without notice to the petitioners, the respondents obtained registration of another specific trade-mark to be applied to the sale of whisky, which consisted of the words "Maple Leaf" and the representation of a maple leaf:—Held, that the registration should be expunged. *Meagher* v. *Hamilton Distilling Co.*, 8 Ex. C. R. 311.

Representations of the King and the Royal Arms—*User before Registration—Declaration Signed by Agent.*] — A label, as applied to boxes containing cigars, bearing upon it in an oval form a vignette of King Edward VII., with a coat of arms on one side, and a marine view on the other, surmounted by the words "Our King," and with the words "Edward VII." underneath, constitutes a good trade-mark in Canada, and may be infringed by the impression, upon boxes containing cigars, of a fac-simile of the royal arms surmounted by the words "King Edward." 2. The English rule prohibiting the use of the royal arms, representations of His Majesty, or of any member of the royal family, or of the royal crown, or the national arms or flags of Great Britain, as the subjects of trade-marks, is not in force in Canada. 3. It is not essential to the validity of a trade-mark registered in Canada that the person registering the same should have used it before obtaining registration. The registration must, however, in such a case, be followed by use, if the proprietor wishes to retain his right to the trade-mark. In this respect there is no difference between the law of Canada and the law of England. 4. The declaration required from the proprietor of a trade-mark by s. 8 of the Trade-Marks and Design Act, R. S. C. c. 63, may be signed by his duly authorized attorney or agent. *Spilling* v. *Ryall*, 23 Occ. N. 102, 8 Ex. C. R. 195.

Statement of Claim — Particulars—Infringement. *Morrison* v. *Mitchell*, 1 O. W. R. 838.

Trade Union — User by non-members. *Robinson* v. *McLeod*, 1 O. W. R. 83.

Use of Corporate Name — *Fraud and Deceit—Evidence.*]—Since 1885 the plaintiffs, incorporated in Massachusetts, had done business in the United States of America and Canada as manufacturers and dealers in india rubber boots and shoes under the name of "The Boston Rubber Shoe Company," having a trade line of their manufactures marked with the impression of their corporate name, registered as their trade-mark known as "Bostons," which had acquired a favourable reputation. The defendants were incorporated in Canada in 1896 by the name of "The Boston Rubber Company of Montreal," and manufactured and dealt in similar goods, on one grade of which was impressed their corporate name, these goods being referred to in their price lists, catalogues, and advertisements as "Bostons," and the company's name frequently mentioned therein as "Boston Rubber Company." In an action to restrain the defendants from continuing to use such impressed trade-mark or any other similar mark, on such goods as an infringement of the plaintiffs' registered trade-mark:—Held, reversing the judgment in 7 Ex. C. R. 187, 21 Occ. N. 517, that, under the circumstances, the use by the defendants of their corporate name in the manner described on goods of their own manufacture similar to those manufactured by the plaintiffs, was a fraudulent infringement of the plaintiffs' registered trade mark and calculated to deceive the public, and so, in bad faith, to obtain sales of their own goods as if they were the plaintiffs' manufactures, and consequently, that the plaintiffs were entitled to an injunction restraining the defendants from using their corporate name as a mark upon such goods manufactured by them in Canada. *Boston Rubber Shoe Co.* v. *Boston Rubber Co. of Montreal*, 22 Occ. N. 275, 32 S. C. R. 315.

Use of Similar Name — *Registration — Misrepresentations—Injunction — Evidence.*] —The fact that the word "Simpson" had been, previously to the plaintiff's registration, used and registered as a trade-mark for pills as a cure for one complaint, did not disentitle the plaintiff to obtain registration of the name as a trade-mark for pills to cure another ailment, and the registration was therefore good. The fact that the name "Simpson" was entirely fictitious and was not the name of the real manufacturer, did not constitute any such misrepresentation as would disentitle the plaintiff to an injunction. Only misrepresentations contained in the trade-mark itself will disentitle the plaintiff to an injunction, and therefore fictitious testimonials published by the plaintiff were not such misrepresentations as would defeat his right. Ford v. Foster, L. R. 7 Ch. 611, followed. *Semble*, that the prior user outside of Canada of the word "Simpson" in connection with Kidney Pills was not sufficient to disentitle the plaintiff to its exclusive use within Canada: — Held, also, upon the evidence, that the defendant had adopted the word "Simpson" wilfully, and solely to induce the public to believe that the pills he sold were those advertised by the plaintiff, and that therefore the plaintiff was entitled to an injunction, with costs. One of the defendant's witnesses stated that he had in the year 1891 seen the name "Simpson's Kidney Pills" inscribed upon a wire door mat in London, England. This evidence was objected to on the ground that it was secondary evidence and that the door mat itself should be

produced:—Held, that the evidence should be admitted because the production of the door mat would be highly inconvenient. *Templeton* v. *Wallace*, 4 Terr. L. R. 340.

TRADE UNION.

Combination of Workmen to Injure Business of Employer — Interim injunction. *Metallic Roofing Co. of Canada* v. *Local Union No. 30, Amalgamated Sheet Metal Workers' International Assn.*, 2 O. W. R. 183, 266, 819, 844.

Exclusion of Member—Interim injunction — Illegal organization. *Cresswell* v. *Hyttenrauch*, 2 O. W. R. 447, 655, 662.

Expulsion of Member—*Articles of Association — By-law in Restraint of Trade — Illegality—Militia Act.*] — The plaintiff, a musician and a member of the active militia of Canada and of the band of a militia regiment, became a member of the defendant association, a body incorporated under the Friendly Societies and Insurance Corporations Act, whose object was to unite the instrumental portion of the musical profession for protection of its interests, the regulation of prices, the enforcement of good faith among its members, and to assist members in sickness, etc. After the plaintiff joined, the defendants adopted a new article providing that no member should play in any engagement with any person playing an instrument who was not a member. The plaintiff was fined, and expelled for default of payment of the fine, for playing in his regimental band at a concert, in uniform, under the direction of the bandmaster, and with the permission of the colonel commanding—some of the band not being members:—Held, that, at the time the plaintiff joined the association, it was a perfectly legal society, its objects being of a friendly and provident nature; but the amendment was unreasonable and in restraint of trade and for that reason, and also because contrary to the Queen's Army Regulations and the Militia Act of Canada, was illegal, and the plaintiff's expulsion was invalid, and he was entitled to an injunction and damages. Rigby v. Connol, 14 Ch. D. 482, Mineral Water Bottle, &c., Society v. Booth, 36 Ch. D. 465, Swaine v. Wilson, 24 Q. B. D. 252, and Chamberlain's Wharf, Limited, v. Smith, [1900] 2 Ch. 605, considered. *Parker* v. *Toronto Musical Protective Association*, 21 Occ. N. 31, 32 O. R. 305.

Fees of Members—*Arrears—By-laws—Penalty for Infraction.*] — By their charter the plaintiff association have power to impose by by-law the payment of an annual fee by each of their members, and also a penalty for every infraction of their by-laws. The association, in pursuance thereof, passed a by-law fixing the membership fee at $2 a year and imposing a penalty of $10 for every infraction of the by-laws. The defendant took out his license, and paid his fee for one year, and afterwards exercised his trade for three years without paying his fee:—Held, that, in the circumstances, the plaintiff association could claim from the defendant only the penalty which he had incurred for the infraction of the by-laws and not the arrears of his fees. *Barbers' Association of the Province of Quebec* v. *Charlebois*, Q. R. 23 S. C. 287.

Inducing Breach of Contract—*Interference with Business — Foreign Officer—Incorporation — Pleading.*] — Damages are recoverable against a trade union and the members thereof in an action by employers of workmen when, by means of threats, abusive language, and a system of espionage, the workmen are induced to break their contracts of employment with the employers, and other workmen are prevented from entering into the employment in their stead. And a foreign officer of an organized body of which the local trade union was a part, who came to this province and aided, encouraged, and directed the members in their unlawful acts, was held liable with them for the consequences. It is too late at the trial, after a trade union has appeared and pleaded in an apparently corporate capacity, to raise the objection that it is not in fact incorporated or liable to be sued. Such an objection must be specially pleaded. *Krug Furniture Co.* v. *Berlin Union of Amalgamated Woodworkers*, 23 Occ. N. 170, 5 O. L. R. 463, 2 O. W. R. 282.

Interference between Master and Servant—Interim injunction — Balance of convenience. *Small* v. *American Federation of Musicians*, 2 O. W. R. 26, 33, 99, 278, 310.

Interference with Employers' Business—Injunction — Action against members of union—Parties — Representation — Local bodies — General council. *Gurney Foundry Co.* v. *Emmett*, 2 O. W. R. 938, 959, 1038.

Interference with Servants of Plaintiff — Interim injunction. *Small* v. *Hyttenrauch*, 2 O. W. R. 447, 656, 658.

Watching and Besetting—*Conspiracy—Injunction.*] — Injunction granted in the terms of the order, in Taff Vale R. W. Co. v. Amalgamated Society of Railway Servants, [1901] A. C. 426. *Le Roi Mining Co.* v. *Rossland Miners' Union, No. 38, Western Federation of Miners*, 8 B. C. R. 370.

TRADING CORPORATION.

See CHOSE IN ACTION — ASSIGNMENT OF —COMPANY.

TRADING STAMPS.

See CONSTITUTIONAL LAW.

TRANSCRIPT.

See EXECUTION.

TRANSFER OF PROPERTY.

See JUDGMENT DEBTOR—LAND TITLES ACT.

TRANSIENT TRADERS.

See MUNICIPAL CORPORATIONS.

TREATING.

See PARLIAMENTARY ELECTIONS.

TREATY.

See CONSTITUTIONAL LAW.

TREES.

Growing Trees — Highway — "Left standing"—Municipal corporation—Statutes. *Wolff* v. *Kehoe*, 1 O. W. R. 78.

Ornamental Trees — *Destruction by Railway Company under Statute—Rights of Owners — Injunction — Construction of Statutes.*]—The right of property in shade trees on highways and to fence them in, conferred upon the owners of the lands adjacent to the highways by s. 688 of the Municipal Act, R. S. M. 1902 c. 116, is not taken away by an Act incorporating a railway company with power to construct a line of railway along the public highway with the consent of the municipality and according to plans to be approved by the council of the municipality, even although such consent has been given and such plans approved. The defendants' Act of incorporation provided that the several clauses of the Manitoba Railway Act, R. S. M. 1902 c. 145, should be incorporated with and deemed part of it. And the Railway Act provides that the several clauses of the Manitoba Expropriation Act, R. S. M. 1902 c. 61, with respect to the expropriation of land and the compensation to be paid therefor, shall be deemed to be incorporated mutatis mutandis with the Railway Act:—Held, that the defendants had no right to cut down the trees on the highway or to lower the grade in front of the plaintiffs' land, although such action was necessary in carrying out the approved plans, without taking the proper steps, under the Railway Act and the Expropriation Act, either to ascertain and pay the damages suffered by the plaintiffs to their land injuriously affected by the intended construction, or to procure an order from a Judge, under s. 25 of the Railway Act, giving them the right to take possession upon giving security for payment of the compensation to be awarded; and that the interim injunction secured by the plaintiffs should be continued until the trial unless the defendants should furnish security that they would proceed forthwith to settle the amount of such compensation. *Bannatyne* v. *Suburban Rapid Transit Co.*, 24 Occ. N. 380, 15 Man. L. R. 7.

Property in Trees Planted in Highway — *Destruction—Recovery.*] — Trees planted upon the public highway in the city of Montreal, with the consent of the municipal authority and in conformity with its regulations, become an accessory to the property in the land in front of which and for the advantage of which they have been planted, and the owner of such land may maintain an action for damages against a neighbour, when by reason of the industry carried on by the neighbour, the trees have been destroyed. Beauchamp v. City of Montreal, M. L. R. 7 S. C. 382, followed. *L'Huissier* v. *Brosseau*, Q. R. 20 S. C. 170.

See MUNICIPAL CORPORATIONS — TIMBER.

TRESPASS TO GOODS.

Destruction of Animal—Proof of identity—Evidence.—*Brenner* v. *Walker* (N.W. T.), 2 W. L. R. 347.

Hire of Chattels—*Contract for — Payment in Satisfaction for Breach of—Effect of—New Trial—Notice of Motion.*]—In an action upon a contract for the hire of chattels, the plaintiff is entitled to recover damages for the improper use of or injury to the chattels or for a conversion of them. Therefore, where a plaintiff sued in assumpsit for the hire of blocks and gear for hoisting, and also added a count in trespass for the improper use and injury to the same and a count in trover for a conversion of a part thereof, and the trial Judge found that a sum of money paid by the defendant to the plaintiff before action was an ample compensation for the plaintiff's claim on the count for hiring:—Held, that this amounted to a finding in favour of the defendant on the pleas of "not guilty," pleaded to the counts in tort. A copy of the notice of the motion for a new trial must be served upon the Judge who tried the cause. The mere filing of the same with the clerk is not sufficient. *Lang* v. *Brown*, 34 N. B. Reps. 492.

TRESPASS TO LAND.

Action — *Possession—Effect of Enclosure by Another.*]—The mere enclosure of the land of another, by the adjoining proprietor, by a fence put up with the consent of and by arrangements with the owner, for the purpose of protecting the lands of both against cattle, does not dispossess the owner, nor prevent him from maintaining trespass against anyone intruding therein, or using his land for purposes other than that for which it was enclosed. Brookman v. Conway, 35 N. S. Reps. 462, affirmed. *Conway* v. *Brookman*, 35 S. C. R. 185.

Animals — *Fences—Agreement—Municipal By-law.*]—The plaintiff and defendant, adjoining land-owners, made an arbitrary division of the line fence between their lots, which was less than five feet in height and which they agreed to keep in repair. By reason of the defendant allowing his portion to get into disrepair, his cattle and sheep got on the plaintiff's land and damaged it. The defendant also allowed his cattle to escape and run at large on the highway, whence, by breaking down the plaintiff's fences, they got on the plaintiff's land and further damaged it. A township by-law provided that no fence should be less than five feet high, and prohibited the running at large

of all breachy cattle:—Held, that the defendant was liable for the damages sustained by the plaintiff, and that such liability was not affected by the by-law. *Barber* v. *Cleave*, 2 O. L. R. 213.

Boundaries—Middle of stream. *Wason* v. *Douglas*, 1 O. W. R. 552.

Boundaries — Survey — Conventional line — Agreement — Possessory title—Real Property Limitation Act—Acts shewing possession. *Clark* v. *Fisher*, 3 O. W. R. 358.

Boundary Lines Act — *Obligation to Fence—Joint Owner—Parties—Possession—Right of Action.*]—The provision in s. 4 of the Boundary Lines Act, R. S. M. c. 12, viz., "Each of the parties occupying adjoining tracts of land shall make, keep up, and repair a just proportion of the division or line fence on the line dividing such tracts, and equally on either side thereof," does not supersede the common law liability of an owner of cattle for all their trespasses except such as are due to defects in fences which the complainant is bound as between himself and such owner to keep up; and such owner will be liable for the trespasses committed by his cattle, unless it is shewn that the complainant was bound to keep up and repair the particular part of the fence through which the cattle entered. The common law rule is not displaced by a joint liability to keep up fences. The injured crops were raised by plaintiff who was in possession, but another person had a half interest in the crop: — Held, that sole possession by the plaintiff was sufficient to support an action of trespass, and it was not necessary to make the co-owner a party or to obtain any release from him. Star v. Rookesby, 1 Salk. 335, and Graham v. Peat, 1 East, 246, followed. *Garrioch* v. *McKay*, 21 Occ. N. 421, 13 Man. L. R. 404.

Cutting and Removing Timber—*Measure of Damages—Wrongful and Wilful Acts.*]—In trespass, the inquiry is, what damages will compensate or restore the plaintiff financially to his original position as nearly as possible at the time when the trespass was committed. Where the defendants had wrongfully and wilfully entered upon and cut and carried away timber from the plaintiffs' limits, and the plaintiffs sued for trespass only:—Held, that the damages should be measured by: (1) the value of the timber after it was severed and manufactured, so far as it was manufactured, while on the timber limits of the plaintiffs, immediately before the defendants removed it; (2) such sum as represented the extent to which the limits were injured, if at all, by reason of their having been partly denuded by the acts of the defendants; (3) such further and other damage as resulted to the limits by the acts of the defendants, such, for instance, as wasteful methods in cutting, using the surface to pass and repass, etc. Martin v. Porter, 5 M. & W. 351, and Bulli Coal Co. v. Osborne, [1899] A. C. 351, applied and followed. Decision of Lount, J., 22 Occ. N. 114, 3 O. L. R. 269, affirmed. *Union Bank of Canada* v. *Rideau Lumber Co.*, 23 Occ. N. 11, 4 O. L. R. 721, 1 O. W. R. 764.

Defence — *Expropriation—Plan — Description — Boundary Line — Damages.*]—The defence in an action for trespass to land was that the land in question has been expropriated by the town of S. under the provisions of the Acts of the province, 1880, c. 84, and conveyed by the town to the defendant company. The Act contained a provision that, upon the filing of a plan in the office of the registrar of deeds for the county, immediately after the town council should have by resolution provided for such expropriation, all right, etc., in said lands should forthwith absolutely vest in the town:—Held, that the filing of the plan would be ineffectual in the absence of a resolution of the town council providing for the acquisition or expropriation of the land; and that a description written on the face of the plan was made part of and must be taken in connection with it. The defence to the action depended in part upon the position of the line between McD. and McL.:—Held, that the mode adopted by the defendant to fix the starting point of this line could not be adopted to the exclusion of all others, and to control the line as established by the vendors and purchasers at the times the conveyances were made, and not since disputed, especially as the effect would be to deprive the plaintiff of his land without proper notice, and without remuneration:—Held, with respect to damages, that though they were not such as the Court would have given, the matter was one in the discretion of the trial Judge, and there was no reason for interfering. *McLennan* v. *Dominion Iron and Steel Co.*, 36 N. S. Reps. 28.

Ejectment — Boundaries — Survey — Encroachment — Damages — Possession — Form of judgment — Variation — Scale of costs — Appeal as to. *Gilmore* v. *Luckhurst*, 3 O. W. R. 383, 676.

Injunction — *Expropriation—Statute—Acquiescence — Compensation.*]—Where a trespasser, by taking proper steps to that effect, would have the right to expropriate the lands in dispute, an injunction should be withheld in order to enable the necessary proceedings to be taken and compensation made. Goodson v. Richardson, L. R. 9 Ch. 221, and Cowper v. Laidler, [1903] 2 Ch. 337, applied. But where there has been acquiescence equivalent to a fraud upon the defendant, the injunction ought not to be granted, even where the legal right of the plaintiff has been proved. Gerrard v. O'Reilly, 3 Dr. & War. 414. Wilmot v. Barber, 15 Ch. D. 96, Johnson v. Wyatt, 2 DeG. J. & S. 17, and Smith v. Smith, L. R. 20 Eq. 500, referred to. By the defendants' charter, 59 V. c. 62, ss. 9, 25 (B.C.), it was provided that the powers to enter, survey, ascertain, set out, and take, hold, appropriate, and acquire lands, should be subject to the making of compensation, and that the powers, other than the powers "to enter, survey, set out, and ascertain," should not be exercised or proceeded with until approval of the plans and sites by the Lieutenant-Governor in council. The defendants entered upon lands of the plaintiffs, made surveys, and constructed works thereon, without making compensation or obtaining such approval. Some time after entry the defendants obtained the necessary order in council approving of the plans and sites of the land to be expropriated:—Held, that making of compensation was not a condition precedent to making the survey and taking posses-

sion of the land, and, as the order in council was not dealt with at the trial, the rights of the parties could not properly be determined on the material presented; the injunction should, therefore, be refused, and the parties left to take proceedings as they should respectively see fit. Judgment in Byron N. White Co. v. Sandon Waterworks and Light Co., 10 B. C. R. 361, varied. *Sandon Waterworks and Light Co.* v. *Byron N. White Co.*, 35 S. C. R. 309.

Injury — *Trespass—Pleading—Negligence—Scienter.*]—In an action of trespass for an injury to the plaintiff's horse by the defendant's cow, the declaration was held bad, on demurrer, for not alleging negligence or knowledge of vice. *Elliott* v. *Doak*, 36 N. B. Reps. 328.

Mining Claim — *Contradictory Evidence—Wilful Trespass—Rule in Assessing Damages—Practice—Adding Party — Reversal on Appeal.*]—In an action for damages for entry upon a placer mining claim and removing valuable gold bearing gravel and dirt, the trial Judge found the defendants guilty of gross carelessness in their work, held that they should be accounted wilful trespassers, and referred the cause to the clerk of the Court to assess the damages. The referee adopted the severer rule applicable in cases of fraud in assessing the damages. The Territorial Court en banc reversed the trial Judge in his findings of fact upon the evidence:—Held, reversing the judgment appealed from, that the trial Judge's findings should be sustained with a slight variation, but that the referee had erred in adopting the severer rule against the defendants in assessing the damages, and that his report should be amended in view of such error. Semble, that the record and pleadings should be amended by adding the plaintiff's partner as co-plaintiff:—Held, per Taschereau, C.J.C., dissenting, that, although not convinced that there was error in the judgment of the trial Judge which the Court en banc reversed, while at the same time it did not appear that there was error in the judgment en banc, yet the latter judgment should stand, as the Court en banc should not be reversed unless the Supreme Court, on the appeal, be clearly satisfied that it was wrong. *Kirkpatrick* v. *McNamee*, 25 Occ. N. 125, 36 S. C. R. 152.

Possessory Action — *Disturbed Possession — Prescription — Title — Intervention.*]—The plaintiff, by possessory action, complained of being troubled in his possession, by the defendants, of the rear portion of lots 2195 and 2196 of the cadastral plan of Three Rivers, extending from "la cime de la côte" to the river St. Lawrence. The defendants pleaded ownership and possession under arrangements with the Crown. The Canada Iron Furnace Company intervened, claiming ownership of the entire lot No. 2196 under a deed of sale of the 30th October, 1890, accompanied by constant possession for over ten years. The plaintiff contested the intervention, alleging that the intervenants could only claim the extent of ground conveyed to their auteur, by sheriff's sale of the 15th February, 1862, and which extended only to the "cime de la côte," none of which is claimed by the action, the portion so claimed starting from the "cime de la côte" and going to the river. The intervenants' title expressly covered all the land to the river, which is given both by the title and by the cadastral plan as the boundary thereof. The intervenants were never troubled in their possession judicially, the only disturbance being a notarial protest by the plaintiff, more than a year and a day prior to the institution of this action, notifying the intervenants that he claimed the land now claimed by his action, and requiring them to join in making a line fence along the "cime de la côte." This protest was not followed by any attempt to obtain possession of the land from the intervenants:—Held, that there was no trouble de droit of the intervenants' possession within ten years. 2. A notarial protest is not a trouble de droit of possession of land, and does not interrupt prescription. 3. The intervenants' title and constant possession gave them ownership of the land, notwithstanding the title of conveyance to their auteur. 4. The intervenants had a sufficient interest to intervene, having shewn a possession which was troubled by the plaintiff's action. 5. Possession which affects a whole lot of land renders it unnecessary to prove particular acts of possession, within a year and a day, of any special part of the lot. *Dupré* v. *Harbour Commissioners of Three Rivers*, Q. R. 23 S. C. 439.

Searching for Liquor without Warrant — *Private Dwelling House — Liquor License Act — County Constable — Notice of Action — Bona Fide Conduct — Leave and License — Jury.*]—The defendant, a county constable appointed by a police magistrate, searched the plaintiff's dwelling house for liquor without a warrant and without any special authority. In an action for trespass the trial Judge held that the defendant was acting in the discharge of his duty, and, there being no evidence of malice, that he was entitled to notice of action, and withdrew the case from the jury and directed a nonsuit:—Held, on appeal, that the question as to whether the defendant was acting bona fide in the discharge of his duty as a constable, in searching a private house, as being a house of public entertainment, for liquor, was a question for the jury; and that leave and license, which was argued on the appeal but not pleaded on the record, should also, if pleaded, be submitted to the jury; and the judgment dismissing the action was set aside and a new trial ordered, with liberty to the defendant to amend by adding a plea of leave and license. *Bell* v. *Lott*, 25 Occ. N. 34, 9 O. L. R. 114, 4 O. W. R. 430.

Searching Private Dwelling House without Warrant — Liquor License Act — House of public entertainment — Honest belief — Leave and license — Questions for jury — Pleading. *Bell* v. *Lott*, 4 O. W. R. 430.

Timber — Conversion — Assignment of claim for wrongful act — Dispute of title —License — Estoppel — Admissions — Husband and wife. *McDermott* v. *Travers*, 5 O. W. R. 313.

Timber — Conversion — Joinder of defendants and causes of action — Purchasers from trespassers. *Rogers* v. *Frechette*, (B. C.), 1 W. L. R. 190.

Title — Pleadings — Jurisdiction of County Court — Damages — Boundary —

Declaration — Claim of tenant — Amendment — Costs. *Miller* v. *Smith*, 6 O. W. R. 784.

Usufructuary of Undivided Half.]— The usufructuary of an undivided half of an immovable has a right of action in trespass. *Martin* v. *Campbell*, Q. R. 23 S. C. 522.

Wrongful and Wilful — *Damages — Mode of Assessment.*]—Where in an action of trespass, the judgment is that the trespass was wrongful and wilful, the assessment of damages must be on the basis of such finding, and not as if the trespass was done innocently or bona fide. *Union Bank of Canada* v. *Rideau Lumber Co.*, 22 Occ. N. 114, 3 O. L. R. 269.

TRESPASS TO PERSON.

Arrest and Search — *Reasonable and Probable Cause — Post Office — Decoy Letter.*]—The appellant, a letter carrier employed by the post office department at Montreal, was intrusted with the delivery of two decoy letters, for the purpose of testing his honesty. Each of the letters contained a small sum of money. One of them bore a non-existent address, the other a real address. The latter was delivered, but the former, under the rules of the department, should have been entered in the book kept at the post office for that purpose, and the letter should have been returned by the carrier to the post office. There being no entry of this letter in the post office book, after the usual time for making such entry had elapsed, the appellant was detained and searched by the respondent, a detective, acting under the instructions of the post office department. The letter not being found on the appellant, he was released. On the following day the letter was returned to the post office: — Held, (affirming the dispositif of the judgment in Q. R. 20 S. C. 549, with a modification of the considérants) that the appellant having violated the rules of the post office department, by failing to enter the letter bearing a non-existent address in the book provided for that purpose, there was reasonable and probable cause for detaining and searching him, and that his action for damages against the respondent, in the absence of evidence that the respondent had made an improper and illegal use of his authority in the manner in which he effected such detention and search, and subsequent release, could not be maintained. 2. A letter is a post letter although directed to a fictitious or non-existent address. *Mayer* v. *Vaughan*, Q. R. 11 K. B. 340.

Assault — Personal injuries — Damages. *Harris* v. *Burt*, *King* v. *Burt*, 474, 2 O. W. R. 474, 3 O. W. R. 400.

Pleading — *Allegations as to Character.*] —In an action for damages for trespass or aggravated assault, allegations concerning the respective characters of the plaintiff and defendant will be struck out of the record, upon inscription in law, as being useless and not pertinent to the issue. *Chénier* v. *Martin*, Q. R. 25 S. C. 324.

See ASSAULT.

TRIAL.

I. CAUSE LIST, 1592.
II. COPY OF PLEADINGS FOR JUDGE, 1592.
III. INSCRIPTION, 1592.
IV. JUDGE—DEATH OF, 1593.
V. JURY, 1593.
VI. JURY NOTICE, 1603.
VII. NOTICE OF TRIAL, 1605.
VIII. POSTPONEMENT, 1607.
IX. SEPARATION OF ISSUES, 1608.
X. SETTING DOWN, 1609.
XI. TEST ACTION, 1609.

I. CAUSE LIST.

Case Tried Out of its Turn in Absence of Party — *New Trial.*]—See *Milagea* v. *Crocket*, 36 N. B. Reps. 351.

Priority — *Action for Pension.*] — An action for an alimentary pension will not be given priority upon the list for trial. *Brodeur* v. *Morcau*, 6 Q. P. R. 437.

II. COPY OF PLEADINGS FOR JUDGE.

Dispensing with — *Setting Down.*] — The copy of pleadings required by art. 295, C. P., is for the use of the Judge alone; and where the Judge of the district had informed the advocates and prothonotary of that district that he did not require this copy, an inscription made without was held valid. *Menier* v. *Whiting*, Q. R. 18 S. C. 113.

III. INSCRIPTION.

Irregularity — *Time — Joinder of Issue.*]—An inscription for hearing upon the merits filed less than three days before issue joined is illegal and will be set aside on motion. *Brisson* v. *International Harvester Co.*, 6 Q. P. R. 42.

Proceeding taken in Name of Deceased Party — *Amendment—Discretionary Order — Interference with Discretion on Appeal.*]—During the time between the hearing of a case and the rendering of the judgment in the trial Court, the defendant died. His solicitor, by inadvertence, inscribed the case for revision in the name of the deceased defendant. The plaintiffs allowed a term of the Court of Review to pass without noticing the irregularity of the inscription, but, when the case was ripe for hearing on the merits, gave notice of motion to reject the inscription. The executors of the deceased defendant then made a motion for permission to amend and to be allowed to make a regular reprise d'instance. The Court of Review allowed the plaintiffs' motion as to costs only, permitted the amendment and reprise d'instance applied for, and reversed the trial Court judgment on the merits. The Court of King's Bench (appeal side) reversed the judgment of the Court of Review, on the

ground that it had no jurisdiction to allow the amendment and hear the case on the merits, and that, consequently, all the orders and judgment given were nullities:—Held, reversing the judgment appealed from, Strong, C.J., and Taschereau, J., dissenting, that the Court of Review had jurisdiction to allow the amendment and reprise d'instance, and that, as there was no abuse of discretion, the Court of King's Bench should not have interfered. *Price* v. *Fraser*, 22 Occ. N. 46, 31 S. C. R. 556.

Reinstatement of Case Struck Out—*Notice.*]—Where a case, inscribed on the roll for trial, has been struck out in the absence of the attorneys, it may be reinstated on the roll on the application of either of the parties, after notice to the other party. *Carter* v. *Walker*, Q. R. 23 S. C. 123.

Time — *Premature Filing.*]—A proceeding in an action has no efficacy except as of the day upon which it is filed at the record office and made part of the record. 2. An inscription for examination and hearing, made before the expiration of the three days which follow issue joined, will be set aside upon the application of the opposite party. *Lachance* v. *Casault*, 4 Q. P. R. 223.

See APPEAL — EXHIBITS — PLEADING.

IV. JUDGE—DEATH OF.

Reservation of Judgment — *New Trial.*]—The evidence was taken and the argument heard before Rose, J., who died without having given judgment:—Held, that the ordinary course would be to have the action set down for argument before a Divisional Court on the evidence already taken, but that there was no power to make such an order, either in Court or Chambers, except on consent. Wellbanks v. Conger, 12 P. R. 354, distinguished. The defendant not consenting, no order could be made, and the cause must go down to trial again. *Clarke* v. *Trask*, 21 Occ. N. 166, 1 O. L. R. 207.

V. JURY.

Answer to Questions. *Balfour* v. *Toronto R. W. Co.* 5 O. L. R. 735, 2 O. W. R. 671.

Application for — *Action for Money Lent—Joinder of Claims—Exception.*] — A claim arising from a loan of money by an advocate to a broker is not a debt of a commercial nature, and consequently is not susceptible, under art. 421, C. C. P., of trial by jury. And where such claim is joined to a demand of a commercial nature the defendant is entitled, under art. 177, C. C. P., to stay the suit by dilatory exception. *Gilman* v. *Fenwick*, Q. R. 20 S. C. 513.

Application for — *Change of Venue—Time for—Amendment.*]—An application for change of venue and trial by jury after an order made giving leave to amend defence, but before delivery thereof, is premature. *Bank of British Columbia* v. *Oppenheimer*, 7 B. C. R. 446.

Application for — *Delay in Proceeding — Bar.*] — A party who has applied for a trial by jury is deprived of the right of proceeding by the expiration of the delay of 30 days from issue joined, if the application has been made by pleading, or from the judgment granting a special application for a trial by jury, if there has been such an application. *Copland* v. *Canadian Pacific R. W. Co.*, 4 Q. P. R. 163.

Application for — *Equitable Relief — Questions of Fact.*] — Action by a former shareholder in a company against T. and the company, the latter being joined as defendant because T. and his brother and partner had a controlling interest in the company, and the consent of the company to be joined as plaintiff could not be obtained. It was alleged that T. while a director of the company had discovered a valuable bed of gold in areas as to which the company held an option to purchase; that the discovery was concealed; and that T. procured a conveyance of the property to himself, and also purchased the shares of the other shareholders, including those of the plaintiff, without disclosing the discovery. These facts were put in issue by T. The relief sought to be obtained was, among other things, a declaration that T. held the areas as trustee for the company, and that the company was entitled to a transfer thereof; also, that the transfer of the shares by the plaintiff to T. should be set aside. The defendant applied for an order to have the issues tried by a jury: O. 34 2:—Held, that the admitted relation of T. with these properties and to his co-owners and co-partners in the transaction was such as to entitle all others interested in the property to the fullest explanation of the dealings of T. with the officers of the company, and the circumstances under which he and his partner became proprietors of the mine. The inquiry could be more effectively made in a trial before a Judge, as in other equitable proceedings, than before a jury. The application was dismissed. *Rood* v. *Thompson*, 22 Occ. N. 36.

Application for — *Fraud—Time.*] — There cannot be a trial by jury except in the cases enumerated in art. 421, C. P. 2. An action for damages, founded upon fraud and false representations, does not come within any of the classes of actions mentioned in that article. 3. After a motion is made to settle the facts, it is not too late to plead that the action is not one proper to be tried by a jury. *Bell* v. *Royal Bank of Canada*, 4 Q. P. R. 309, Q. R. 21 S. C. 321.

Application for — *Time.*]—An application for a trial by jury will be received if it is made within three days after issue joined, although the notice thereof was not given a clear day before the return of the motion. *Richer* v. *Shawinigan Water and Power Co.*, 7 Q. P. R. 71.

Application for — *Trespass.*]—To make a case for an order for trial of an action by a jury, all the causes of action must be susceptible of being tried in this exceptional way. 2. An action in which damages are claimed against the defendants for having executed an illegal mandat de perquisition and having entered without warrant the domicil of the plaintiff and having threatened her

with criminal prosecution, may be tried before a jury; but if the plaintiff claims, besides, damages on account of being deprived of the use of certain personal property, that cause of action takes away the right to trial by jury. *Roy* v. *Dickson*, 4 Q. P. R. 357.

Application for — *Time.*]—A special application to a Judge for leave to exercise the option of having a case tried by a jury, when that option has not been exercised by the declaration or the defence, must be presented to the Judge within the three days which art. 423 fixes for this purpose, and it will not suffice to give to the opposite party notice of this application within this time, even when one of three days is a non-juridical day. *Canadian Pacific R. W. Co.* v. *Foster*, Q. R. 12 K. B. 139.

Application for — *Time — Justice's Court — Adjournment — Continuation of Trial before Another Justice—Security for Costs.*]—An application for a jury under C. S. c. 60, s. 31, must be made one clear day previous to the trial; and a demand made after a trial had been commenced, and adjourned at the request of the defendant before any substantial progress had been made, is too late. A bond for security for costs under 49 V. c. 53, approved of by a justice who has been called upon to continue a trial commenced before the justice who issued the first process, and who was unable by reason of illness to conclude the trial, is sufficient. *Temperance and General Life Assce. Co. of North America* v. *Ingraham*, 35 N. B. Reps. 558.

Application for — *Time — Non-juridical Day.*]—Where the third and fourth days following that upon which issue is joined are non-juridical days, a motion for leave to elect to have a case tried by a jury may be presented on the following juridical day. *Morlock* v. *Webster*, 5 Q. P. R. 484.

Application for — *Time—Pleading.*]—A plaintiff who is in default for a reply to a plea, may obtain leave to file his reply, but such filing will not have the effect of extending the time to elect for trial by jury, the time therefor having expired on the fourth day after issue joined. *Deniger* v. *Grand Trunk R. W. Co.*, 5 Q. P. R. 136.

Claim and Counterclaim.]—Where the claim is such that it cannot by reason of R. 170 of the Judicature Ordinance (C. O. 1898 c. 21), be tried by a jury, and there is a counterclaim which, if the defendant had sued in a separate action, he would have been entitled to have tried by a jury:—Held, that if the counterclaim arises out of the same transactions as the claim, they must be tried together; and in that event the defendant, having accepted the forum chosen by plaintiff, a jury cannot be allowed. *Friel* v. *Stinton*, 5 Terr. L. R. 252.

Direction to—*Submission of Questions—Scientific Investigation—New Trial—Exceptions to Charge—Exclusion of Jury.*]—In an action by a ship owner against a tug owner for damages for negligence on the part of the tug in allowing the ship to drift ashore while attempting to tow her from a dangerous position, the Judge in his charge to the jury explained the law applicable to the issues, but he did not point out to the jury the bearing of the facts in evidence upon the questions to be determined:—Held, that the charge was incomplete and was misunderstood by the jury and that there must therefore be a new trial. The Judge is bound to submit questions to the jury if requested to do so. Per Hunter, C.J.: (1) A jury is not suited to try a dispute involving questions as to what were the proper nautical manœuvres to be performed under peculiar conditions, and the new trial should be held before a Judge without a jury. (2) The Court has jurisdiction to order a new trial without a jury, although the appellant in his motion for a new trial does not so ask.—Per Martin, J.: (1) It is the duty of the Judge under s. 86 of the Supreme Court Act, 1904, to instruct the jury upon all leading groups of evidence and apply to them the law as affecting the issues arising out of such evidence. (2) The jury should not be excluded from the court room during the discussion on an application by counsel for further direction by the Judge. (3) The plaintiffs have an inherent right to a jury, and mere complexity of fact is no ground for depriving them of that right. *Alaska Packers' Association* v. *Spencer*, 24 Occ. N. 361, 10 B. C. R. 473.

Disagreement — Motion for nonsuit—Negligence of master—Death of servant—Action for damages. *Rogers* v. *Empire Limestone Co.*, 3 O. W. R. 788.

Disagreement — *Fraud — Judgment by Court.*] — On the second trial of an action on a promissory note, where the defence alleged fraud on the part of the plaintiffs in obtaining the indorsement, the jury disagreed. Plaintiffs then moved for judgment on the ground that there was no evidence of fraud, and the motion was refused:—Held, that no jury could properly find fraud, and it was desirable, especially in view of the first abortive trial, that the judgment should now be entered which should have been entered at the trial. *Yorkshire Guarantee and Securities Corporation* v. *Fulbrook*, 9 B. C. R. 270.

Disqualification of Juror — *Setting aside Verdict.*]—If a juror on the trial of a cause is allowed without challenge to act as such on a subsequent trial, that is not per se a ground for setting aside the verdict on the latter. *Dunsmuir* v. *Lowenberg, Harris, & Co.*, 24 Occ. N. 117, 34 S. C. R. 228.

Failure to Set Down in Time—Power to give leave to set down—Jurors Act, s. 97—Amending Act, 2 Edw. VII. c. 14, s. 3. *Fleming* v. *Canadian Pacific R. W. Co.*, 5 O. W. R. 588.

Failure to Submit Question — *New Trial.*]—In the trial with a jury of a replevin action, the fact in issue was whether an annual rent, the amount whereof was fixed by an award, was agreed prior to the submission to arbitration to be paid in advance, or whether both the amount of the rent and the time of payment were included in the submission. The ascertainment of this fact was not left to the jury, and pursuant to a general verdict judgment was entered for the defendant:—Held, on appeal, that, in consequence of the non-submission of this question of fact to the jury, there must be a new trial. *MacAdam* v. *Kickbush*, 10 B. C. R. 358.

Findings—Meaning of—Negligence—Contributory negligence — Injury at railway crossing — Signals — Evidence — Nonsuit. *Moore* v. *Grand Trunk R. W. Co.*, 6 O. W. R. 1031.

Findings—Negligence—Failure to agree as to contributory negligence. *White* v. *Canada Atlantic R. W. Co.*, 3 O. W. R. 840.

Findings as to Negligence—*Questions as to Special Grounds—Judge's Charge—Non-direction—Misdirection—New Trial.*]—Upon a trial by jury, the Judge in directing the jury as to the law is bound to call their attention to the manner in which the law should be applied by them according to their findings as to the facts, the extent to which he should do so depending on the circumstances of the case he is trying. And, where the form of the charge was defective in this respect, and, consequently, left the jury in a confused state of mind as to the questions in issue, a new trial was directed. Judgment in Alaska Packers' Association v. Spencer, 10 B. C. R. 473, affirmed; Davies, J., dissenting:—Held, per Nesbitt, J., that in an action founded on negligence it is advisable that specific questions should be submitted to the jury to enable them to state the special grounds on which they find negligence or no negligence. *Spencer* v. *Alaska Packers' Association*, 35 S. C. R. 362.

General Verdict—*Questions Submitted—Oral Contract—Credibility of Parties.*]—The terms of an oral contract were in question. The plaintiff and defendant, being the only witnesses on the point, each swore positively to his version of the contract. Counsel for each of the parties at the trial proposed certain questions, asking that they be submitted to the jury and objecting to the submission of the questions proposed by the other side. The Judge submitted both sets of questions, but directed the jury that they were at liberty either to answer the questions and thus give a special verdict, or to give a general verdict. The jury gave a general verdict for the plaintiff. On a motion by the defendant to set aside the verdict:—Held, that the question of there being a mistake or no consensus ad idem did not arise, and that the verdict depended on the jury's view of the credibility of the parties, and that, therefore, the verdict should not be disturbed. *Newson* v. *McLean*, 2 Terr. L. R. 4.

Inconclusive Findings—*New Trial—Negligence.*]—The plaintiff's intestate had a contract with the defendant company to repair a bridge, and in an action to recover damages for his death by the defendants' negligence, the jury found, inter alia, that he went on such business on a coal train without any ticket, but with the consent of the officer in charge, and that the latter had no authority, unless by custom, to allow the deceased to travel on the train:—Held, that the findings were inconclusive and that there should be a new trial. *Nightingale* v. *Union Colliery Co.*, 8 B. C. R. 134.

Inconsistent Findings—*Contract—New Trial.*] — In an action for damages for breach of a contract the jury found, in answer to questions submitted by the Judge, that the racks furnished under the contract by the plaintiffs, and rejected by the defendants' inspector, were not in accordance with the contract and specifications, but were in accordance with the sample rack furnished by the defendants on acceptance of the plaintiffs' tender; they also found that the defendants employed a competent inspector and he acted in good faith, and they assessed the damages at $831.70, for which amount a verdict was entered for the plaintiffs:—Held, on a motion to set aside the verdict and enter a verdict for the defendants, that, in view of the findings that the inspector acted in good faith, and that the racks were not manufactured according to the contract and specifications, there must be a new trial. *Lawton Co.* v. *Maritime Combination Rack Co.*, 36 N. B. Reps. 604.

Inconsistent and Unsatisfactory Findings—Re-trial. *Moore* v. *Grand Trunk R. W. Co.*, 5 O. W. R. 211.

Interpleader Issue.]—Neither a Judge nor the Court, in the North-West Territories, has power to direct the trial by jury of an interpleader issue. *McIntosh* v. *Shaw*, 4 Terr. L. R. 97.

Judge's Charge — *Time for Objecting—Statement in Writing — Misdirection—Affidavit.*]—A party who desires to object to the direction given to the jury by the trial Judge must formulate his objection at the trial, and indicate in writing the portion of the charge to which he objects, and he will not be permitted to make the objection at a later stage, establishing by affidavit the direction given to the jury which he alleges to be contrary to law. *Bélanger* v. *Larocque*, Q. R. 25 S. C. 403.

Jurors—*Same Juror Sitting on Former Trial — Challenge — New Trial.*]—The fact that a member of a special jury was one of the jurors at a former trial is a good ground of challenge at a new trial, but the fact that such a juror served without challenge is not per se a ground for granting a new trial. At the first trial, with a special jury, the plaintiff got a verdict in his favour, and on appeal a new trial was ordered. At the second trial a nonsuit was entered, and on appeal a new trial was ordered. At the third trial, also with a special jury, the plaintiff got a verdict in his favour. Between the second and third trials the defendant changed her solicitors. At the first trial the defendant was in Court, but on account of illness was not present at either the second or the third trial. J. M. was a juror on the first trial and also on the third trial, but neither the defendant nor her solicitors were aware of the fact until after the conclusion of the trial:—Held, refusing a new trial on this ground, that in selecting a special jury it was the duty of the solicitor to ascertain any grounds of challenge, an opportunity to do which is provided by s.-s. 5 of s. 59 of the Jurors Act. *Harris* v. *Dunsmuir*, 22 Occ. N. 341, 9 B. C. R. 393.

Misdirection — *Judge's Opinion of Evidence.*]—It is not misdirection for the Judge to tell the jury his own opinion on the evidence before them. In his charge to the jury the Judge stated that he himself would pay very little attention to certain corroborative evidence adduced by the defendants, but he also told them that the matter was entirely

for them to decide:—Held, not misdirection. *Harry* v. *Packers S. S. Co.*, 10 B. C. R. 258.

Misdirection — *Non-production — Inference—New Trial.*] — In an action involving disputed accounts, it is not a ground for a new trial that the Judge told the jury they might draw inferences favourable or unfavourable to the plaintiff's case from the fact that he refused to produce, under notice, documentary evidence in his possession, which, it was admitted, contained some account of the transaction in dispute. *Hale* v. *Leighton*, 36 N. B. Reps. 256.

Option for—*Failure to Bring on Trial—Subsequent Reply — Motion for Act of Option.*]—When, after making the option for a jury trial in his declaration, the plaintiff allows more than 30 days to elapse from the date on which he should have filed his answer to a plea, without proceeding to bring on the trial, he is deprived of his right to a jury trial, and subsequent production of an answer, whether by consent or otherwise, has not the effect of reviving the lapsed right to a jury trial. A motion praying act of an option already made is not a proceeding to bring on the trial: *Asselin* v. *Montreal Light, Heat and Power Co.*, 7 Q. P. R. 218.

Option for—*Time—Pleading—Vacation.*] —If a plea is filed during the long vacation, the plaintiff may reply on the 7th September, from which date the delay for making option for trial by jury will run if the plea is not answered. *Belanger* v. *Montreal Street R. W. Co.*, 7 Q. P. R. 272.

Order for Special Jury—*New Trial.*]—Pursuant to an order therefor, a trial was had with a special jury; on appeal a new trial was ordered:—Held, that the order for a special jury was not exhausted, and a summons for a special jury on the new trial was unnecessary. *Alaska Packers' Association* v. *Spencer*, 11 B. C. R. 138, 1 W. L. R. 103, 188, 567.

Order for Special Jury—*New Trial—Change of Circumstances.*]—Pursuant to an order therefor a trial was had with a special jury; on appeal a new trial was ordered:—Held, per Irving and Morrison, JJ., Hunter, C.J., dissenting, that the order for a special jury was not exhausted by the abortive trial, and that, as there had been no amendment of the pleadings or change in the circumstances, the order was not provisional in its nature. Per Hunter, C.J., dissenting: — Any purely procedure order which does not touch the merits of the case, or the rights of the parties, can be disregarded or vacated if the circumstances have changed or the ends of justice require it, although it has not been appealed against; and, as there were issues involving scientific investigation, the trial should be had without a jury. *Alaska Packers' Association* v. *Spencer*, 11 B. C. R. 280, 1 W. L. R. 103, 188, 567.

Question for Jury—*Master and Servant — Injury to Servant — Negligence — Findings of Jury—Casual Connection — New Trial — Costs.*] — Plaintiff received injuries through carelessness of a fellow workman, and the jury found negligence, and stated in what the negligence consisted, but because they did not state that such negligence was the cause of plaintiff's injuries a new trial was ordered. The jury when asked whether the defendants through their foreman were guilty of negligence, and if so in what such negligence consisted, were not explicitly directed to confine their findings to such negligence, if any, as, upon the evidence, they should be satisfied had caused the explosion which injured plaintiff. *Hillyer* v. *Wilkinson Plough Co.*, 5 O. W. R. 748, 9 O. L. R. 711.

Retirement—*Facts for Judge Only.*] — On a trial by jury after the plaintiffs' case has commenced, the Judge may, in his discretion, permit the jury to retire while proof is being given of facts with which the Judge alone is concerned. *Bank of British Columbia* v. *Oppenheimer*, 20 Occ. N. 370, 7 B. C. R. 448.

Right to Jury—*Action to Set Aside Will —Issues.*]—In an action to set aside a will on the ground that it was obtained by fraud and undue influence, the plaintiff asked for a jury: — Held, that the action was one of those referred to in Rule 81, and as such, according to Rule 330, must be tried without a jury. Per Drake, J., that the character of an action is determined by the issues raised in the pleadings rather than by the prayer for relief. Stewart v. Warner, 4 B. C. R. 298, and Corbin v. Lookout Mining Co., 5 B. C. R. 281, approved. *Hopper* v. *Dunsmuir*, 10 B. C. R. 17.

Right to Jury — *Duty of Judge.*] — The power which a Judge has to take a case away from the jury should be exercised only when it is clear that the plaintiff could not hold a verdict in his favour; if the matter is reasonably open to doubt, the Judge should let the case go to the jury, and then decide, if necessary, whether there is any evidence on which the verdict can be supported. *Nightingale* v. *Union Colliery Co. of British Columbia*, 23 Occ. N. 206, 9 B. C. R. 453.

Right to Jury—*Joinder of Issue—Subsequent Leave to Reply—Revival of Right to Ask for Jury.*]—Issue is joined by reason of default in replying to a plea; and the right to trial by jury, lost by neglect to demand an act of option within the 30 days following that upon which the plaintiff has been foreclosed of his right to reply to the plea, is not revived by the plaintiff subsequently obtaining leave to file his reply. *Vincent* v. *Montreal Urban R. W. Co.*, 6 Q. P. R. 289.

Right to Jury—*Joinder of Issue—Time —Waiver.*]—A case is ready for trial on the day when issue is joined, either by the filing of a pleading or the foreclosure from filing same. 2. After the right to a jury trial has been forfeited by the expiry of 30 days after a foreclosure, the consent to the filing of a pleading does not constitute a waiver of such forfeiture. *Matthews* v. *Town of Westmount*, 6 Q. P. R. 52.

Right to Jury — *Insurance — Powers of Jury—Motion—Costs.*]—An action to recover the amount of a policy of insurance issued by a mutual insurance company is not of such a nature that it can be submitted to a jury. 2. The question of the want of jurisdiction of the jury may be raised at any stage of the cause, but if it is raised for the first time in answer to a motion to "fixer les faits," such motion will be dismissed with

costs. *Montreal Coal and Towing Co.* v. *British Empire Mutual Assurance Co.*, 5 Q. P. R. 283.

Right to Jury — *Option—Inscription for Proof and Hearing—Delay.*]—The delay of 30 days, within which a party must proceed to bring on a trial by jury, runs from the day of the granting of a motion praying acte of his option for jury trial. 2. A motion for fixing the facts for the jury is a proceeding to bring on the trial, and an inscription for proof and hearing filed by the adverse party, notwithstanding such motion, will be rejected. *Morlock* v. *Webster*, 6 Q. P. R. 49.

Right to Jury — *Practice—Demand in Pleadings — Time — "Ready for Trial" — Amendment.*] — A cause stands "ready for trial," under the provisions of art. 442, C. C. P., upon issue being regularly joined between the parties; and if a party who has made a demand in the pleadings for a jury trial, allows more than 30 days to elapse after the cause so stands ready for trial, without proceeding to bring on the trial, or obtaining an extension of the delay on application to the Court, he is deprived of his right to a jury trial by the sole operation of law. This rule is not affected by the fact that the adverse party, during the 30 days, with the formal consent of the party who demanded a jury trial, withdrew an allegation of one of his pleas. *Standard Life Assurance Co.* v. *Montreal Coal and Towing Co.*, Q. R. 13 K. B. 183.

Right to Jury — *Time for Exercising Option.*] — A motion to compel a party to exercise his option for or against a trial by jury, will be granted even after the expiry of the time fixed by art. 423, C. P., if it appears that the delay has been for the purpose of accommodating the opposite party. *Varin* v. *St. Lawrence Sugar Refining Co.*, 6 Q. P. R. 295.

Severing Issues—Rule 170. *Turner* v. *Van Meter* (N.W.T.), 2 W. L. R. 345.

Special Direction to Sheriff.]—Where an action is to be tried at the Victoria or Vancouver civil sittings held pursuant to s. 5 of the Supreme Court Act Amendment Act, 1901, a special direction (under s. 69 of the Jurors Act) to the sheriff to summon a jury is necessary. *Tanaka* v. *Russell*, 9 B. C. R. 336.

Special Jury—*Fees of Jurors—Mileage.*] —A special juror is entitled to $2 for each day's attendance at Court, whether he serves or not, and whether in order to attend Court he travels from his place of residence or not; if he so travels he is in addition entitled to mileage. *Taylor* v. *Drake*, 22 Occ. N. 220, 9 B. C. R. 54.

Special Jury—*Striking—Parties—Defendant to Counterclaim—Challenge.*]—The defendants in the original action counterclaimed against the plaintiff and one R. On the defendant's application an order for a special jury was made, the plaintiff and R. acquiescing. On the striking of the jury the sheriff refused to allow R. to take any part, and the plaintiff then applied under Rule 157 to strike out the counterclaim because of the impossibility of properly striking a special jury where there are more than two parties: —Held, that the plaintiff had no right to make the application. As R. acquiesced in the order for a special jury when it was made and had not appealed, a challenge to the array by his counsel at the trial was overruled. *Bank of British North America* v. *Robert Ward & Co. (Ltd.)*, 9 B. C. R. 49.

Summoning of—*Procedure—Jurors' Act—Directory or Imperative.*]—If on the trial of an action in the Supreme Court twenty persons do not appear from which a jury may be selected, the panel may be quashed. The provisions of the Jurors Act relating to the procedure to be followed by the sheriff in summoning a jury are not imperative but directory, and an irregularity in respect thereto is not ipso facto a ground for setting aside the panel. *Ross* v. *British Columbia Electric R. W. Co.*, 7 B. C. R. 394.

Title to Land—*New Trial.*] — Cases involving the title to land should be tried without a jury, so that the necessity for a second trial may be avoided. *Wason* v. *Douglas*, 21 Occ. N. 521.

Verdict—*Indefiniteness—Circumstances of Case — Discharge of Jury — Recalling, and Amending Verdict — Effect of—New Trial—Non-direction.*] — In an action for damages caused by water being backed up on to the plaintiff's premises, the jury did not answer the questions put, but answered: "We have not answered exactly in the form of the question. We find that the construction and grading of the street across Boundary creek caused the plaintiff damage in the sum of $3,000;" without stating that the grading was done by the defendants. It appeared that the dispute at the trial narrowed down to whether it was the grading of the street by the defendants or the grading of an alley by one Fletcher that caused the damage. On the verdict judgment was entered for the plaintiff: —Held, on appeal, that from the circumstances of the case the verdict would support the judgment. Where counsel at the trial abstains from asking the Judge to submit a point to the jury, a new trial will not be granted on the ground of non-direction as to that point. After judgment was pronounced and the jury was discharged, at the direction of the Court the jury was recalled and asked certain questions as to the meaning of the verdict, and the verdict was amended accordingly:—Held, that whatever was done after the discharge of the jury was a nullity. *Waterland* v. *City of Greenwood*, 22 Occ. N. 245, 8 B. C. R. 396.

Verdict—*Special Verdict—Setting Aside—Weight of Evidence.*]—The Court will not set aside a verdict rendered by a special jury, merely because the Court would have come to a different conclusion on the evidence; the verdict is not considered against the weight of evidence unless, in the opinion of the Court, it is one which the jury, viewing the whole of the evidence, could not reasonably find. (Article 501, C. C. P.). *McLeod* v. *Montreal Street R. W. Co.*, O. R. 20 S. C. 8.

Verdict—*Weight of Evidence—Negligence—Railway—Sparks from Engine.*]—Fire was discovered on J.'s farm a short time after the passing of a train of the Grand Trunk

Railway, drawn by two engines, one having a long, and the other a short, or medium, smoke box. In an action against the company for damages it was proved that the former was perfectly constructed. Two witnesses considered the other defective, but nine men, experienced in the construction of engines, swore that a longer smoke box would have been unsuited to the size of the engine. The jury found that the fire was caused by sparks from one engine, and they believed it was from that with the short smoke box; and that the use of said box constituted negligence in the company, which had not taken the proper means to prevent the emission of sparks:—Held, affirming the judgment of the Court of Appeal, 2 O. L. R. 689, 22 Occ. N. 12, that the latter finding was not justified by the evidence, and the verdict for plaintiff at the trial was properly set aside. *Jackson* v. *Grand Trunk R. W. Co.*, 22 Occ. N. 249, 32 S. C. R. 245.

See APPEAL — CONTRACT—COURTS—DEFAMATION—INSURANCE—MASTER AND SERVANT —MEDICINE AND SURGERY — NEGLIGENCE — PRINCIPAL AND SURETY.

VI. JURY NOTICE.

Action against Municipal Corporation—*Non-repair of Street—Judicature Act, s. 104—Delay in Moving—Costs.*] — Injuries caused by the negligent use of a steam roller belonging to a municipal corporation and operated by a contracting company on a street of the former, are not caused through non-repair of the street; and a motion by the defendants, under s. 104 of the Judicature Act, to strike out a jury notice in an action to recover damages for injuries so caused, was refused. Because of the long delay in moving the costs were made costs to the plaintiff in any event. *Kirk* v. *City of Toronto*, 24 Occ. N. 62, 7 O. L. R. 36, 2 O. W. R. 1138.

Action against Municipal Corporation—*Non-repair of Street — Jury Notice — Striking Out.*]—By s. 104 of the Judicature Act, an action against a municipal corporation for an injury "sustained through non-repair" of a highway, is to be tried without a jury. It was alleged that an accident to the plaintiff was caused by the negligent construction of a certain pavement, which was built on an incline, and made with an exceedingly smooth granite unish, at all time dangerous to pedestrians, and when moist rendered even more dangerous than when dry through the faulty, improper, and negligent construction thereof. The Master in Chambers decided that, secundum allegata, the action was for non-repair, which he defined as meaning any omission of duty on the part of the municipality which makes the highway unsafe. Making a new road or walk defectively and leaving it in such unsafe condition would seem to be non-repair, within the words of the statute, as interpreted by the cases. The jury notice was therefore struck out. *Armour* v. *Town of Peterborough*, 25 C. L. T. 283, 5 O. W. R. 630, 10 O. L. R. 306.

Action against Municipal Corporation—*Non-repair of Streets—Obstruction.*]—An action for damages for injuries caused by runaway horses which were frightened by a steam roller, left standing on a highway, is an action based on an act of misfeasance by the defendants, and not on the non-repair of the highway, and the plaintiff is entitled to have it tried by a jury. Order of the Master in Chambers, 2 O. W. R. 1115, reversed. *Clemens* v. *Town of Berlin*, 24 Occ. N. 92, 7 O. L. R. 33, 3 O. W. R. 73.

Action against Municipal Corporation—Non-repair of streets—Obstruction — Amendment. *Read* v. *City of Toronto*, 4 O. W. R. 310.

Default of Proceeding on—*Certificate — Filing—Time.*] — A certificate of the prothonotary attesting that a party who has demanded a trial by jury has made default in proceeding upon his demand will be struck out of the record if it is filed before the expiry of thirty days from the joining of the issue. *Mathers* v. *City of Montreal*, 3 Q. P. R. 382.

Effect on Future Trial.]—A jury notice is not a notice of trial, but one changing the mode of trial. If given in sufficient time it assigns the case to the jury list of trials, and when once given makes the case a jury case, at any time or times when the trial comes on, unless the case be an equitable one, or the parties agree to a trial without jury. *Hackett* v. *Rorke*, 37 N. S. Reps. 435.

Irregularity — Specific performance — Counterclaim for deceit—Legal and equitable issues—Striking out jury notice—Discretion. *Huron and Bruce Loan Co.* v. *Evans*, 3 O. W. R. 701, 756, 801.

Leave to File—Delay—Short notice of trial — Interpleader issue—Equitable issue—Court of Chancery. *O'Connor* v. *O'Connor*, 2 O. W. R. 737, 794.

Libel—*Necessity for.*]—The effect of s. 102 of the Judicature Act, R. S. O. 1897 c. 51, which provides for actions of libel, &c., being tried by a jury, is to dispense with a jury notice being given in such actions, so that a notice of trial is properly given without such notice having been first served; s. 106 not applying to actions of libel. *Putterbaugh* v. *Gold Medal Mfg. Co.*, 22 Occ. N. 122, 3 O. L. R. 259.

Motion to Strike Out—Equitable issues. *Ontario Bank* v. *Stewart*, 2 O. W. R. 811, 819.

Order Striking Out—Powers of Judge in chambers—Leave to appeal. See *People's Building and Loan Assn.* v. *Stanley*, 22 Occ. N. 254, 4 O. L. R. 90.

Power to Deprive Party of Right to Jury—Judicature Act, s. 110—Intra vires. *People's Building and Loan Assn.* v. *Stanley*, 2 O. W. R. 122.

Regularity — Action for damages — Amount under $500 — Statutes — Construction — Application — Repeal. *Ledieu* v. *Roediger* (Y.T.), 1 W. L. R. 515.

Striking Out—*Judge in Chambers—Common Law Action—Nuisance — Injunction — Damages.*] — Motion to strike out a jury notice in an action for an injunction to restrain a nuisance in the shape of a sewage

farm, and for damages: — Held, this not being an action which prior to the Administration of Justice Act, 1873, was cognizable by the Court of Chancery, that the jury notice could not be set aside as irregular by the Common Law Procedure Act. Long prior to the Administration of Justice Act, 1873, the common law Courts had power to grant an injunction in a case such as this. While, no doubt, a Judge sitting in Chambers has power, in the exercise of his discretion, to strike out a jury notice in an action such as this, although the party requiring a jury may primâ facie be entitled to it, the practice is not to exercise that power, but to leave it to be dealt with by the trial Judge. *Shantz* v. *Town of Berlin*, 23 Occ. N. 15, 4 O. L. R. 730, 2 O. W. R. 1115.

Striking Out—Mortgage action — Venue —Speedy trial—Consolidation of actions—Conduct of. *Lemon* v. *Lemon*, 2 O. W. R. 445, 473.

Time—Leave. *Castle* v. *Chaput*, 2 O. W. R. 499.

See PLEADING.

VII. NOTICE OF TRIAL.

Close of Pleadings—*Several Defendants —Irregularity—Waiver — Delay.*]—A notice of trial is irregular unless the pleadings are closed as against all the defendants; and a defendant against whom the pleadings are closed when notice of trial is served by the plaintiffs can take advantage of the fact that the pleadings are not closed as against all the defendants, and have the notice of trial set aside, although the other defendants are content to accept it. A defendant, by delaying the delivery of statement of defence till the last possible day, and by delaying a motion to set aside a notice of trial for six days after service thereof, does not waive an irregularity in the notice. *Long* v. *Long*, 24 Occ. N. 297, 7 O. L. R. 596, 3 O. W. R. 428.

Distant Sittings—*Dismissal of Action.*]—In January, the plaintiff's solicitors gave notice of trial at the civic sittings to be held in July in Victoria, where, according to statute, civil sittings are also held in February, March, and May:—Held, on a summons to dismiss for want of prosecution, that the plaintiff must give notice of trial for the March sittings, otherwise the action will stand dismissed. *Wiles* v. *Times Printing and Publishing Co.*, 10 B. C. R. 226.

Equitable Action—*Default Judgment — Appearance in Spite of — Time — Entry for Trial—Motion to Set Aside—Non-appearance at Trial—Dismissal of Action—Conditions of Order—Appeal—Amendment—Costs.*]—An action for partition or sale of lands and for a declaration that a Crown grant to the defendants was inoperative and void. Judgment for default of appearance was entered against three of the four defendants in June, 1899. In February, 1900, an appearance was entered on behalf of all the defendants and a defence delivered. Notice of trial was given and the action entered by the defendants. The plaintiffs moved before the trial Judge to set aside the notice. This motion was dismissed; and, the plaintiffs not proceeding with the trial, an order was made dismissing the action for want of prosecution unless plaintiffs paid costs and gave security:—Held, that the action was of an equitable nature, and the plaintiffs were not entitled under any practice prevailing immediately prior to the 1st October, 1884 (when the Judicature Act came into force), to obtain a judgment by default against the defendants as at common law; the suit must be governed by the same practice as any other equitable action not provided for in Order XIII., Rules 11, 13; the defendants could appear at any time before judgment, although the time limited for appearance had elapsed; a defendant could appear at any time, though not served. 2. The appearance and defence being regular, the notice of trial and entry were regular; and semble, that, if the appearance and defence were irregular the motion should have been to set them aside, and not the subsequent proceedings. 3. The notice of trial was regularly given under Order XXXIV., Rule 11, and, the defendants having appeared when the cause was called for trial, and the plaintiffs having failed to appear, the action was properly dismissed under Rule 23 of that Order. 4. The conditions of the order made by the trial Judge, though unusual, were within his province. 5. The order made at the trial should be amended by adding recitals shewing what actually took place at the trial, and the appeal from it should be dismissed without costs, the difficulty having been created by want of care in drawing up the order, and the action should be dismissed with costs in case the conditions imposed were not complied with. *Dugon* v. *LeBlanc*, 34 N. S. Reps. 215.

Failure to Proceed Pursuant to Notice—*Motion for Nonsuit — Affidavit in Answer — Service — Leave to Proceed — Terms.*]—An application for judgment as of nonsuit for not proceeding to trial pursuant to notice, was refused, upon the plaintiff giving a peremptory undertaking to go to trial at the next sitting, and on payment of the costs of the motion, notwithstanding that the plaintiff's affidavit in answer to the motion, excusing the default, had not been served, as required by the Rule of Hilary term, 1894. *Frederick* v. *Gibson*, 36 N. B. Reps. 364.

Necessity for—*Order to Proceed at Next Sitting—Adjournment.*]—An order made on the defendants' application to dismiss for want of prosecution, directing that the plaintiff set down his action for the next sitting at Nelson and proceed with the trial, otherwise the action do stand dismissed without further order, dispenses with a notice of trial; and if, before the date fixed for the sitting at the time the order was made, the sitting is adjourned, it is a compliance with the order by the plaintiff if he enters the action for the later date, and is ready for trial when the case is called. *McLeod* v. *Waterman*, 9 B. C. R. 370.

Service of—*Letter Wrongly Addressed—Ratification.*]—On the day prior to the last day for serving notice of trial, the plaintiff's solicitor, who lived in St. Thomas, prepared a notice of trial and copies thereof, in three actions, which he directed to be forwarded to his Toronto agents, with instructions to serve a return with admissions of service; but, by

a mistake in the office, the envelope was addressed to the defendants' solicitors in Toronto, and reached their office on the following morning; but did not come to the notice of the member of the firm who had charge of the defences therein until after four o'clock, when, on discovering that the letter was not addressed to his firm, he returned it with the notices to his St. Thomas agents, with instructions to return it to the plaintiff's solicitor, which was done:—Held, reversing the decision of the Master in Chambers, that what was done did not constitute valid service of the notices on the defendants' solicitors; nor did the defendants' solicitors do anything to ratify such service. *Newsome* v. *Mutual Reserve Fund Life Association*, 22 Occ. N. 115, 3 O. L. R. 253.

Time—*Judgment Granting New Trial—Settlement of.*]—By the judgment of the Supreme Court of Canada an appeal in this action was allowed and a new trial granted. The judgment was read in open Court on the 27th May. The plaintiff's solicitor thereupon gave the usual ten days' notice of trial for the 10th June, 1902. The minutes of the judgment were not settled until the 3rd June, and when settled bore date the 27th May, 1902. The notice of trial was set aside as premature. *Grant* v. *Acadia Coal Co.*, 22 Occ. N. 261.

Time for—*Power to Abridge—County Courts.*]—A County Court Judge has no jurisdiction to abridge the six clear days' notice of trial required by s. 92 of the County Courts Act. *Hickingbottam* v. *Jordan*, 21 Occ. N. 490, & B. C. R. 126.

See MECHANICS' LIENS—PARLIAMENTARY ELECTIONS.

VIII. POSTPONEMENT.

Absence of Witness—*Onerous Terms.*]—Where a party to a suit is entitled to a postponement of the trial, on the ground of the absence of a material witness, it is improper to impose as a term of granting the order a condition that the party consent to a change of venue. *Royal Bank of Canada* v. *Hale*, 36 N. B. Reps. 471.

Absence of Witness—Terms—Venue—Costs. *Gooch* v. *Anderson*, 2 O. W. R. 426.

Adding Parties—Amendment—Trial proceeding without adjournment — Witness for defendant not present—Refusal to adjourn—New trial. *Arthur* v. *Fawcett*, 5 O. W. R. 334.

Determination of Questions Arising in Another Pending Action—Causes of action—Identity. *City of Toronto* v. *Toronto R. W. Co.*, 4 O. W. R. 221, 345, 5 O. W. R. 14.

Discretion—*Review—New Trial.*]—If a trial Judge refuses, except upon unusual and onerous terms, to postpone a trial on the ground of the absence of a material witness, the Court will review the exercise of his discretion, and grant a new trial. *Hale* v. *Tobique Manufacturing Co.*, 36 N. B. Reps. 360.

Extension of Time for Delivery of Defence—Illness of defendants' manager—Terms—Costs. *Cliff* v. *New Ontario S. S. Co.*, 6 O. W. R. 519; *Grandin* v. *New Ontario S. S. Co. and Canadian Northern R. W. Co.*, 6 O. W. R. 521.

Peremptory Order for Trial.]—An order that the plaintiff set his action down for trial for a certain sitting, and in default that his action be dismissed without further order, is not a peremptory order for trial; and where the plaintiff has complied with the order, and moves at the trial for a postponement, it will be postponed if a proper case is made out. *Thurston* v. *Weyl*, 9 B. C. R. 452.

IX. SEPARATION OF ISSUES.

Preliminary Trial of One Issue—Rule 531. *Bank of Montreal* v. *Morrison*, 3 O. W. R. 303.

Preliminary Trial of Question of Fact—Life insurance—Contract—Validity—Suicide of assured — Issue as to sanity — Separate trial — New trial of whole case. *Waller* v. *Independent Order of Foresters*, 5 O. W. R. 421.

Preliminary Trial of Question of Law—*Demurrer.*]—The action was founded upon an agreement, under which the defendants were to transfer to the plaintiff a quantity of stock in certain telephone companies and property and assets connected therewith, in consideration of which the plaintiff agreed to make certain payments in money, deliver certain stock, and transfer to the defendants certain lands, including the portion of parish lot 3, Kildonan, lying west of the main highway. The plaintiff conveyed the land to the defendants, but charged that he had been induced to enter into the agreement by the misrepresentations of the defendants and that the stock transferred to him was of no value. He claimed $210,000 damages and also claimed a lien on lot 3, Kildonan, for $150,000. In the statement of defence the defendants raised the question of the plaintiff's legal right to a lien:—Held, that a Judge should make an order for the trial of such a question before the trial of the issues of fact, only where the points of law involved are such as affect the whole case, the disposition of which would either determine the case or declare some important principle which would influence the consideration of the matters remaining. If there are issues of fact which must be tried in any event, however the point of law be decided, the order should be refused and the point left to be argued before the Judge at the trial. If the question of the plaintiff's right to a lien were argued and decided, the main issues raised in the action would still remain undisposed of. A question like the present one, not being the principal issue involved, but arising as an incident to the main relief sought, should not be set down to be argued and decided before the trial of the action. *Gardner* v. *Bickley*, 24 Occ. N. 382, 15 Man. L. R. 354.

Preliminary Trial of Question of Law—Disposing of whole action — Reasonable probability of establishing propositions of law — Rule 259 — Jurisdiction of Master in Chambers. *Smith* v. *Smith*, 5 O. W. R. 518, 673.

Preliminary Trial of Question of Law — *Pleading.*] — Under Rule 453 of the King's Bench Act., Man., it is only in respect of some question of law which is fundamental or goes to the root of the cause of action or defence set up that there should be a separate argument before the trial. As to all other matters in the pleadings which may be objectionable, an application in Chambers, under Rule 326, to strike them out, is the proper remedy. *Makarsky* v. *Canadian Pacific R. W. Co.*, 15 Man. L. R. 53.

X. SETTING DOWN.

Close of Pleadings — Rights of defendant — Injunction motion — Terms of order. *Saunderson* v. *Johnston*, 4 O. W. R. 459, 487.

Delay — *Motion to Strike out Inscription.*]—A motion by the plaintiff to strike out an inscription on the merits made by the defendant on the 2nd June for the 11th September following will be refused, where it does not appear that such inscription has been made for the purpose of unjustly delaying the proceedings. *Bélanger* v. *Montmorency Cotton Mills Co.*, 7 Q. P. R. 202.

XI. TEST ACTION.

Substitution of Another Action as Test Action.] — After one of a number of actions brought by different plaintiffs against the same defendants in respect to causes of action which were identical has been ordered to be tried as a test action, the Court has power to substitute another action as a test action. Twenty-nine actions were brought by different persons against the defendants for damages caused by the death of relatives in an explosion in the defendants' coal mine, and on the plaintiffs' application an order for a test action was made, the order providing that the defendants, if dissatisfied with the result of the test action, might apply to have the other action proceeded with, and that they might apply to have any of the actions forthwith proceeded with, if there existed any special ground of defence applicable to it, and not raised in the test action. After obtaining the order, the plaintiffs' solicitor discovered that, on account of the particular place in the mine in which McLeod was killed, a separate defence not applicable to the other cases might apply, and an application was made for the substitution of another action as the test action:—Held, that the object of the order, which was provisional in its nature, was to have a fair test action, and, as the one chosen would not be a fair one, another should be chosen. *McLeod* v. *Crow's Nest Pass Coal Co.*, 23 Occ. N. 341, 10 B. C. R. 103.

TROVER AND DETINUE.

Animal — Evidence of identity — Misdescription — Amendment. *Pearce* v. *Hart* (N.W.T.), 1 W. L. R. 476.

Contract for Keep of Animals—Dispute as to terms—Detention—Tender before action — Counterclaim — Costs. *McKinnon* v. *Minatty* (Y.T.), 1 W. L. R. 272.

Demand and Refusal.] — In an action of detinue, as distinguished from an action of conversion, a proof of demand and refusal is essential, if the detention is denied. *Gray* v. *Guernsey*, 5 Terr. L. R. 439.

Negligence — *Parent and Child.*]—A lad borrowed a horse from a person from whom his father had forbidden him to borrow horses. On the son reaching home with the horse, his father told him to tie it up, with the intention that his son should return it later. On his father attempting to untie the horse for the purpose of his son returning it, it broke away and was lost, and the father made no effort to find it:—Held, that the father was not liable in detinue or trover, or in an action for negligence. *Kirkland* v. *Rendernecht*, 4 Terr. L. R. 195.

See COMPANY — CONTRACT — COSTS — GIFT — SALE OF GOODS — VENDOR AND PURCHASER.

TRUST COMPANY.

See COSTS.

TRUSTEE ACT.

See EXECUTORS AND ADMINISTRATORS —TRUSTS AND TRUSTEES.

TRUSTEE INVESTMENT ACT.

See EXECUTORS AND ADMINISTRATORS.

TRUSTS AND TRUSTEES.

Accidental Mixture of Goods—*Sale by Trustee — Tenants in Common — Following Proceeds—Equitable Claim — Jurisdiction of County Court—Demand.*]—The defendant shipped wheat in a car from a place in Manitoba to Duluth, with instructions that the wheat was to be unloaded at Roland and cleaned and dried at the plaintiff's elevator there. This was done, and the wheat was thereby reduced in bulk to about 573 bushels. The plaintiff's employees, in reloading it into the car, supposing it to be the plaintiff's wheat, added about 260 bushels of the plaintiff's own wheat to make up a car load, and forwarded the car to its destination. The defendant had obtained an advance of money from B., the repayment of which he secured by transferring to B. the bill of lading for the wheat with the agreement that B. should sell it, and, after deducting the amount of the loan, pay the balance to the defendant. B. sold all the wheat, paid himself, and accounted to the defendant for the balance, neither of them knowing what part of the wheat was the plaintiff's—Held, that there was a mixture of goods by accident, and the owners became

tenants in common of the whole in the proportions which they severally contributed to it; (2) that B., as regards the wheat in question, stood in a fiduciary relation towards both the plaintiff and defendant; that the proceeds of property sold by a trustee without the consent of the owner can in equity, when traceable, be followed as fully as the property itself, if unconverted, could have been; that, so long as such money can be definitely traced it makes no difference that it has been mixed with other money; and that this rule applies, not only in the case of a trustee in the narrow and technical sense, but to any person in any kind of a fiduciary relation to others; (3) that an equitable claim like the plaintiff's in this action can now be entertained by a County Court; (4) that no demand and refusal were necessary before action. *Roblin* v. *Jackson*, 21 Occ. N. 217, 13 Man. L. R. 328.

Account — Contract — Parties. *Livingston* v. *Counsell*, 2 O. W. R. 517.

Action to Enforce Trust — Conveyance of land — Death of alleged trustee — Action against heirs-at-law — Evidence — Failure to prove trust. *Birks* v. *Haines*, 6 O. W. R. 467.

Action to Establish Trust — Joint purchase of land — Quit claim deed — Consideration — Account of profits — Evidence —Onus. *Phillion* v. *Douglas* (Man.), 2 W. L. R. 572.

Breach of Trust — *62 V. (2) c. 15 s. 1 — "Honestly and Reasonably"—Opinion Evidence — Inadmissibility.*]—The provisions of 62 V. (2) c. 15, s. 1, relieving trustees from the consequences of technical breaches of trust who have acted "honestly and reasonably," does not render competent as evidence the opinions of bankers or other financial men as to whether the trustee has so acted in the course he has taken or omitted to take. The general rule of evidence still applies, that mere personal belief or opinion is not evidence, and that the test of reasonableness is that exhibited by the ordinary business man, or the man of ordinary sense, knowledge, and prudence in the conduct of his own affairs. The nearest approach to a working rule is, that, in order to exercise a fair judgment with regard to the conduct of trustees at a particular time, we must place ourselves in the position they occupied at that time and determine for ourselves what, having regard to the opinion prevalent at that time in the neighbourhood and concurrent with the transaction, would have been considered the prudent course for them to have adopted. This is a different thing to asking the opinion of witnesses of what would have been done or what would have happened under stated circumstances several years ago, as was sought in this case. *Smith* v. *Mason*, 21 Occ. N. 260, 1 O. L. R. 594.

Breach of Trust — *Liability for, of Co-trustee — "Honestly and Reasonably."*] — A testator devised his estate to his three executors upon trust. One of the executors was a solicitor, and with regard to him the will provided that in the administration and management of the estate he should be entitled to the same professional remuneration as if he were not trustee. Another executor was in England, and the third, the defendant, was told by the testator that the solicitor-trustee was to have the management of the estate, and consented to act upon that understanding. All three proved the will and acted as trustees, but the whole management of the estate was left to the solicitor, and at his death it was found that he had, without the knowledge of the defendant, misappropriated the moneys of the estate, and that his own estate was insolvent. The testator had perfect confidence in the solicitor, who up to the time of his death was reputed to be wealthy:—Held, that the defendant, having acted honestly and reasonably within the meaning of 62 V. (2) c. 15, s. 1, was not liable to make good to the estate the loss occasioned by the misconduct of the solicitor. *Dover* v. *Denne*, 22 Occ. N. 294, 3 O. L. R. 664, 1 O. W. R. 297.

Breach of Trust — *Purchase by Trustee from Trust Estate — Partnership — Adequacy of Price — Delay in Bringing Action —Evidence—Entries in Books.*]—In 1885 the trustees of a certain business sold it at an adequate price to B., who before purchasing stipulated with C., one of the trustees, that he should go into partnership with him; C. did go into partnership, and in 1893 he sold out his interest at a large profit. In 1903 certain beneficiaries commenced an action founded on an alleged breach of trust against C. and the representatives of his deceased co-executor, and asked for an order declaring that the sale to B. was a sham and was really one to C.:—Held, that, considering the number of years since the sale took place and that it was for a fair price, C.'s account of the transaction must be accepted, notwithstanding several suspicious circumstances. In cross-examination of a defendant it is admissible to question him as to what disposition he has made of his property since the suit was begun or in anticipation of it, and a defendant so disposing of his property does an act which will be viewed with suspicion. Per Hunter, C.J.: Entries made by the deceased executor in a private book kept by him were not admissible in evidence either for or against the other executor, neither were the entries in the charge book of the solicitor for B. and C. as to instructions received by him from B. in regard to the drawing of certain papers carrying out the arrangement between B. and C. admissible in evidence as against C. *Camsusa* v. *Coigdarripe*, 11 B. C. R. 177.

Breach of Trust — *Relief—61 V. c. 26—Costs.*] — A testator devised and bequeathed his real and personal estate to his wife "to be hers in such a way that she shall during her natural life have the full use, benefit, and enjoyment thereof." He directed his executors to sell his real estate and to invest any money belonging to his estate in certain specified securities, "so that my said wife may have the interest and income arising therefrom during her life," and appointed his wife and the plaintiffs executors. Proceeds from the sale of real estate came to the hands of the plaintiffs, and were by them remitted to the widow, living in England. The widow invested part of the proceeds in securities in the name of herself and one of the plaintiffs, and disposed of, though in what way did not appear, the balance of the principal moneys. A suit was

brought by the plaintiffs after the widow's death to be relieved from liability for the loss of such part of the estate. By 61 V. c. 26, a trustee who has acted honestly and reasonably, and ought fairly to be excused for the breach of a trust, and for omitting to obtain the directions of the Court in Equity in the matter in which he committed such breach, may be relieved by the Court from personal liability for such breach. Relief granted, but without costs. *Simpson* v. *Johnston*, 22 Occ. N. 38, 2 N. B. Eq. Reps. 333.

Breach of Trust — Seizure under chattel mortgage — Injunction — Damages — Counterclaim — Compensation of trustee—Costs. *Watts* v. *Sale*, 2 O. W. R. 1020.

Compensation of Trustee — *Action for —Pleading — Particulars.*]—In an action by a trustee to recover the just compensation stipulated as belonging to him as trustee under a trust deed, it is not necessary that he should specify fixed charges for each of the different acts done by him in his capacity of trustee. *Hanson* v. *Montreal Park and Island R. W. Co.*, 5 Q. P. R. 355.

Conveyance Absolute in Form — *Mortgage — Resulting Trust — Notice to Equitable Owner — Estoppel — Inquiry.*] — The transferee of an interest in lands under an instrument absolute on its face, although in fact burthened with a trust to sell and account for the price, may validly convey such interest without notice to the equitable owners. *Oland* v. *McNeil*, 22 Occ. N. 197, 32 S. C. R. 23.

Conveyance of Land to Trustee for Infant — Fraud of trustee — Conveyance to creditor as security—Breach of trust — Written declaration of trust — Oral evidence to vary — Notice — Knowledge of solicitor —Suppression of facts — Equities between innocent parties — Legal estate — Charge on land — Redemption — Costs. *Macarthur* v. *Hastings* (Man.), 1 W. L. R. 285.

Debentures — *Validity — Ultra Vires— Breach of Trust—Crown.*]—In an action for the recovery of interest upon certain debentures issued by the defendants and held by the Crown, the defendants set up that they had no authority to issue the debentures; that the application by them of moneys received from the sale of debentures to the payment of interest on other debentures, was a misapplication of the trust fund and a breach of trust; and that the Crown's advisers knew, when the debentures were acquired by it, that the proceeds were to be so misapplied:—Held, that, inasmuch as the defendants had authority to issue and dispose of the debentures, their acts in so doing were intra vires, and that complicity by the Crown in a breach of trust committed by them could not be relied on as a defence to the action. *Rex* v. *Quebec North Shore Turnpike Trustees*, 8 Ex. C. R. 390.

Discretion — *Lunatic — Setting Apart Moneys for—Will.*]—Where, under the terms of a will, executors and trustees are required to retain in their hands a sufficient sum to provide for the support of a lunatic, the Court will not interfere with the exercise of the discretion given to the trustees as to the appropriation of the moneys for such purpose. *In re Sargent*, 24 Occ. N. 357, 8 O. L. R. 260, 3 O. W. R. 769.

Enforcement of Trust—Sale of mining locations — Interest on profits—Agent's commission — Costs. *Long* v. *Loney*, 3 O. W. R. 718.

Investments — *Realization — Tenants for Life — Remaindermen—Apportionment —Election — Rate of Interest.*]—A testatrix devised and bequeathed all her real and personal estate to trustees to sell and convert into money and to invest the money. She directed that the residue after payment of debts, etc., should be divided equally among her four children, three daughters and a son; each daughter to receive the income of her share for life, and her children the capital after her death; the son to receive his fourth absolutely on coming of age. In 1887, after all the children had attained their majority, a deed of partition was made. The investments were divided into four equal parts, an undivided fourth of certain real estate which had belonged to the testatrix being allotted to each of the children. By the deed the children ratified the acts of the trustees and continued them in the trust. At the same time the son executed a deed to the trustees, under which they were to hold his share in trust for him during his life, with remainder to his children. The real estate above mentioned was subject to a building lease renewable. When the lease expired in 1893 it was renewed for 21 years at $1,850 a year. The lessee made default in 1894, and the trustees took possession of the land and buildings, but for a number of years were unable to obtain an adequate rental or make a sale. In November, 1902, a sale was effected for $47,500:—Held, following In re Cameron, 2 O. L. R. 756, that the life tenants were entitled to some portion of this sum. But in ascertaining what sum was to be allowed them, the period before the deed of partition in 1887 was not to be considered. The life tenants then, in effect, elected to treat this property as a satisfactory investment. The rate of interest was to be determined by the rate which could be obtained on securities upon which trustees may invest. Walters v. Solicitor for the Treasury, [1900] 2 Ch. 107, followed. An inquiry was ordered to determine what sum invested on the 1st May, 1894, would have produced $47,500 on the 15th November, 1902, interest being calculated at 4½ per cent., with half-yearly rests, and credit being given for sums actually received by the life tenants from the rents accruing during that period. *In re Clarke, Toronto General Trusts Corporation* v. *Clarke*, 24 Occ. N. 23, 6 O. L. R. 551, 2 O. W. R. 980.

Investment — *Shares in Company — Conversion.*]—An order was made authorizing an executrix to convert certain shares in a company bequeathed to her for life with remainder to her children into shares of a new company (in which the old one was about to be merged), such shares not being an investment authorized by the Trustee Investment Act, but it appearing that the arrangement would be for the benefit of the estate. *In re Strathy Trusts*, 21 Occ. N. 339.

Lien — Abortive sale — Foreclosure — Purchase by trustee. *Hutton* v. *Justin*, 1 O. W. R. 64.

Lien of Trustee — *Abortive Sale — Foreclosure — Purchase by Trustee—Report on Sale — Certificate in Lieu of — Order — Terms.*]—The defendant having been declared a trustee, with a lien for advances, and the greater portion of the trust estate having been offered for sale, to satisfy the amount found due him under the direction of the Court, and the sale having proved abortive:—Held, that the defendant's position as a trustee debarred him from the ordinary remedy of foreclosure, to which a mortgagee is entitled after an abortive sale. But, after a sale by auction has been tried in vain, the trustee is at liberty to make proposals on his own behalf, and the Court may, in its discretion, accept him as a purchaser of the estate. Tennant v. Trenchard, L. R. 4 Ch. 537, 546, 38 L. J. Ch. 661, followed. Held, also, that it was not necessary to wait for the report on sale, but the motion might be based upon a certificate of the Master shewing that the sale had proved abortive, no ground for impeaching the sale proceedings being suggested. Held, also, that the property embraced in the order not being the whole of the trust estate, it would not, upon the evidence, be just to compel the defendant to accept that which was put up for sale in satisfaction of his entire claim. The defendant offering to submit to terms, an order was made providing that he should be allowed to purchase at the amount of his claim less $250, in the event of $17,500 not being realized by a sale by tender or private contract. *Hutton* v. *Justin*, 22 Occ. N. 23, 2 O. L. R. 713.

Mal-investment — Competent advice—Trustee acting honestly and reasonably—Relief—62 V. (2) c. 15. *Weir* v. *Jackson*, 5 O. W. R. 281.

Misappropriation of Trust Funds—*Payment by Trustee to Stranger—Appropriation to Debt of Trustee.*]—A sum of money was bequeathed to B., by his father, "to the use and benefit" of the children of B., for their "support and education," and not in any wise to be subject to or liable for any debts or obligations of B. personally. B. forwarded to T. a sum of £500 to hold "in trust," informing him that it was a special legacy for the benefit of his children. T. acknowledged receipt of the money, as stated, and placed it to the credit of the children of B. as directed. The money so remitted having been subsequently appropriated by T. and his co-defendants, in part payment of the indebtedness to them of B. personally, an action was brought by B., as trustee for his children, and by the children, to have the defendants declared trustees, and for an account:—Held, per Weatherbe and Henry, JJ., that the appropriation could not be disturbed, it having been made to appear that the money paid over to T. by B. was not the money set forth in the pleadings, but a sum of money bequeathed to B. absolutely:—Held, per Graham, E.J., that there should be an inquiry to ascertain what sum should be allowed for the support and maintenance of the children of B., and that the plaintiffs, other than B., should have judgment against B. for the balance; that the defendants should make good this balance to the extent of the fund received by them:—Held, per Henry, J., that the intention of testator was to give the legacy to B., subject only to the obligation to use it for the support and education of the children; that if the sum of £500 became at any time subject to the terms of the trust, it became free from its operation as soon as the purposes of the trust were performed, and that the defendants, having whatever rights in the fund B. had, were no more answerable to the plaintiffs than B. himself would be. *Bissett* v. *Taylor*, 35 N. S. Reps. 440.

Money in Bank — Disagreement of two trustees — Payment into Court — Application by one — Costs. *Hobbs* v. *Anglo-Canadian Contract Syndicate (Limited)*, 2 O. W. R. 245.

New Trustee — *Married Woman.*]—Under the Trustee Act, R. S. O. 1897 c. 129, a married woman was appointed a trustee to fill a vacancy, in view of the circumstances detailed in the report. *In re Gough*, 22 Occ. N. 112, 3 O. L. R. 206.

Parol Evidence to Establish Trust—Statute of Frauds — Conveyance of land to agent of true purchaser — Subsequent conveyances — Lis pendens — Notice — Registry laws — Reference — Accounts. *McMillan* v. *Boyce*, 3 O. W. R. 49.

Passing Accounts — *Jurisdiction of Court of Equity — Commission.*]—A trustee under a deed of trust for the benefit of creditors cannot, upon his own application, pass his accounts in the Court of Equity. Trustee allowed a commission of five per cent. on receipts. *In re Van Wart*, 21 Occ. N. 500, 2 N. B. Eq. Reps. 320.

Public Park — *Conveyance to Municipality in Trust — Conditions — Breach — Forfeiture — Assignee — Champerty.*]—C. conveyed lands to a city corporation for a park and public recreation ground, with conditions prohibiting their use for certain specified purposes, and that the corporation should, within a limited time, clear the lands, seed them, build a road thereto, and maintain the same in good condition. In an action by the assignee of C.'s reversionary interest, for a declaration that the corporation held the lands in trust and for a reconveyance, under the proviso on breach of conditions, it appeared that about one-sixth of the land had been left in its natural state, but that the remainder had been cleared and made fit for ordinary athletics, though not level. The road had been built, but, as population did not increase in the vicinity, the grounds were not in demand for athletic or exhibition purposes, and had not been used, and had become covered with undergrowth:—Held, affirming judgment in 10 B. C. R. 31, that there was no such breach of the conditions as would warrant a declaration of forfeiture. Semble, that, had there been a breach of trust, the resulting forfeiture could have been decreed in favour of the assignee. *Clark* v. *City of Vancouver*, 35 S. C. R. 121.

Purchase of Land — *Advance of Money for—Resulting Trust — Evidence to Establish — Nonsuit — Jury Trial — Withdrawal of Issues of Fact.*]—The plaintiffs as assignees of M. sought to obtain a declaration that

certain lands held in the name of defendant were, at the time of the assignment, the property of M., and, by reason of the assignment, became vested in the plaintiffs. The evidence shewed that the money required by the defendant for the purchase of the properties in question was obtained from M., but that M. had nothing to do with any of the purchases except to advance the money to the defendant, by whom the negotiations were conducted, and in whose name the deeds were taken and recorded, and who, in all cases, acted independently of M. in negotiating for and acquiring the properties from the respective owners:—Held, that the doctrine of resulting trusts was not applicable, and, there being no issue of fact for the jury on this phase of the case, that the Judge was justified in withdrawing it from them:—Held, also, the Judge having at the close of the trial announced his intention of withdrawing the case from the jury, that counsel for the plaintiffs should at that time have indicated the facts or issues that they wished the jury to pass upon, and, having neglected to do so, that it was now too late for them to object:—Held, also, that the objection was without merit, as the jury was applied for by the defendants and not by the plaintiffs. Semble, that where a cause of an equitable nature has been ordered to be tried with a jury, under the provisions of O. 34, r. 2, the trial Judge cannot, without the consent of both parties, withdraw the case from the jury, and himself try the issues of fact. *McKenzie* v. *Ross*, 33 N. S. Reps. 252.

Purchase of Land—Principal and agent—Lien for purchase money—Purchase for value without notice—Damages for detention of land. *Murray* v. *Simpson*, 2 O. W. R. 95.

Right of Beneficiary to Enforce Trust. *Morse* v. *Morse*, 1 O. W. R. 500.

Remuneration of Trustees—*Fixed Annual Sum—Solicitor-trustee—Profit Costs.*]—Appeal by one of the trustees of an estate from the judgment of a Surrogate Court fixing his remuneration. The Surrogate Judge allowed five per cent. on the interest collected only, but nothing for any other services, on the ground that he had allowed two and a half per cent. in a former order for the taking over of the corpus:—Held, following Re Berkeley's Trusts, 8 P. R. 193, that an annual allowance should be made for looking after the corpus of the fund, and that it should not depend upon the amount collected and invested, but should be a fixed annual allowance, based on the nature of the property and the consequent degree of care and responsibility involved. Held, also, that the Surrogate Judge, instead of allowing the trustees a percentage on the principal sum taken over, and nothing for the collection of the interest, should have allowed them nothing for the taking over of the estate, but a percentage on all interest collected and paid over, and an annual sum for the care of the estate. Held, also, that the general rule is, that a trustee-solicitor is not entitled to charge the estate with fees for any professional services, but that an exception, which is not to be extended, has been established by the decision of Lord Cottenham in Cradock v. Piper, 1 Macn. & G. 664, under which a solicitor-trustee, who brings or defends proceedings in Court for himself and his co-trustee, is entitled to recover profit costs, and, therefore, to charge such costs to the estate. *In re Williams*, 22 Occ. N. 323, 4 O. L. R. 501, 1 O. W. R. 501.

Sale of Land—*Specific Performance—Contract for Sale of Land by Trustees—Evidence of Concurrence by All—Statute of Frauds—Correspondence—Authority of Trustees to Bind Co-trustee.*]—One of three trustees assumed in the name of all to make an offer to sell a freehold property, part of the trust estate, for $13,000. A second trustee assented to and approved of the offer when made aware of it; but the third repudiated it as soon as it came to his knowledge:—Held, in an action brought against the three trustees for specific performance, by the person who had accepted the offer, that the trust estate was not bound, although the dissenting trustee had, only a fortnight before, assented to a sale of the same property to another person at $12,000. The situation had changed in the fortnight; further inquiries had been made; a new customer had been found; a new negotiation had been opened with the prospect of a better price. The cestui que trust had a right to the benefit of the third trustee's best judgment in the changed situation before concluding the new contract, and to have that judgment manifested by his signature, either actual or expressly authorized. Where there are several trustees, all must act. *Gibb* v. *McMahon*, 25 C. L. T. 291, 5 O. W. R. 554, 9 O. L. R. 522.

Shares in Company — Contract — Declaration of trust — Statute of Frauds. *Creighton* v. *Carman*, 3 O. W. R. 748.

Shares in Building Society — "*In Trust*"—*Notice—Mortgage — Purchaser for Value—Consolidation.*]—The defendant A. J., being the holder of six shares of permanent stock in her own name, and six shares of instalment stock "in trust," and other shares, in a building society, obtained a loan of $700 from the company, and transferred to the company's treasurer, as security, "all my stock in the said company." Subsequently she obtained a further loan of $900, and transferred to the treasurer, as security, six shares of instalment stock, the intention being to transfer the six shares held "in trust" and already assigned, as the company contended, to secure the prior loan of $700, giving also a mortgage on land, reciting that she was the owner of six shares of the capital stock of the company, and that the company had agreed to advance $600 upon the said shares with this mortgage as further security. The defendant A. K. J. became the purchaser of the land subject to the $600 mortgage (which she assumed), and purchased from A. J. her equity in the six shares of instalment stock:—Held, that the use of the words "in trust" put the company upon inquiry, and they were affected by the notice that A. J. was not the owner of the shares and had no power to mortgage. Held, also, that s. 53 of c. 205, R. S. O. 1897, did not empower the company to disregard the trusts, although it relieved them from seeing to the execution of any trust to which the shares were subject. Held, that the company could not consolidate the two mortgages as against A. K. J., as she was a purchaser for value, without it being shewn

that she was aware at the time she purchased the equity of redemption in the lands that any prior mortgage existed against the six shares in the hands of the company. Birkbeck Loan Co. v. Johnston, 22 Occ. N. 160, 3 O. L. R. 497, 1 O. W. R. 163, affirmed with a variation as to parties. *Birkbeck Loan Co.* v. *Johnston*, 6 O. L. R. 258, 2 O. W. R. 556.

Statute of Frauds — *Express Trust — Purchase, to Make a Home for Relative — Implied Trust — Absence of Fraud.*]—The plaintiff claimed a declaration that certain lands standing in the name of the defendant W. were held by him in trust for the defendant F. and a sale thereof to satisfy the plaintiff's judgment against F. Three things were mainly relied on to establish the trust; (1) that W. on one occasion told the plaintiff that he had bought the land for F.; (2) that in a letter to the inspector of a company, he said that the land would eventually belong to F.; (3) that in his books he had kept an account of his dealings with F., entering the different items of debit and credit in respect to this farm, as well as of other matters:—Held, on the evidence, that W., no doubt, intended that F. (a relative) might have a home upon the farm, but was determined to retain the ownership of the land. There was no agreement between the parties, either as to a life tenancy or as to the acquisition of the fee simple in the land by F., which he could have enforced against W. in a court of law; and the plaintiff, under his registered judgment against F., was in no better position than the latter would be if suing on his own behalf. It was urged that there was a trust in favour of F.; that this was a resulting trust and therefore excluded from the provisions of the Statute of Frauds. As no portion of the purchase money of the land was advanced by F., there could be no resulting trust in his favour. No fraud on the part of W. was shewn, and there was no trust which could be enforced. *Thompson* v. *Wright*, 24 Occ. N. 97.

Technical Breach of Trust — *Relief under Trustee Act — Statute of Limitations — Accounts — Evidence — Books of Account —Reference — Report — Correction on Further Directions.*]—Under the last will of N., after making provision for his daughter E., all the rest and residue of his estate was given to his two daughters A. and C., equally, share and share alike. A. was appointed executrix and trustee, and the share given to C. was directed to be invested, and the interest, dividends, and annual produce paid to her half-yearly during her lifetime for her sole and separate use, etc. A. proved the will and filed an inventory, and paid over to E. the amount bequeathed to her, but with respect to C., who was very deaf and weak-minded, contented herself with supporting her during her lifetime, usually taking from her at the close of each year a receipt mentioning no amount, but sealed and witnessed, and acknowledging payment of the interest due her to the date of each receipt. The incomes of both A. and C. were applied by A. to their joint support, C. being provided with all necessary care and attention. After the death of both A. and C., at the instance of the plaintiffs, claiming under E., a reference was ordered to a Master to ascertain the amount of the residue of the estate of N. to which C. was entitled, and also receipts and expenditures by A. in her lifetime on account of C., and by the defendants as executors of A. after her death. After receiving the report of the referee, the Judge referred the report back to be varied, and with further instructions. On appeal from the latter order:—Held, that the whole cause and the matters in controversy being still before the Judge, he had power, in giving further directions to the referee, to correct any errors into which he thought he had fallen, the cause in this respect being unlike a common law action. Also, in the circumstances, that, though there had been a technical breach of trust on the part of A., the case was an appropriate one for relief under the Trustee Act (Acts of 1892 c. 13); and that the defendants were entitled to avail themselves of the protection of the Statute of Limitations. Also, as to income received by the defendants since the death of A., the Judge was right in holding that they should only be charged within 6 years of action brought. Also, as to a sum of money received by A., and not accounted for, her estate could not be relieved from liability, but with respect to income which should have been derived from the investment of the sum so not accounted for, the same rule must be applied as in the case of income received by the defendants after the death of A., and that the liability must be restricted to the period of 6 years before the commencement of the action. Also, that the Judge was right, under the provisions of O. 32, r. 3, in directing books of account kept by A., and which consisted largely in admissions against her own interest, to be taken as prima facie evidence of the truth of the matters therein contained. *Cairns* v. *Murray*, 37 N. S. Reps. 451.

Transfer of Mining Areas to Trustee — *Power to Sell — Title of Vendee — Action — Parties.*] — In an action for, among other things, a declaration, that, as against the defendants, the plaintiffs were entitled to an undivided one-third interest in certain gold mining areas transferred by the plaintiffs to the defendant McN., and sold by the latter to the defendant W., it appeared that the main objects with which the transfer in question was made were: (1) payment of certain advances made by McN. on account of the purchase money of the property; (2) the payment of an amount due by the plaintiff E. H. O. to the McLaughlin Carriage Co., for which the plaintiff C. G. O. was liable on a bond as surety:—Held, that the defendant McN. had power to sell the property for the purpose of carrying out the intentions of the parties. 2. That the plaintiffs not having established their right to the declaration prayed for, the claims or rights of the company, for whose benefit the transfer was made, could not be adjudicated upon without their being made parties to the suit. *Orland* v. *McNeil*, 34 N. S. Reps. 453.

Trustees' Compensation — Quantum —Railway bonds — Litigation — Responsibility. *Re Toronto General Trusts Corporation and Central Ontario R. W. Co.*, 6 O. W. R. 350.

Will — *Annuities — Setting Apart Securities — Distribution of Residue — Realization of Estate — Investments — Redemption — Consent — Summary Application—Rule*

938.]—An order made under Rule 938 declared that the persons interested in the residue of the estate of a testator were entitled to have sums set apart by the executors and trustees, from time to time, from the capital of the estate, to provide for annuities bequeathed by the testator, as sufficient funds for that purpose came to the hands of the executors, or to have such sums applied by them in the purchase of Government annuities, and, after provision made for payment of the specific legacies and the annuities, to have the residue in the hands of the executors from time to time distributed among the persons entitled:—Held, that the order was substantially right. The annuitants were not entitled to have the estate of the testator realized and converted into money further than might be necessary for the payment of his debts and funeral and testamentary expenses; their right was limited, after this had been done, to having the annuities sufficiently secured by the setting apart of such part of the estate as might be adequate for that purpose. In re Parry, 42 Ch. D. 570, and Harbin v. Masterman, [1896] 1 Ch. 351, followed. Hicks v. Ross, [1891] 3 Ch. 499, referred to. Held, also, that these matters could properly be determined and an inquiry directed upon an originating notice under Rule 938 brought on by one of the persons entitled to the residue. In re Medland, Eland v. Medland, 41 Ch. D. at p. 492, and In re Parry, supra, followed. Held, that it is only when the persons whose estate is liable to pay an annuity and the annuitant both consent, that an annuity may be redeemed out of the estate; and the order should be varied so as to require that consent. Order of Boyd, C., 21 Occ. N. 380, varied. *In McIntyre, McIntyre v. London and Western Trusts Co.*, 22 Occ. N. 90, 3 O. L. R. 212, 1 O. W. R. 56.

Will — *Misappropriation by Co-trustee—Limitation of Actions—Trustee Act — Bar.*]—R. G. died in 1870, having by his will given the income of his estate to his widow for life, and subject to certain bequests, the residue to the children of his brothers and sisters, and appointed T. H., J. G., and the widow executors and executrix of his will with power "to dispose of the property if they see fit." J. G. managed the estate until the time of his death in 1885, by which date some of the real property had been disposed of and invested, and his management was duly accounted for. T. H. then took the management of the estate until 1895, when the widow, after much pressure by her friends, took proceedings against him for an account, the result of which was that he was found largely indebted, and a large sum was lost to the estate. The widow died in 1902; probate of her will was then granted to the defendants; and T. H. was removed as trustee, and the plaintiffs appointed in his place. In an action by the plaintiffs against the defendants in 1903 to compel them to make good the losses to the estate of R. G. occasioned by the negligence of the widow in permitting her co-executor to misappropriate the funds of the estate:—Held, that, as all the alleged acts of negligence or breaches of trust charged against the widow occurred more than six years before action, s. 32 (1) (b) of the Trustee Act, R. S. O. 1897 c. 129, was a good defence. In re Bowden, Andrew v. Cooper, 45 Ch. D. 447, followed. *Gardner v. Perry*, 23 Occ. N. 295, 6 O. L. R. 269, 2 O. W. R. 681.

See ASSESSMENT AND TAXES—EXECUTORS AND ADMINISTRATORS—HUSBAND AND WIFE—INTEREST—MUNICIPAL CORPORATIONS—SCHOOLS—TENANTS IN COMMON—WILL.

TUTOR.

See ALIMENTARY ALLOWANCES—APPEAL—INFANT—SOLICITOR

ULTRA VIRES.

See CONSTITUTIONAL LAW.

UMPIRE.

See ARBITRATION AND AWARD.

UNDERTAKING.

See WRIT OF SUMMONS.

UNDUE INFLUENCE.

See COSTS—GIFT—MUNICIPAL ELECTIONS—PARTICULARS—WILL.

UNINCORPORATED ASSOCIATION.

See CONTEMPT OF COURT—DISCOVERY—PARTIES—PLEADING—TRADE UNION—WRIT OF SUMMONS.

UNIVERSAL LEGATEE.

See REVIVOR.

UNLAWFUL ASSEMBLY.

See CRIMINAL LAW.

USE AND OCCUPATION.

See LANDLORD AND TENANT.

USUFRUCT.

See HUSBAND AND WIFE—PARTITION—WILL.

USURPING PROFESSIONAL FUNCTIONS.

See SOLICITOR.

USURY.

See INTEREST.

VACANT SUCCESSION.

See CURATOR.

VACATION.

See COSTS—PLEADING.

VACCINATION.

See PUBLIC HEALTH ACT.

VAGRANCY.

See CRIMINAL LAW.

VALUATION.

See ASSESSMENT AND TAXES.

VALUATORS.

See MUNICIPAL CORPORATIONS.

VEHICLES.

See CARRIERS — CONTRACT — INSURANCE — MASTER AND SERVANT—MUNICIPAL CORPORATIONS—NEGLIGENCE.

VENDOR AND PURCHASER.

Act of Sale—*Droits de Mutation—Failure to Pay—Nullity—Improvements—Mortgage — Priorities — Payment to Insolvent Mortgagor.*]—The defendant mortgaged a lot of land to C. in 1888 and 1889. In 1899 P., the possessor of the lot, sold the improvements thereon to C. The plaintiff, a judgment creditor of P., caused the lot to be seized in the possession of P., invoking a sale by the defendant to P. in 1894. The defendant claimed the property as his, and sold it to C. for $25:—Held, that the act of sale in 1894 was absolutely null and void and must be considered as non-existent, because the dues thereon had not been paid; that such nullity not only prevented the transmission of the property, but took away all probative value as to establishing the sale, and that such an act, being non-existent in the eye of the law, did not even prove the payment and the receipt of the moneys mentioned in it. 2. That C. committed no fraud in purchasing from the defendant. 3. That, besides, in the actual case, the plaintiff, a creditor of P., claiming to be the earlier purchaser, alleging that P., his debtor, was charged with the mortgage debt of the defendant to C., thereby affirmed the bad faith of P., who, not having the mortgage debt, could not invoke his lien for the improvements, the mortgage debt of C. having priority in law over such improvements. 4. There is nothing illegal in a mortgagee paying for the improvements upon the mortgaged premises with the object of protecting his security, even if he whom he pays is insolvent, inasmuch as it is not fraud for a debtor to pay his insolvent creditor. *Nadeau v. Roseberry*, Q. R. 18 S. C. 542.

Action for Purchase Money—Evidence—Trespass to goods. *Grear* v. *Mayhew*, 1 O. W. R. 529, 2 O. W. R. 140.

Action for Purchase Money—Evidence—Weight of—Corroboration. *Murray* v. *Empire L. & S. Co.*, 1 O. W. R. 310.

Action for Purchase Money—*Time for Payment—Acceleration — Insolvency of Purchaser.*]—Under art. 1092, C. C., an action to recover the balance of purchase money of land may be brought although the time for payment has not arrived when the debtor has become insolvent or has diminished the value of the security. Judgment of Court of King's Bench, Quebec, affirmed. *Kensington Land Co.* v. *Canada Industrial Co.*, [1903] A. C. 213.

Agreement for Sale of Land—*Title—Tender of Transfer from Third Party—Action for Purchase Money—Repudiation—Penalty—Specific Performance—Election.*] — Where at the time of an agreement for sale and purchase of land, the title to the land stood in the name of the vendor's wife, but the vendor obtained and tendered a transfer from his wife to the purchaser before the purchaser repudiated the agreement: — Held, following Paisley v. Wills, 19 O. R. 303, 18 A. R. 210, that the purchaser was liable to an action or balance of purchase money. Right to repudiate discussed. If a thing be agreed to be done, though there be a penalty annexed to secure its performance, yet the very thing itself must be done, and the Court will not permit the person on whom the penalty rests to resist specific performance by electing to pay the penalty. *Hamilton* v. *McNeill*, 2 Terr. L. R. 31.

Authority of Agent of Vendor—*Ratification — Estoppel—Part Performance—Statute of Frauds.*]—One T., who had been appointed agent for the management of plaintiff's estate at E., by the plaintiff's wife, which appointment was expressly ratified by the plaintiff, had appointed, with her authority, one M., a real estate agent, as agent for sale. M. made several sales, all of which were confirmed by the plaintiff, and, on the 3rd February, 1904, sold to the defendant C.

the land in question, of which sale the plaintiff was duly notified; and the defendant went into immediate possession and commenced making improvements, of which the plaintiff was also notified on the 19th February. On the 8th June, after a large sum had been spent in improvements, the plaintiff notified the defendants that he repudiated the sale, and brought an action for possession:—Held, that M. had authority from the plaintiff through T. to make the sale to the defendant. 2. That if M. had not been authorized to make the sale, the plaintiff had ratified it by his conduct in standing by and allowing the defendant to make improvements, under the arrangement of purchase, and not immediately repudiating it and giving notice within a reasonable time. 3. That the part performance of the agreement of purchase by the defendants was sufficient to take it out of the Statute of Frauds. Quære, whether noncompliance with the Statute of Frauds comes in question in an action of ejectment, or whether the plaintiff could recover possession in such an action by reason of a breach of any of the terms of the agreement. *McDougall* v. *Cairns*, 2 Terr. L. R. 219.

Construction — Payment of purchase money by instalments—Default—Failure of crop—Cancellation—Notice—Time—Action — Forfeiture. *McAuley* v. *Dick* (N.W.T.), 1 W. L. R. 381.

Contract for Exchange of Lands — Reformation of contract—Mistake in description — Specific performance — Statute of Frauds — Part performance — Terms of contract — Liquidated damages — Payment into Court—Costs. *Knapp* v. *Carley*, 3 O. W. R. 940.

Contract for Sale — *Payment—Conveyance — Dependent Obligations—Title—Dower — Payment into Court — Costs.*] — By an agreement entered into between plaintiff and defendant for the sale of land, it was provided that if the purchase money was paid by instalments the deed was to be given when and not before the last instalment was paid. If defendant exercised his option and paid the whole purchase money at any time within four years, then the deed was to be given when the money was paid:—Held, that the obligations were mutual and dependent, and that the acts were performed concurrently. By the terms of the agreement, a good title was to be given, and this could not be done, as a release of dower could not be obtained, but defendant signified his willingness to retain possession and to accept compensation. The matter being a small one, and there being some question as to the jurisdiction of the County Court to afford relief:—Held, that the matter should be transferred to this Court, and the judgment for defendant in the County Court set aside; that the plaintiff should have leave to apply at Chambers to ascertain the value of the dower, and that the balance of the purchase money should be paid into Court within one month after the ascertainment of the value of the dower; otherwise defendant should be taken to have abandoned his option, and plaintiff should have judgment for the amount of his claim with costs:—Held, that plaintiff's claim being for an amount under $80, costs must be taxed according to the scale of the County Court in such cases. *Arenburg* v. *Wagner*, 33 N. S. Reps. 396.

Contract for Sale of Land—Action to rescind—Fraud—Representation of agent for vendors as to value—Large commission paid to agent—Crediting on purchase money—Acquiescence. *Krolik* v. *Essex Land, Loan, and Improvement Co.*, 3 O. W. R. 508.

Contract for Sale of Land — *Description—Latent Ambiguity—Evidence — Rectification — Specific Performance — Statute of Fraud.*]—B. on behalf of D. negotiated with C. for the purchase of C.'s property on the north-west corner of Hastings street and Westminster avenue, Vancouver, and D. drew up a receipt for the part payment of the purchase price, leaving the description blank for C. to fill in, as he did not know the land registry description, but adding the description "N.W. cor. etc." below the space reserved for C.'s signature. B. took the receipt to C. and paid him $10, and he filled in the blank description as lots 9 and 10, block 10, and signed the receipt. Lots 9 and 10, block 10, were on the north-east corner, and were not owned by C.; whereas lots 9 and 10, block 9, were on the north-west corner, and were owned by C. B. sued to have the agreement or receipt rectified or performed so as to cover lots 9 and 10, block 9, and to have the agreement specifically performed:—Held, that it was the property on the north-west corner that the parties had in contemplation, and that C. filled in the wrong description either by mistake or fraud, and that the plaintiff was entitled to specific performance of the true agreement. *Borland* v. *Coote*, 24 Occ. N. 383, 10 B. C. R. 493.

Contract for Sale of Land—*Payment in Goods—Rescission—Failure of Consideration—Trover for Goods—Reconveyance.*]—V., being desirous of purchasing a lot of land in the possession of F., was negotiating with him about it, but no agreement of purchase had been arrived at. W., a dealer in cattle, went to V. and offered to purchase from him two head of cattle. He refused to sell, stating that he wished to exchange them with F. for the land. W. then went to F. and agreed to extinguish a debt of $79 that he had against him if he would convey the land to V. W. went again to V. and offered him the land in exchange for the two head of cattle and his note for $20. This offer V. accepted. The parties then met at the office of a justice, and F. gave V. a warranty deed of the land, and V. gave W. his note for $20. W. selected the cattle, asked V. to turn them out, and said he would come again and take them away. V. recorded the deed, but, discovering that F. had no title on the records, told W. he could not have the cattle. W. afterwards went and took the cattle from V.'s pasture without his consent. V. alleged that W. told him that F. had a good title, and agreed to give him a good title, and if he did not do so the bargain was to be off. W. denied that he told V. that F. had a good title, or that he agreed to give V. a good title. In an action of trover in a County Court to recover the cattle and note, the Judge told the jury that if they believed V.'s version of the transaction, the title in the cattle did not pass, and there was evidence upon which they might find for the plaintiff. The jury found for the plaintiff:—Held, on appeal, that V. having accepted and registered the deed under the contract, the consideration had not entirely failed, and V. could not rescind the contract and sue in trover for the

cattle and note without reconveying or offering to reconvey the land, and that the appeal should be allowed and a nonsuit entered. *Vanbuskirk* v. *Vanwart*, 36 N. B. Reps. 422.

Contract for Sale of Land—*Resolution by Municipal Corporation — Acceptance of Offer to Purchase — Evidence — Written Instruments—Statute of Frauds—Estoppel.*]—T. offered to purchase lands which the municipality had bid in at a tax sale, and to pay therefor the amount of the arrears of taxes and costs. The council resolved to accept "the amount of taxes, costs, and interest" against the lands, and authorized the reeve and clerk to issue a deed at that price:—Held, reversing the judgment appealed from, that, even if communicated to T. as an acceptance of his offer, this resolution would have raised no contract, on account of the variation made by the addition of interest. An instrument, which was never delivered to T., was executed by the reeve and clerk of the municipality, in the statutory form of conveyance upon a sale for taxes, reciting the above resolution, but without a reference to any contract in pursuance of the resolution, and about two months after the passing of the resolution, upon receipt of another offer for the same lands, the council resolved to intimate to the person making the second offer "that the lot had been sold to T.":—Held, that these circumstances could not be relied upon as an admission of a prior contract of sale:—Held, also, that, even if it could be inferred that contractual relations had been established between T. and the municipality, it did not appear that there had been any written communications in respect thereto made on behalf of the municipality, and, consequently, the alleged admission of a contract did not satisfy the Statute of Frauds, and could have no effect. *District of North Vancouver* v. *Tracy*, 24 Occ. N. 114, 34 S. C. R. 132.

Contract for Sale of Land — Sale by vendor to another — Application of purchase money—Payment of mortgage—Subrogation to rights of mortgagee. *Quider* v. *Hedges*, 3 O. W. R. 555.

Contract for Sale of Land — Specific performance — Objection of purchaser — Foreign defendant — Jurisdiction — Title—of distribution. *Cooke* v. *McMillan*, 4 O. W. R. 523.

Contract for Sale of Land — *Specific Performance—Statute of Frauds—No name of Purchaser in Memorandum — Laches — Agent's Duty to Furnish Name of Purchaser.*] — Action for specific performance of an alleged contract by the defendant to sell to the plaintiff two lots of land. The writing relied on was an acknowledgment signed by the agents for the defendant (naming firm) of having received from B. & R. $25 deposit on the purchase of the lots, describing them, with the price and terms of sale. The plaintiff asserted that he was the purchaser, though his name did not appear in the agreement. B. & R. were his solicitors and agents. The defence was that the agreement did not comply with the requirements of the Statute of Frauds, as the name of the purchaser did not appear in it; that the plaintiff by his laches had disentitled himself to specific performance of the agreement; and that, on account of the default of the plaintiff, the defendant had rescinded the agreement:—Held, that the plaintiff had not made out a case entitling him to specific performance of the agreement in question, and the action should be dismissed with costs. The note or memorandum of an agreement for the sale of real estate must contain the names of the contracting parties, or such a description of them that there cannot be a fair dispute as to their indemnity. The term "vendor" is not in itself a sufficient description of one of the contracting parties: Potter v. Duffield, L. R. 18 Eq. 4; Williams v. Jordon, 6 Ch. D. 517; White v. Tomalin, 19 O. R. 513. In the present case the purchaser was neither named nor described in the agreement. As the agreement did not comply with the requirements of the Statute of Frauds, the plaintiff was not entitled to recover. *Maber* v. *Penkalski*, 24 Occ. N. 407.

Contract of Sale—*Construction of Covenants—Dependent or Independent—Payment into Court.*]—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, &c., 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, &c., the said price or parcel of land freed and discharged from all incumbrances: — Held, following Macarthur v. Leckie, 9 Man. L. 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. *Sword* v. *Tedden*, 21 Occ. N. 546, 13 Man. L. R. 572.

Contract of Sale—*Default—Rescission—Demand or Notice—Necessity for—Costs of Pending Opposition.*]—The plaintiffs had sold to the defendants a bit of land for construction of their line, for an annual rent of $25 as long as the purchase money, $500, should not have been paid, it being stipulated that if the defendants made default in payment of any gale of rent for six months after it fell due, the sale should be rendered void and of no effect, and it should be lawful for the plaintiffs to resume possession of the land and to dispose of it as their own property without indemnity or reimbursement of the sums paid. The defendants having made default in payment of one of the gales of rent for more than six months after it fell due, the plaintiffs began an action to rescind the sale, and, besides, claimed the costs of a pending opposition which they had filed to protect their rights upon a seizure of the land being made as against the defendants:—Held, that, by reason of the default clause above referred to, the plaintiffs had the right to demand the rescission of the sale, without any demand of payment of the gale of rent, or any mise en

demeure having been addressed to the defendants, the latter being in default by the very terms of the contract. 2. But the plaintiffs could not recover from the defendants the costs of the opposition, seeing that litigation was still pending on the subject of such costs, no adjudication having been made upon such opposition. *Maison St. Joseph du Sault au Récollet* v. *Montreal Park and Island R. W. Co.*, Q. R. 19 S. C. 484.

Contract of Sale—*Rescission for Fraud —Secret Commission to Purchaser's Agent— Collusion—Election.*]—The defendant was induced by his agent to agree to buy the plaintiff's farm for $1,850, although the plaintiff's price for it was only $1,800. He paid $250 in cash and went into possession. It was represented to him that there were 80 acres of cultivated land on the farm, but it turned out that there were only about 58 acres. On discovering this he asked to have the agreement cancelled and his money returned, but this was refused. He then, on the advice of the same agent, raised a crop on the farm and remained in possession for over a year, but refused to make the further payments agreed on. The plaintiff then brought this action to have the agreement cancelled and the money he had received forfeited. At the trial it came out that the plaintiff had paid the agent $50 out of the money paid by the defendant, who asked to have the agreement cancelled and his money refunded to him:—Held, without deciding whether the defendant by his inaction had lost his right to repudiate the bargain on account of the shortage in the cultivated area, and distinguishing Campbell v. Fleming, 1 A. & E. 40, that, on account of the newly discovered secret payment by the plaintiff to the defendant's confidential agent, the defendant had the right to ask for cancellation of the sale and repayment of the $250, with costs of action. Panama, &c., Co. v. India Rubber, &c., Co., L. R. 10 Ch. 515, followed. *Murray* v. *Smith*, 22 Occ. N. 241, 14 Man. L. R. 125; *Sparling* v. *Houlihan*, 22 Occ. N. 306, 14 Man. L. R. 134.

Contract of Sale — *Taxes — St. John Assessment Act.*]—By agreement dated the 18th March, 1902, for the sale of land in the city of St. John, the vendee was to be given a "good title free of all claims on the 1st May," the date when possession was to be given. Section 131 of the St. John Assessment Act, 52 V. c. 27, enacts that "any assessment upon or in respect to real estate shall be a special lien on such real estate from the 1st day of April in the year of the assessment," &c. By 58 V. c. 49, s. 1, power is given to the city to sell real estate, on failure of the person assessed to pay taxes assessed in respect of the land. On the 1st May, 1902, the rate of taxation for the year from the 1st April had not been fixed by the assessors, and the rate was not determined, nor was the assessment list filed by the assessors with the common clerk until a number of weeks after the 1st May. The vendee contended that the taxes for the year beginning on the 1st April should be paid by vendor, and the matter was referred to the Attorney-General, whose decision it was agreed should be final:—Held, that the vendee should pay the taxes, save one month's proportion thereof, to be borne by the vendor. *In re de Forest*, 22 Occ. N. 400.

Contract of Sale — *Time of Essence — Waiver—Notice — Rescission — Forfeiture of Payments — Receiver — Rents — Laches — Specific Performance—Costs.*]—Semble, that the acceptance by a vendor of a payment on account of a past due instalment of purchase money is a waiver of his right to take advantage of a provision in the agreement of sale making time of the essence thereof; but, if there be a subsequent default in payment of a subsequent instalment, that, being a new breach, gives the vendor a right to insist on that provision:—Held, that a vendor, if he gives to the purchaser a notice limiting a reasonable time within which to complete an agreement to purchase, and informing him that after the lapse of the time limited the agreement will be treated as at an end, and if he does not act subsequent to waive the effect of the notice, thereby legally rescinds the agreement, and the purchaser is not entitled to specific performance. 2. That mere delay in enforcing his rights, consequent upon such a rescission, does not disentitle the vendor to a declaratory order that the agreement is rescinded. 3. That in such a case payments on account of purchase money are forfeited to the vendor if there be a provision to that effect in the agreement, and, semble, even without such a provision. 4. That where, after such an agreement, the property in question passed into the hands of a receiver appointed by the Court, and he, as well as the purchaser, was given a notice of the terms above mentioned, the receiver was accountable to the vendor for the rents received subsequent to the date on which the notice terminated the agreement. The receiver, on the grounds of his being an officer of the Court, and of the delay of the vendor in taking steps to enforce his rights, was not ordered to pay the costs of the application in which the above questions were raised. *Forfar* v. *Sage, Ex. p. Wilkins*, 5 Terr. L. R. 255.

Covenant—*Building Restriction—Deed of Land — Covenant Running with Land — Breach — Construction — "House."*] — The purchaser of land covenanted, for himself, his heirs, executors, administrators, and assigns, not to erect more than one house thereon. It was held by Street, J., that the burthen of the covenant passed with the land to the defendants, the assigns of the purchaser, and the benefit of it to the plaintiffs, the assigns of the vendor in respect of the adjoining land, but that the covenant should not be extended beyond what its terms reasonably imported. He was of opinion that "house" meant "dwelling house" and that putting up a stable and carriage house was not a breach; and "if the defendants could build a house first and then add a stable without breach of the covenant, there was no reason why they should not begin by building the stable and afterwards build the house. *Hime* v. *Lovegrove*, 25 C. L. T. 344, 5 O. W. R. 706, 9 O. L. R. 607.

Covenant — Building restrictions—Intention of parties—Security—Building scheme—Breach of covenant—Damages in lieu of injunction—Assessment. *Snow* v. *Willmott*, 5 O. W. R. 361.

Deed of Sale—*Warranty—Assessment for Building Church—School Taxes—Payment of Arrears by Purchaser — Recovery — Prescription.*]—In case of a sale of land "with warranty against all troubles, hypothecs, debts, dowers, donations, substitutions, alienations,

and incumbrances whatsoever," the existence of an assessment (répartition) for the building of a church, at the time of the sale, cannot give the purchaser a right of warranty or to be indemnified against the vendor if he knew at the time of the deed of assessment. The school taxes and assessments for building a church affecting land, being public charges or of common law, ought to be taken into consideration in the purchase of land, and as to future payments to be taken into account at the time of sale. The purchaser with legal warranty, who has paid municipal or school taxes owing by the vendor, cannot recover these taxes from the latter, if, when he commenced his action, the debt due the municipality by the vendor for payment of these taxes had been prescribed; the purchaser, being subrogated to the rights of the school corporation, has no greater rights than the latter against the vendor. *Peabody* v. *Vincent*, Q. R. 26 S. C. 37, 253.

Deed of Sale — *Terms of Warranty — Right of Action.*] — The purchaser of land, who has paid the price thereof, has no right of action against his vendor for damages and a clear title, if the deed of sale does not contain a clause of franc et quitte, but simply that the vendor warrants the buyer against trouble and will hold him harmless against all incumbrances. *Vail* v. *Baker*, 6 Q. P. R. 159.

Delay in Carrying Out Contract — Specific performance—Interest—Costs. *Connell* v. *Jewell*, 2 O. W. R. 655.

Delivery of Conveyance—Covenant for possession—Enforcement. *Ham* v. *Pillar*, 1 O. W. R. 259.

Doubtful Title—Forcing on purchaser. *Re Campbell and Horwood*, 1 O. W. R. 139.

False Demonstratio—*Position of Vendor's Signature — Specific Performance.*] — On the conclusion of negotiations between C. and B. as to the sale of two city lots on the corner of Hastings street and Westminster avenue, in Vancouver, B.C., C. signed a document as follows: — "Vancouver, June 28th, 1902. Received from James Borland the sum of ten dollars, being a deposit on the purchase of lots Nos. 9 and 10, block No. 10, district lot 196, purchase price twenty thousand dollars ($20,000), the balance to be paid within 10th July . . days, when I agree to give the said James Borland a deed in fee simple free from all incumbrances. Jos. Coote, N. W. Cor. Hastings & Westr. Ave." The lots on the corner of the streets mentioned were, in fact, lots 9 and 10 in block 9, and the trial Judge found that these were the lots intended to be sold, and also that the words below the signature formed part of the receipt. In an action for specific performance of the agreement for sale of the lands:—Held, affirming the judgment appealed from, Borland v. Coote, 10 B. C. R. 493, 24 Occ. N. 383, Killam, J., dissenting, that the inaccuracy of the description in the receipt was a mere discrepancy, which should be disregarded, and a decree made for specific performance in respect of the lots actually bargained for between the parties. *Coote* v. *Borland*, 25 Occ. N. 28, 35, S. C. R. 282.

Fraudulent Representation—*Value of Land—Rental—Abatement of Price.*]—In an action quantum minoris, it is necessary to prove that the buyer, plaintiff, gave more than the real value of the property, which proof had not been made in this case. Judgment in Q. R. 17 S. C. 387 affirmed. Doherty, J., did not concur in the last considérant of the judgment of the Court below, viz., that where the alleged fraud relates to the motive inducing the purchaser to buy at a price exceeding that which he would have given if the fraud had not been practised, no action lies at the suit of the purchaser who adheres to the sale, to reduce the price. *Bailey* v. *Reinhardt*, Q. R. 20 S. C. 225.

Incumbrance—*Lis Pendens—Notice—Interpleader—Rule 1103 (a).*]—Action brought against one who had contracted to purchase lands for the purchase price. Pending the action the Molsons Bank sought to set aside, as fraudulent as against themselves and his other creditors, a grant of certain lands by one Sanderson to his wife, the vendor. Before accepting conveyance of these lands or paying the purchase money, the purchaser from Mrs. Sanderson was apprised of the registration of a certificate of lis pendens issued in the action brought by the bank:—Held, that the registration of a certificate of lis pendens is not an incumbrance within the meaning of R. S. O. c. 119, s. 15. It did not create any lien or charge upon the lands against which it was registered. Nor was this case one in which it would be at all possible to comply with the requirements of the statutory provision which the purchaser invoked. The Molson's Bank could not assert any liability on the part of the purchaser to pay to them such purchase money. Their claim must have been to have it declared that the lands in question were exigible to meet the demands of themselves and the other creditors of the vendor's grantor. Rule 1103 "deals with a liability in one person to pay a specific sum of money, while at the same time two other persons are making claims in respect of that sum:" Ingham v. Walker, 3 T. L. R. 448, 31 Sol. J. 271. See too Baxter v. Day, 73 Wisc. 27. The application was wrongly conceived, and should be dismissed with costs to be paid by the applicant to the vendor. The Molsons Bank, having supported the motion, should have no costs. *Molsons Bank* v. *Eaucr*, 6 O. W. R. 93, 180, 10 O. L. R. 452.

Interest in Land—Specific performance—Assignment and delivery of plaintiff's agreement with owner—Dispute as to terms of contract — Waiver — Costs. *Brown* v. *Hoare* (Man.), 2 W. L. R. 33.

Judgment against Vendor — *Title of Purchaser—Priority—Registry Laws.*] — The hypothec resulting from a judgment against the vendor of an immovable registered before the title of the purchaser, has priority over the rights of the latter. *Crepeau* v. *Bruneau*, Q. R. 24 S. C. 368.

Judgment for Purchase Money — *Subsequent Rescission by Vendor.*]—A vendor obtained judgment against a purchaser for certain instalments of the purchase money, less a sum allowed to the purchaser by way of set-off. The agreement for sale provided that the vendor might rescind in case of default, and that all moneys theretofore paid should be forfeited; and, after execution under the judgment had been returned unsatisfied, and after default in payment of further

instalments, the vendor gave notice of rescission:—Held, that he was entitled to do this, and that his doing so did not entitle the defendant to an order setting aside the judgment and for payment to him of the amount allowed by way of set-off. *Jackson* v. *Scott*, 21 Occ. N. 227, 1 O. L. R. 488.

Lien—*Bailleur de Fonds—Charge on Purchase Money—Gift—Acceptance.*] — Although an act of sale or gift does not contain a stipulation for an hypothecary guaranty, the immovable sold or given remains burdened with a lien in the nature of a bailleur de fonds, for appreciable charge in money stipulated for in the act of gift, or for what remains due of the price of sale. Such hypothec exists in favour of the vendor or donor, or of the third person to whom it is stipulated in the act of gift or sale that the charges upon the gift or the price of the sale shall be paid. 2. The lodging of his claim by a creditor with the liquidator to be collocated upon the product of the sale of an immovable, of which the price is due to him, as a creditor indicated in the act of sale, constitutes a sufficient acceptance of the stipulation on his part. *Canadian General Electric Co.* v. *Shipton*, Q. R. 21 S. C. 83.

Misrepresentations—*Fraud — Error — Rescission — Exchange — Improvements — Option—Actio Quantum Minoris—Latent Defects—Damages—Warranty.*]—An action will lie against the vendor of land to set aside the sale and recover the price, on the grounds of error and latent defects, even in the absence of fraud. The purchaser has the option of returning the property and recovering the price or of retaining the property and recovering a portion of the price; he cannot be forced to content himself with the action quantum minoris and damages, upon the pretext that the property might serve some of his purposes, notwithstanding the defects. Where the vendor has sold, with warranty, a building constructed by himself, he must be presumed to have been aware of any latent defects, and to have acted fraudulently in making the sale. Where the vendor represented that a block of buildings had been constructed by him of solid stone and brick, and it was discovered after the transfer that a portion was built of lumber encased with stone and brick in a manner to deceive:—Held, that the contract was vitiated for error and fraud, and the vendor, as he knew of the faulty construction, was liable to return the price and for damages. The action quantum minoris and for damages does not apply to cases where contracts are voidable for error or fraud. The sale was made in part in consideration of vacant city lots given in payment pro tanto, and, during the time the defendant was in possession of the lots, he erected buildings upon them with his own materials:—Held, that, even if the contract amounted to a contract of exchange, it was subject to be rescinded in the same manner and for reasons similar to those which would avoid a sale, and, if the contract be set aside for bad faith on the part of the defendant, the plaintiff has options similar to those mentioned in arts. 417, 418, 1526, and 1527 of the Civil Code, that is to say, he may either retain the property built upon, on payment of the value of the improvements, or cause the defendant to remove them without injuring the property, or compel the defendant to retain the property built upon and to pay its value, besides having the right to recover damages according to the circumstances. *Paguello* v. *Choquette*, 24 Occ. N. 77, 34 S. C. R. 102.

Mistake—*Rectification of Agreement.*]—Suit for rectification and specific performance. The defendant agreed to sell to the plaintiff lots 26, 27, and 28 according to a subdivision in Kildonan; he gave him a transfer under the Real Property Act, which the plaintiff registered, and he received a certificate of title. The plaintiff supposed the lots so sold to him to be those which were really 27, 28, and 29, and took possession of the last named three, and made improvements on lot 29. Later on the defendant sold lots 29 to 34 to another person, when they were located by a surveyor, and the plaintiff discovered that the lot on which his improvements were was lot 29, instead of 28, as he had supposed. The plaintiff brought this action to have it declared that the intention had been to sell him the lots which were really 27, 28, and 29, and to have the sale agreement rectified, and for specific performance of the rectified agreement. The plaintiff testified that the defendant told him that a house, which since turned out to have been on lot 29, was on lot 28, and he relied on that representation in buying, and making his improvements. The defendant said he told the plaintiff he was selling by the plan only, and that the plaintiff must find the lots for himself. It was admitted that the plaintiff looked over the property before buying, though he did not measure the distance from the railway track to the lots he chose, which, if done, would have shewn him their numbers and probably prevented the mistake:—Held, that the plaintiff did not rely on any representation by the defendant, but looked over the property with a knowledge of how to find the lots according to their actual numbers, and his misfortune was the result of his own mistake only. It was argued that the case was one of a unilateral mistake, but to entitle the plaintiff to damages as in a case of unilateral mistake a plaintiff must shew fraud on the defendant's part: May v. Platt, [1900] 1 Ch. 616. There was no suggestion of fraud in the present case. *Williams* v. *Hespeler*, 24 Occ. N. 409.

Mortgage—*Payment into Court—Interest—Bonus—Municipal Corporation.*] — Where the corporation of a city acquired the property of a light, heat, and power company, which was subject to a mortgage for a large sum, the Court refused to exercise the powers conferred on it by ss. 15 and 16 of the Act respecting the law and transfer of property, R. S. O. 1897 c. 110, by requiring the company to accept, on an existing mortgage, three per cent., the Court rate of interest, instead of five per cent., the rate secured by the mortgage for the unexpired period thereof, and to authorize the corporation to deduct the amount of the mortgage so computed from the purchase money. *In re Kingston Light, Heat, and Power Co. and City of Kingston*, 24 Occ. N. 358, 8 O. L. R. 258, 3 O. W. R. 769.

Mortgage Sale—*Notice of Sale—Service of—Recitals in Deeds—Assigns—Meaning of—Devolution of Estates Act—Caution—Non-registration of.*]—Where, by a provision in a

mortgage, no want of notice required by the mortgage was to invalidate any sale thereunder, but the vendor was alone to be responsible, and the conveyance made on a sale under the power of sale contained recitals that service had been duly made on the mortgagor and his wife, the accuracy of such recitals being in no way disproved, a subsequent vendor of the land, in making title on a sale thereof, is not called upon to furnish any other evidence of such service; and further, the objection being as to the proof of service on the wife, no such proof was in any event required, for, by the terms of the mortgage, service only was to be required to be made on the mortgagor and his assigns, and the wife was not an assign. Where, after the death of a mortgagor, a married woman, and after the coming into force of the Devolution of Estates Act, R. S. O. c. 127, and the expiration of a year from the mortgagor's death, without any caution being registered, sale proceedings were taken on the mortgagor, service of notice of sale on the husband and her heirs, two infant daughters, is sufficient, it not being necessary to serve the personal representatives. *In re Martin and Merritt*, 22 Occ. N. 116, 3 O. L. R. 284.

Mutual Mistake—*Innocent Misrepresentation—Rescission of Contract — Damages — Costs—Fraud.*]—Plaintiff entered into a contract for the purchase of land from the defendant, after the latter had personally shewn him what he honestly thought was the land he owned. After payment of certain instalments of the purchase money and certain sums of money for taxes and otherwise in connection with the land, the plaintiff bought an outfit of horses, implements, lumber, etc., and took them out to the railway station nearest the land, intending to take possession and commence farming operations. He then discovered that the property which he had bought was not the one which had been shewn to him, but was greatly inferior to it in value. He then brought this action in which he charged the defendant with fraudulent misrepresentation as to the locality of the property:—Held, that the plaintiff was entitled to have the contract rescinded and to repayment of all moneys paid by him under it with interest at five per cent. per annum. Adam v. Newbigging, 13 App. Cas. 308, followed. (2) The plaintiff was not entitled to damages, as the defendant's misrepresentation had not been fraudulently made. (3) Appearances having justified the charge of fraud, though this was not proved, costs should be allowed. *Hopkins* v. *Fuller*, 25 Occ. N. 481 15 Man. L. R. 282.

Offer to Sell—*Purchaser Pendente Lite—Certificate of Lis Pendens — Specific Performance—Delay — Damages.*]—A letter by the vendor's agent to a probable purchaser, giving the description of the vendor's land, mentioning the price at which the vendor is willing to sell, and asking the person written to if he is willing to purchase at that price, is an offer to sell, not simply a request for an offer to purchase, and, upon the person so written to stating that he wishes to buy at the price named, a contract of sale and purchase is constituted between the parties. After the contract for the sale had been entered into, the vendor sold and conveyed the land in question, which was of a speculative character to a third person, who purchased in good faith and without notice of the prior contract. Before he registered his deed the original purchaser began this action for specific performance and registered a certificate of lis pendens, but, although he knew of the second sale, he did not take any step in the action, or make the second purchaser a party, for nearly twelve months:—Held, that the second purchaser's rights were not affected by the registration of the certificate, and that in any event the delay would have been fatal to the claim for specific performance as against him. The vendor having deliberately broken his contract because of a better offer, substantial damages were assessed against him. Clergue v. McKay, 23 Occ. N. 243, 6 O. L. R. 51, 1 O. W. R. 178-241, 2 O. W. R. 647, affirmed. *Clergue* v. *Preston*, 24 Occ. N. 330, 8 O. L. R. 84; *Clergue* v. *McKay*, 3 O. W. R. 860.

Option of Purchase—Vendor selling to another — Waiver of option — Knowledge of purchaser—Delay—Damages. *Betts* v. *Hiscox*, 3 O. W. R. 345.

Partnership Lands—*Death of One Partner—Conveyance to Surviving Partner by Administratrix — Infants—Consent of Official Guardian—Personalty.*] — Two brothers in partnership in business were the owners of certain land as partnership assets used in the business. One of them died intestate, leaving a widow and infant children, and the widow took out letters of administration and conveyed the land to the surviving partner. Later the surviving partner died, and his personal representative agreed to sell the land. On an application under the Vendors and Purchasers Act, R. S. O. 1897 c. 134, in which the purchaser contended that the consent of the official guardian should be obtained to the conveyance to the surviving partner, under s. 8 of the Devolution of Estates Act, R. S. O. 1897 c. 127:—Held, that the latter Act did not apply, as the property devolved by operation of law upon the personal representative virtute officii, and not by virtue of the statute, and that the children were not concerned or interested in the land in any sense contemplated by the Act. *In re Fulton and McIntyre*, 24 Occ. N. 225, 7 O. L. R. 445, 3 O. W. R. 406.

Payment by Instalments — Default — Right of vendor to cancel—Delay—Tender—Re-sale. *Armstrong* v. *Ericson*, (N.W.T.), 2 W. L. R. 185.

Possession — *Instalments of Purchase Money—Eviction—Interest.*]—A purchaser of immovables, for the time that he has been in possession, in spite of the fact that he has eventually been evicted, must pay interest upon the portion of the purchase money which fell due during the time that he was in possession. *Berlan* v. *Stadacona Water, Light, and Power Co. and Town of Farnham*, Q. R. 25 S. C. 525.

Possession by Purchaser — *Title — Waiver—Improvements.*]—Where a purchaser, entitled by the terms of the contract to a perfect title, upon payment of his deposit entered into and continued in possession as provided by the contract, and made improvements even after alleged defects in the title were brought to his attention, and after he had brought an action for specific performance, the vendor

asserting that he had a good title:—Held, that the purchaser had not waived his right to have a good title shewn. In the absence of fraud on the part of the vendor, or other special circumstances, if a purchaser takes possession under the contract, and the vendor is unable to make a good title, the purchaser is not entitled to be repaid the amount expended by him in improvements. *Rankin* v. *Sterling*, 22 Occ. N. 230, 3 O. L. R. 646, 1 O. W. R. 243.

Previous Sale of Land — *Partition — Title of Vendor Confirmed—Costs of Vendee—Evidence—Ancient Documents.*] — Where a suit for partition of lands sold previously to the commencement of the suit established the exclusive title of the vendor, and the suit was not caused by any fault of his, the vendee made a party to the suit was held not to be entitled to deduct his costs from the purchase money. Where a document, of date 1831, purporting to have been executed by father and son, was produced from the custody of a grandson of the former, and as having been kept with title papers in a box formerly in the custody of the grandson's brother, and now in the grandson's custody, and where a document, of date 1840, purporting to be a will, was produced from the custody of a nephew of a person purporting to have signed it as a witness, and as having been kept by him with other papers in a chest now in the nephew's custody, both documents were held admissible in evidence without proof of execution. *Patterson* v. *Patterson*, 25 Occ. N. 91, 3 N. B. Eq. 106.

Registered Hypothecs—*Cloud on Title — Validity of Registration.*] — The registration, alone, of hypothecs affecting an immovable property sold gives the purchaser the right to invoke the benefit of art. 1535, C. C., and he is not obliged to contest with the creditors the contention made by the vendor that such registrations are without effect. *Malbœuf* v. *Leduc*, Q. R. 19 S. C. 67.

Rents of Land — *Apportionment—Contract—Conveyances.*] — The plaintiff, on the 29th May, 1902, contracted in writing with the defendant for the sale to the defendant of certain land, a portion of which was at the time under lease to a tenant whose term commenced on the 1st May, 1902, and was then unexpired. The plaintiff claimed an apportionment of the rent between the 1st May and the 24th June, when the deed was delivered:—Held, that the Act respecting the apportionment of rent, R. S. N. S. c. 150, s. 2, did not apply as between vendor and purchaser, and the written contract containing no reservation of rent, the purchaser was entitled to the whole rent. *Miller* v. *Nicholls*, 23 Occ. N. 176.

Requisitions on Title—*Dower—Taxes —Executions.*] — The purchaser made these requisitions: (a) That evidence should be given shewing that dower rights do not attach in the cases of conveyances made without bar of dower (in 1852 and 1853) before commencement of the period of possession relied on. (c) That the vendor should furnish evidence that the lands to be conveyed by her are not incumbered by any executions or arrears of taxes or local improvement rates:—Held, that the vendor was bound to comply with the requisitions. *In re Clayton and Vandecar*, 21 Occ. N. 337.

Rescission—Action by purchaser—Misrepresentations — Knowledge of purchaser — Evidence as to falsity of statements—Statements made in good faith. *Robb* v. *Samis*, 3 O. W. R. 907.

Rescission—Fraud—Agency—Coercion — Improvidence—Specific performance. *Jarvis* v. *Gardner*, 2 O. W. R. 640, 3 O. W. R. 458.

Rescission—Fraud — Representations — Value — Agent's commission — Laches—Acquiescence. *Krolik* v. *Essex Land, Loan, and Improvement Co.*, 2 O. W. R. 87.

Rescission—Misrepresentations — Knowledge—Deceit—Damages. *Robb* v. *Samis*, 2 O. W. R. 706.

Rescission of Contract—*Misrepresentations—Consideration—Possession—Laches — Waiver—Ratification.*] — The defendant, by falsely representing that he had a serious offer for the purchase of his property for a brewery, induced the defendant to take a deed of it, the defendant fearing that a brewery might be an injury to a hotel which he was projecting near by. Payment of the purchase money was deferred. On discovering the falsity of the representations, the defendant notified the plaintiff that he repudiated the contract, and invited him to bring an action to test its validity if he was unwilling to take back the property. The plaintiff delayed some time in bringing this action for the recovery of the purchase money, and in the meantime the defendant remained in possession and collected the rents:—Held, that, under the provisions of the Quebec Civil Code, as the vendor had made false representations which deceived the purchaser as to the principal consideration for which he contracted, he could not recover; that the purchaser had a right to have the contract rescinded on the ground of error; that, under the circumstances, the delay could not be imputed as laches of the defendant, nor waiver of his right to have the contract set aside, and that the defendant's administration of the property in the meantime could not be construed as ratification of the contract. *Barnard* v. *Riendeau*, 31 S. C. R. 234.

Rescission of Sale—*Default of Payment —Registration.*]—The vendor cannot demand that the sale of an immovable effected by him shall be declared void, and that he shall be placed in possession of the immovable, without alleging and proving that the stipulation for the rescission of the sale in default of payment has been registered. *Beaudoin* v. *Gaudry*, 4 Q. P. R. 161.

Rescission of Sale — *Delay in Making Title—Pleading—Oral Demand.*]—The delay of a vendor to make title to his purchaser of the immovable, which he has sold him, is not a ground for rescinding the sale. 2. When the purchaser has not demanded the rescission of the sale by his pleading, he cannot obtain it upon a demand made ore tenus, and this is so even when the grounds which he invokes for obtaining it, appear upon the record. *Brunet* v. *Berthiaume*, Q. R. 21 S. C. 314.

Rescission of Sale—*Part Performance of Contract — Non-fulfilment of Conditions — Abandonment.*]—The defendant had sold his restaurant to the plaintiffs, who had paid a

part of the price in cash, another part being agreed to be paid on the day of the transfer of the liquor license, and the balance by monthly payments thereafter. The defendant put the plaintiffs in possession of the restaurant, but afterwards retook possession. The plaintiffs took no steps to obtain the transfer of the license, and the defendant did not offer them a transfer. Subsequently the plaintiffs sued for the cancellation of the sale and to be reimbursed what they had paid to the defendant, alleging that he had dispossessed them:—Held, that the parties not having executed or really intended to execute the bargain made between them, there was ground for adjudging the cancellation of the sale. *Coté* v. *Nevcu*, Q. R. 22 S. C. 268.

Right of Remere—*Jus ad Rem—Assignment of Right.*]—A vendor à réméré deprives himself of all his rights of property; he reserves only a simple jus ad rem in the property sold, and cannot, consequently, sell it anew to a second purchaser: art. 1487, C. C. 2. In this case, L., the vendor à réméré, was held not to have sold the property a second time to C., but to have merely assigned to him his right of re-purchase, which is assignable. Judgment in Q. R. 24 S. C. 438 reversed. *Sirois* v. *Carrier*, Q. R. 13 K. B. 242.

Right of Remere—*Exercise of.*] — One who has reserved the right of réméré upon an immovable must seek out the purchaser in order to fulfil the conditions upon which he has reserved such right, and it is not for the purchaser to seek him out. *Chartrand* v. *Desrouard*, 6 Q. P. R. 131.

Sale of Land—Action to rescind—Undue influence — Mental incompetency — Vendor's understanding of transaction—Inadequacy of consideration—Conflicting evidence. *Bernst* v. *Kuhn* (Man.), 2 W. L. R. 448.

Sale of Land at Auction en Bloc—*False Bidding—Part Payment.*] — Where an immovable composed of several lots is sold at auction en bloc, in pursuance of notice of sale, a sum paid on account of the purchase price should be deducted from the total price, and one of the purchasers cannot escape the consequences of false bidding by saying that he has paid his part. *Marceau* v. *Morin*, 5 Q. P. R. 349.

Sale of Land to Religious Society — Religious Institutions Act—Meetings of congregation — Election of trustees — Notice — Time—Advertisement — Public auction. *Re Levinsky and Hallett*, 5 O. W. R. 1.

Sale of Land without Title—*Remedy of Purchaser—Executor—Power to Convey.*] —A purchaser of land troubled in his possession has no right of action en garantie against his vendor who has sold him the land of another, but has a right of action for indemnity. 2. In the absence of express provisions in a will, an executor cannot, without the consent of his co-executors, as such executor, transfer the title to property. *Gosselin* v. *Martel*, 5 Q. P. R. 265.

Sale of Mining Rights—*Fraud—Exaggerated Representations—Rescission—Parties.*]—Representations exaggerating the value of rights sold do not constitute acts of fraud which give to the purchaser the right to insist that the sale is void, but they amount to a simple wrong, which is not a ground for nullifying a contract between adults. 2. An action to set aside a sale of mining rights and rights of redemption, of which the plaintiff alleges that he possesses only a part, will be dismissed upon demurrer, if the owners of the other parts of such rights are not before the Court. *Jeannotte* v. *Caron*, 5 Q. P. R. 183.

Sale under the Direction of Court—*Error in Fixing Reserve Bid — Opening Biddings.*]—A purchaser at a sale under the direction of the Court, having no knowledge of an irregularity in fixing the reserve bid, cannot be affected by such irregularity; and a motion made to set aside a sale and open the biddings, on the ground that in fixing the reserved bid the value of one part of the property was not taken into consideration, was dismissed with costs. The referee not having in his report approved of the sale, but having made a special report regarding it, the purchaser, although ready, was unable to pay the balance of his purchase money into Court:—Held, that he should be allowed to pay it in without interest, and without prejudice to his right to object to the title. *In re Jelly, Provincial Trusts Co.* v. *Gamon*, 22 Occ. N. 64, 3 O. L. R. 72.

Sale under Power in Will — *Debts Charged on Lands — Devise after Payment—Executors' Power to Sell—Gifts to Widow in Lieu of Dower — Evidence of Election—Release.*] — A testator by his will directed his executors to pay his debts, and, subject to the payment of debts, devised a particular portion of the estate, and directed that the balance of that portion of his estate, after payment of the debts, should be divided among his four children in equal shares. Then followed a paragraph declaring that the property willed should go to the parties direct:—Held, that a power of sale was given to the executors under the provisions of s. 19 of R. S. O. 1897 c. 129, and that purchasers were, by s. 19, released from the necessity from inquiring as to the due execution of the power. The will also contained gifts to the widow, including an annuity to be accepted in lieu of dower, which was regularly paid to her, and which she apparently had elected to accept in lieu of dower — Held, that the purchaser was entitled either to a release from her or to a declaration from her in form sufficient to estop her as against him from claiming dower. *In re Bradburn and Turner*, 22 Occ. N. 142, 3 O. L. R. 351, 1 O. W. R. 152.

Separate Agreement as to Profits — *Condition — Defect in Title — Right of Vendor to Recover on Condition — Right of Purchaser to Set up Defence of Defect of Title — Judicial Admission — Specific Performance.*] — The appellant, by notarial deed, sold to the respondents certain immovable property, the price of which was acknowledged in the deed to have been fully paid. By another notarial agreement, executed at the same time, the appellant deposited with the respondents a sum of money equal to one-third of the price, the condition being that the respondents should pay him one-third of the profits made by them by selling the property in lots, but he reserved the right to demand the return of this deposit

if he were dissatisfied with their management of the enterprise:—Held, that the two contracts must be deemed to be, and were, distinct and independent transactions — the one being an absolute sale of the property to the respondents, and the other a joint venture with them, for the disposal of the property in lots. And the appellant, having exercised his option to take back his deposit, was entitled to recover the same, and the respondents could not, by dilatory exception, set up a defect in the title of the property transferred by a deed of sale, or ask, under art. 1535, C.C., that the disturbance be removed before repayment of the deposit, the respondents' recourse against a defect in title being by a separate action against the appellant as warrantor. 2. Where ambiguity exists in one or more of the answers of a party examined as a witness, an isolated expression cannot be detached from the context, to serve as a judicial admission for the purpose of making proof against an authentic act. 3. In case of uncertainty, the law which the parties have made for themselves in the text of contracts formally executed by them, should be literally enforced by the Courts. *Anderson* v. *Provost*, Q. R. 13 K. B. 458.

Specific Performance — Action by vendor to enforce — Right of vendor to relief—Conditional agreement of sale by vendor to third parties — Effect of — Wrongful registration — Costs. *McConnell* v. *Lye*, 6 O. W. R. 314.

Specific Performance — Execution by foreigner — Understanding — Onus —Terms of sale — Plaintiffs not prepared to carry out. *Weidman* v. *Pelakise* (Man.), 2 W. L. R. 308.

Specific Performance — Objection of purchaser — Jurisdiction of Court over foreign defendant — Title — Will — Conveyance by executors — Period of distribution — Further evidence on appeal. *Cooke* v. *McMillan*, 5 O. W. R. 507.

Specific Performance — Offer — Acceptance — Conditions — Incomplete contract. *Tiel* v. *Taylor* (N.W.T.), 2 W. L. R. 458.

Specific Performance — *Option — Rescission — Time — Laches.*]—The plaintiff agreed to purchase land from the defendants, and to pay the balance of the purchase price on the 1st July, 1904, the agreement providing that time should be of the essence of the contract, and that in case of the plaintiff's failure to pay the balance at the time agreed, the defendants should be at liberty to treat the contract as cancelled; a deed of the property was executed in Toronto and sent to the defendants' agent in Vancouver to deliver to the plaintiff when he paid up; the plaintiff did not pay the balance on the 1st July, and on the 18th July the defendants notified him that they treated the agreement as cancelled and that they had re-sold the land: — Held, that the defendants had exercised their option of rescinding within a reasonable time, and that the plaintiff was not entitled to any relief. *Peirson* v. *Canada Permanent and Western Canada Mortgage Corporation*, 11 B. C. R. 139, 1 W. L. R. 99.

Specific Performance — Partnership land — Authority of one partner to sell — Statute of Frauds — Description of land — Mutual mistake — Dominion Lands Act—Interest in homestead — Want of mutuality. *Grierson* v. *Johnston* (N.W.T.), 1 W. L. R. 83.

Specific Performance — Statute of Frauds — Letters — Unsigned agreement—Authority of agent — Misrepresentations of Vendor — Tender of conveyance — Waiver — Amendment. *McIlveride* v. *Mills* (Man.), 1 W. L. R. 229.

Specific Performance— *Oral Contract for Sale of Land — Statute of Frauds — Memorandum in Writing Incomplete as to Terms — Admission of Terms by Plaintiff —Parol Evidence — Purchaser for Value— Enforcement of Contract Against — Notice to Solicitor — Registry Laws — Misconduct — Costs.*]—The action was brought to compel specific performance of an agreement for the sale by the defendant S. to the plaintiff of a house and premises. The plaintiff paid $10 on account of his purchase and obtained the following receipt signed by S.: "Hamilton, Oct. 10, 1904. Received from Mr. Edwin Green the sum of ten dollars on house and lot number 328 East avenue sold by Mr. James Stevenson for $350 by paying (fifty dollars) to Mr. Stevenson, allowing one-half for lawyers' fees, also paying water rates. Balance $40 on house." S. afterwards sold and conveyed the property to the defendant B. for $425. The plaintiff admitted that the agreement orally made was for a sale at $400, payable $50 in cash and $350 by the assumption of an existing mortgage, and for payment by the plaintiff of the taxes for 1904 and interest upon the mortgage since the 14th May. The receipt was the only memorandum of the bargain. The solicitor for B. had full knowledge of the previous sale to the plaintiff, and it was held that this was notice to B., who was thus deprived of the protection of the Registry Act. The second point ruled was that the receipt plainly shewed a contract for a sale at $400, of which $350 was to be paid by the assumption of the existing mortgage and $50 in cash; and the third that the receipt sufficiently shewed that Edwin Green was the purchaser. The defendants escaped, however, upon the fourth question raised, which, like the second and third, depended upon the Statute of Frauds—the omission from the receipt of all reference to the special terms as to interest and taxes. The defendants averred that these terms were part of the bargain, and the plaintiff admitted that it was so, and expressed his willingness to perform that part of the contract as a condition of obtaining specific performance. The Court (distinguishing Martin v. Pycroft, 2 De G. M. & G. 785), reluctantly gave effect to this defence. "The receipt," said Anglin, J., "not purporting to contain the whole terms of the bargain, offers no legal impediment to the introduction of parol evidence to prove terms which it omits. The contract was, for aught that appears to the contrary, designedly left in part parol. Its special equitable jurisdiction not being invoked by the defendant or requisite to his defence, the Court is not in a position to impose terms upon him. He defeats the plaintiff's claim without any indulgence which

it is peculiarly the province of a court of equity to afford. By evidence admissible in any court he shews a parol contract of which only some of the terms are evidenced as required by the Statute of Frauds. His defence is thus complete. By no known process can those terms be put in a writing signed by the defendant. Nothing less can constitute an enforceable agreement so long as the Statute of Frauds prevails. There is no fraud, no mistake, even if it would suffice, to enable the Court to avoid the effect of the statute; nor part performance to satisfy it in the absence of a sufficient memorandum. *Green* v. *Stevenson*, 25 C. L. T. 354, 5 O. W. R. 761, 9 O. L. R. 671.

Specific Performance — *Statute of Frauds — Names of Parties — Laches — Default — Discretion.*] — 1. A note or memorandum in writing containing an agreement for the sale of land must, to satisfy the Statute of Frauds, name both the contracting parties or describe them so that they can be ascertained without extrinsic parol evidence, and it is not sufficient that the agent of the intending purchaser is named. 2. An intending purchaser of land who has been guilty of laches, bad faith, and default for a considerable time in payment of the cash stipulated for, disentitles himself to the exercise of the judicial discretion to grant specific performance in his favour. *Maber* v. *Penskalski*, 24 Occ. N. 407, 15 Man. L. R. 236.

Tenant — Attornment of — Interest — Possession — Costs. *Re Dickson and St. Andrew's College*, 2 O. W. R. 846.

Title to Land — *Conditional Devise Over to Children of Named Woman—Possibility of Issue Extinct — Presumption — Evidence.*]—Land was devised to the vendor for life with remainder to her son in fee, subject to a devise over to the children of M., a married woman, in the event of the vendor's son dying without issue. The son was living and had had issue, and he and the existing children of M. (all being of age) had conveyed their interests to the vendor. M. was now a widow and 54 years of age:—Held, on an application under the Vendors and Purchasers Act, that the Court should, without evidence as to the physical condition of M., act on the presumption that there would be no further issue of her body, and declare that the vendor could make a good title in fee simple—such a title as could be forced upon an unwilling purchaser. *In re Tinning and Weber*, 25 Occ. N. 38, 8 O. L. R. 703, 4 O. W. R. 514.

Title to Land — *Removal of Incumbrances — Certificate of Registrar.*]—One who has brought an immovable, free and clear of incumbrances, is entitled to compel his vendor to make title to him in respect of such immovable and to remove the charges upon such immovable. 2. The documents of title to an immovable include a certificate of the registrar stating that the property is free from every charge and hypothec. *Ville-Marie Bank* v. *Kent*, 4 Q. P. R. 206.

Title to Land — *Specific Performance — Purchaser at Judicial Sale — Administration Proceedings — Mortgage — Advertisement of Sale — Form of — Sheriff's Deed.*] —A lot of land was devised to M. for the term of her natural life, and, after her death, to any child or children that she might have by the devisor. At the time of the devisor's death the property was subject to a mortgage, and there was one child by the marriage, who subsequently married. M. instituted an administration suit for the settlement of the estate, as the result of which, a sale was ordered; and she became the purchaser at the sale, and the Master's deed was made out to her. Subsequent to the purchase, M. executed a paper by which she agreed to convey the property in question to her daughter K. for her life, subject to the life interest of M.; then to go to the children of K. in fee simple:—Held, following Kearney v. Kean, 3 S. C. R. 339, that the purchase by M. at the administration sale must be presumed to have been an act done in the due course of administration; that it was in substance a mere discharge of an incumbrance; and, notwithstanding the fact that the Master's deed was absolute in its form, M. took the property in question subject to the life interest in herself, in trust for her daughter K., who had a clear title to the remainder in fee, paramount to any title derived under the agreement. 2. That, as against the title of K., the instrument executed by M. purporting to give K. a life estate only had no effect. 3. That K. had a good title to the land, and that, as against the defendant, who purchased at a sheriff's sale under the decree in an action on a mortgage made by K. and her husband, and who refused to complete the purchase, the plaintiff, the holder of the mortgage, was entitled to a decree for specific performance. 4. The advertisement of sale was in the following form: "All the estate, right, title, interest, and equity of redemption of K., and of all persons claiming or entitled from or under the said K., of, in, to, or out of all that lot, piece, or parcel of land," &c.; and the form of the order was that "the said land and premises be sold," &c.:—Held, that this form was sufficient to cover all the estate, right, title, interest, and equity of redemption of the defendant at the time of giving the mortgage. 5. That the deed was given by virtue of the statute (Acts 1890 c. 14, ss. 5 and 6), and by virtue of the provisions of the statute the land ordered to be sold by virtue of the sheriff's deed was vested in the grantee. 6. Semble, that the form of words in use in Nova Scotia was adopted in consequence of the practice of not settling conditions of sale, and offering a specific title: Diocesan Synod of Nova Scotia v. O'Brien, Ritch, Eq. Dec. 352; and that the form is suitable for a good title, or a limited one, and a more specific reference to the title is not made. *Power* v. *Foster*, 34 N. S. Reps. 479.

Warranty of Vendor —*Charge on Land — Municipal By-law — Drainage — Assessment Roll.*]—A by-law was passed by the municipal council of a town, providing for the construction of a drain, which drain was to pass in front of an immovable property subsequently sold by the defendants to the plaintiffs. The by-law also provided that the immovables on either side were charged for the construction of this drain at the rate of $1.75 per running foot. The drain was constructed before the sale to the plaintiffs, and subsequent to the sale an assessment roll was prepared in accordance with the by-law:—Held, that, as the by-law created the charge and determined the amount, independently of the assessment roll, which merely

registered the determination already arrived at by the town council, the charge was covered by the legal warranty of the vendor. *Masson* v. *Les Ecclésiastiques du Seminaire de St. Sulpice de Montréal*, Q. R. 17 S. C. 573.

Warranty of Vendor — *Construction of Deed — Sheriff's Deed — Sale of Rights in Land — Eviction by Claimant Under Prior Title.*]—By the deed of conveyance the vendor declared that he had sold with warranty all rights of property and other rights which he had acquired by virtue of a deed of sale from the sheriff of the lands therein mentioned, and of which he was actually in possession, and that "the immovable belonged to him as having been acquired from the sheriff:"—Held, reversing the judgment appealed from, Strong, C.J., and Taschereau, J., dissenting, that the warranty covenanted by the vendor had reference merely to the rights he might have acquired in the lands under the sheriff's deed, and did not oblige him to protect the purchaser against eviction by a person claiming prior title to a portion of the lands. Ducondu v. Dupuy, 9 App. Cas. 150, followed. *Drouin* v. *Morissette*, 22 Occ. N. 79, 31 S. C. R. 563.

Warranty of Vendor — *Description —Plan of Subdivision —Change in Street Line — Accession — Troubles de Droit — Eviction — Issues on Appeal.*]—A vendor of land described according to an existing plan of subdivision, with customary legal warranty, is not obliged to defend the purchaser against troubles resulting from the exercise subsequently by municipal authorities of powers in respect to the alteration of the street line. A party called into a petitory action to take up the fait et cause of the defendant therein, as warrantor of the title, may take up the defence for the purpose of appealing from the trial Court judgments maintaining both the principal action and the action in warranty, although he may have refused to do so in the Court of first instance, but, should the appellate Court decide that the action in warranty was unfounded, it is ipso facto ousted of jurisdiction to entertain or decide upon the merits of the principal action. *Monarque* v. *La Banque Jacques-Cartier*, 22 Occ. N. 7, 31 S. C. R. 474.

Warranty of Vendor — *Eviction — Charges.*]—A purchaser of immovables cannot sue his vendor, nor the grantor of his vendor, to obtain from him a clear title, before eviction from his property, or before having been sued for charges or claims upon it which were not made known to him at the time of the purchase. *Trudeau* v. *Molleur*, 5 Q. P. R. 221.

Warranty of Vendor—*Eviction — Special Agreement—Damages.*]—A sale of land, including a dam, was accompanied by a warranty of the vendor of his title. The vendee, having been evicted from the portion of the premises used for the dam, brought an action to recover back the price he paid, and for damages. The vendor tendered the price and costs of resisting the action for eviction, but denied liability for damages, on the ground that there was no special agreement as to the cause of eviction under art. 1512 C. C.: — Held, that the warranty of title did not constitute a special agreement which would entitle the vendee to damages under art. 1512, C. C. *Allan* v. *Price*, 20 Occ. N. 432, 30 S. C. R. 536.

Warranty of Vendor—*Failure of Title —Specific Performance — Rescission—Payment by Vendor to Real Owner — Remedy against Arrière-garant.*]—The purchaser of an immovable with a legal garantie, whose vendor was not the owner at the time of the sale, may, without waiting until the true owner claims possession of the immovable, sue his vendor for rescission of the sale or to compel him to make a good title. 2. When, in such a case, the vendor can obtain a good title by paying a fixed sum to the true owner, the purchaser may have judgment against the vendor for payment of this sum to the true owner, and upon default by the vendor in the payment of it within the time fixed, the purchaser may make the payment and charge the vendor with it. 3. The purchaser may exercise this remedy against the vendor's predecessor in title who has given a garantie. *Trudeau* v. *Molleur*, Q. R. 24 S. C. 27, 5 Q. P. R. 418.

Warranty of Vendor — *Incumbrance—Discharge — Title Deeds — Certificate of Registrar.*]—The purchaser of an immovable, sold to him with garantie, may demand that the vendor be ordered to pay off a creditor who at the time of the sale had a hypothec upon the immovable. 2. On such a sale, the vendor is bound to hand over to the purchaser the title deeds of the immovable sold, and among them the certificate of the registrar stating that the immovable is free from all charges and hypothecs. *In re Banque Ville-Marie*, Q. R. 22 S. C. 162.

Warranty of Vendor — *Incumbrance—Special Municipal Tax—Apparent Charge.*]—When an immovable is sold after the passing of a municipal by-law providing for the execution of certain works in the municipality where the immovable is situated, and for payment for such work by means of a tax upon the immovables in such municipality, but before the completion of an assessment roll for the purpose of levying such tax, the vendor is not liable as a warrantor to pay such tax. 2. It is only by the putting into force of such roll that the tax becomes a charge upon the immovables of the municipality. 3. One who buys an immovable in a municipality is supposed to have knowledge of all the municipal by-laws which can affect it, and a charge made by a by-law is therefore an apparent charge, as to which the vendor is not a warrantor. 4. The vendor who has sold with a guaranty of title, but without any stipulation "de franc et quitte," is not obliged to extinguish a charge which exists upon the immovable sold, as long as the debt which constitutes such charge is not exigible. Judgment in Q. R. 17 S. C. 573, reversed. *St. Sulpice Seminaire* v. *Masson*, Q. R. 10 K. B. 570.

Warranty of Vendor — *Incumbrance—Special Municipal Charge — Apparent Charge.*]—The warranty of the vendor of an immovable property does not extend to a charge imposed by the municipality in which the property is situate, for a term of years, as a special tax for the cost of a drain, except as to the arrears of such tax due by the vendor at the date of the sale. Thibault

v. Robinson, Q. R. 3 Q. B. 280, and Les Ecclésiastiques du Séminaire de St. Sulpice v. Masson, Q. R. 10 K. B. 570, followed. *Sharpe* v. *Dick*, Q. R. 22 S. C. 527.

Warranty of Vendor — *Land Abutting on Street—Reduction in Width.*]—A vendor who has sold land fronting on a street is not obliged to indemnify the purchaser because, subsequent to the sale, the municipal authority has reduced the width of the street so that the land sold is no longer upon the street line. Judgment in Q. R. 19 S. C. 93, reversed. *Banque Jacques-Cartier* v. *Gauthier*, Q. R. 10 K. B. 245.

Written Contract for Sale of Land —Enforcement by vendor — Parol variation of contract—Specific performance—Description of land—Statute of Frauds. *McNab* v. *Forrest*, 2 O. W. R. 821.

Written Contract Signed by One of Two Tenants in Common—Specific performance—Statute of Frauds — Conveyance by the other tenant delivered in escrow—Time for completion of purchase. *Goodman* v. *Wedlock*, 6 O. W. R. 777.

VENTE A REMERE.

See BANKRUPTCY AND INSOLVENCY.

VENUE.

Action to Rescind Contract — Construction of proviso in contract as to place of trial — Jury notice—Action not brought under contract. *Greer* v. *Sawyer-Massey Co.*, 6 O. W. R. 560, 594.

Affidavit—Information and belief — Convenience — Expense. *McKay* v. *London Street R. W. Co.*, 6 O. W. R. 511.

Cause of Action—*Con. Rule 529 (b)*—*Declaratory Action.*]—"Cause of action" in Con. Rule 529 (b) means the whole cause of action, and where part of the cause of action arises in the county in which the parties reside, and another part, or the whole, in another county, the rule does not apply, and the question of venue must be determined under the general rules as to convenience:—Quære, whether an action for a declaration of right falls within the Rule? *Connor* v. *Dempster*, 23 Occ. N. 307, 6 O. L. R. 354, 2 O. W. R. 833.

Change — *Affidavit of Merits—Preponderance of Convenience—Speedy Trial—Costs.*]—Upon a motion by the defendant in a County Court action to change the venue from Digby to Halifax:—Held, that where an affidavit of merits is required, it should, if made by the party himself, state that he has a good defence on the merits, as he is advised (by his solicitor or counsel) and verily believes: but if made by the solicitor, it should state that the party has a good defence on the merits, as the deponent is instructed (by his client, or the client's agent) and verily believes. 2. That the preponderance of convenience was, upon the affidavits, entirely in favour of a trial in Halifax rather than in Digby. Levy v. Rice, L. R. 5 C. P. 119, and Church v. Barnett, L. R. 6 C. P. 116, followed. 3. That the fact that the trial would take place on an earlier day at Digby, which would suit the plaintiff's convenience, as he intended to go away, was not a justification for laying the venue at Digby. 4. That the order changing the venue should be with costs, as it had been opposed on unreasonable grounds. *O'Hearn* v. *Keith*, 21 Occ. N. 572.

Change—*Agreement before Action.*] — A conditional sale agreement provided that "in case of any litigation arising in connection with this transaction, it is agreed that the trial will be held only in" the place where the vendors carried on business):—Held, that this condition was binding, and in an action by the purchaser to recover damages because of the unsatisfactory condition of the article sold, an order was made changing the place of trial to the place agreed upon, although the balance of convenience was in favour of the place named by the plaintiff in his writ. *Dulmage* v. *White*, 22 Occ. N. 260, 4 O. L. R. 121.

Change—Cause of action—Residence of parties—Expense—Undertaking. *Bertram* v. *Pursley*, 2 O. W. R. 264.

Change — *Contradictory Affidavits—Defence on Merits.*]—An application under Order XXXIV. R. 2, on the part of the defendant company, to change the venue from Halifax to Pictou. The defendants filed an affidavit which stated that they had a good defence to the action on the merits. The plaintiff opposed the motion and read affidavits tending to shew that the defendant had not a good defence on the merits:—Held, that the plaintiff's affidavits could be read on such a motion; and the Judge, not being satisfied that the defendant had a good defence to the action on the merits, refused to change the venue. *Cooper* v. *Copper Crown Co.*, 21 Occ. N. 313.

Change — *Convenience — Fair Trial.*]—The writ of summons was issued in Rossland, where all parties resided. The venue was laid in Victoria, and the defendants applied, on the ground of greater convenience, for a change of venue to Rossland. This application was refused because a fair trial by jury could not be had there, on account of the feeling among the mining classes. The defendants then applied for a change to Nelson, where they contended a fair trial could be had, but the plaintiffs filed affidavits to shew that the feeling was the same as in Rossland:—Held, that, although the expense of a trial at Nelson would be less than at Victoria, still the venue should not be changed, unless it was clear that an absolutely fair trial could be had. *Centre Star Mining Co.* v. *Rossland Miners' Union*, 24 Occ. N. 198, 10 B. C. R. 306.

Change — Convenience — Cause of action — Witnesses — Expense — Undertaking — Security — Delay in moving. *Dwyer* v. *Garstin*, 2 O. W. R. 879, 1105.

Change — Convenience — Witnesses — Expense—Action against assignee for benefit of creditors. *Halliday* v. *Armstrong*, 3 O. W. R. 285, 410.

Change — *County Court Action — Contract—Clause Governing Venue — Construction — Enforcement.*]—In an action brought in the County Court of the county where the plaintiffs' head office was situated, on an agreement which contained a provision "that on default in payment suit therefor may be entered, tried, and finally disposed of in the Court where the head office of the Noxon Company (Limited) is located," a motion to change the venue to another county was refused, on the ground that the word "Court" is to be understood as meaning "the Court having jurisdiction" mentioned in s. 1 a of 3 Edw. VII. c. 13 (O.), and should be construed in reference to the contract in which it occurs; and that the parties had agreed that in case of litigation, the suit should be carried on in the Court, whether High Court, County Court, or Division Court, having jurisdiction in the locality where the head office was:—Quære, whether stronger grounds must be shewn on motion to change the venue in a County Court than a High Court action. *Noxon Co. v. Coz*, 24 Occ. N. 58, 6 O. L. R. 637, 2 O. W. R. 1046, 1057.

Change — County Court Action—Venue improperly laid by plaintiff—Costs of motion to change—Affidavit — Solicitor. *Leach v. Bruce*, 4 O. W. R. 441.

Change — County Court action — Convenience — Number of witnesses — Prejudice—Fair trial — Expense — Undertaking. *Hisey v. Hallman*, 2 O. W. R. 403.

Change — County Court action — Preponderance of convenience — Expense—Fair trial — Jury — Affidavit — Solicitor—Scandal—Costs. *Baker v. Weldon*, 2 O. W. R. 432.

Change — County Court action — Preponderance of convenience — Special circumstances—Apportionment of costs. *Pretty v. Lambton Loan Co.*, 2 O. W. R. 417.

Change — County Court action — Residence of parties—Cause of action. *Corneil v. Irwin*, 2 O. W. R. 466.

Change — County Court action — Witnesses — Expense. *Thorp v. Walkerton Binder Twine Co.*, 2 O. W. R. 845, 889.

Change — *Defence on Merits.*]—For a defendant to obtain a change of venue to the county in which he resides, or in which the cause of action arose, under the Judicature Act, 1900, Order xxxiv., as amended in 1901, he has only to satisfy the Judge that he has a good defence, on the merits—not an absolute defence, but a probable one. *Cowan v. Logan*, 21 Occ. N. 356.

Change — Grounds — Counterclaim respecting land—Local venue—Preponderance of convenience — Witnesses — Expense — Poverty of defendant. *McIntyre v. Cosens*, 2 O. W. R. 1149.

Change — *Preponderance of Convenience —Undertaking as to Expense.*]—The plaintiff, who was a workman, was injured by an accident which took place near Welland, and he then went to Belleville, his place of residence, and received there medical treatment. The venue in the action brought by him to recover damages was laid at Belleville. All the eye-witnesses of the accident lived at or near Welland, and it appeared that there would be a difference in travelling expenses and witness fees of about $50 in favour of a trial at that place:—Held, that this difference in expense, and the fact that the cause of action arose at Welland, were not sufficient to do away with the plaintiff's prima facie right to have the trial at Belleville, especially when the evidence of professional men living there would be necessary:—Held, also, that an undertaking by the defendant to pay the extra expense to the plaintiff of a trial at Welland was not a ground for changing the venue, for that would not be of any advantage until the trial was over, and would not lessen the financial difficulty to the plaintiff of bringing his witnesses to a distant point. *McDonald v. Dawson*, 24 Occ. N. 322, 8 O. L. R. 72, 3 O. W. R. 773.

Change — Preponderance of convenience —Witnesses — Expense — Fair trial — Affidavits — Examination for discovery. *Hanrahan v. Wellington Cold Storage Co., Bayly v. Wellington Cold Storage Co.*, 4 O. W. R. 203.

Change—Preponderance of convenience—Books of municipality — View of premises. *Drew v. Town of Fort William*, 2 O. W. R. 467.

Change — Slander — Preponderance of convenience—Costs of trial. *Butt v. Butt*, 2 O. W. R. 423.

Change — Speedy trial—Postponement of sittings—Second application by plaintiffs for change. *Whelihan v. Hunter*, 1 O. W. R. 788, 2 O. W. R. 20.

Change — *Statement of Claim—Amendment.*]—A plaintiff who wishes to name some place other than that named in the original statement of claim as the place of trial, must obtain leave to do so on a summons, which clearly shews that it is desired to change the venue, and not on a summons simply to amend statement of claim. *Wade v. Uren*, 9 B. C. R. 274.

Change — Substantial grounds — Preponderance of convenience—Cause of action —Residence of parties — Witnesses — Expense — Increased security for costs. *McDonald v. Park*, 2 O. W. R. 455, 492, 812, 972.

Change — Writ of summons—Estoppel —Consent — Cause of action—Preponderance of convenience — Witnesses — Books—Expense—Fair trial—Costs. *Town of Oakville v. Andrew*, 2 O. W. R. 608.

Convenience — Expense — Early trial. *Houston v. Houston*, 3 O. W. R. 798.

Convenience — Witnesses — Cause of action. *Gardiner v. Beattie*, 6 O. W. R. 975.

County Court Action — Convenience—Expense. *Humphrey v. Jory*, 6 O. W. R. 440.

County Court Action — *Venue Improperly Laid by Plaintiff—Costs of Motion to Change—Affidavit—Solicitor.*] — Motion by

defendant to change venue and transfer action to the County Court of Northumberland and Durham from the County Court of Victoria. Case under Rule 529 (b), which in Corniel v. Irwin, 2 O. W. R. 466, it was held to apply to the County Court:—Held, there was nothing to satisfy what was said in Pollard v. Wright, 16 P. R. 507, to be necessary to have a change of venue. Not only was there no proof of "a very strong case," but, strictly speaking, there was no proof that could be considered. The only affidavit was one of plaintiff's solicitor. According to Hood v. Cronkrite, 4 P. R. 279 (per Draper C.J.), affidavits on these motions should be made by the party and not by his solicitor, who can only repeat what his client has told him. Attention drawn to this in Baker v. Weldon, 2 O. W. R. at p. 434. The solicitor's affidavit was vague and indefinite. If plaintiff could not speak more positively and precisely he could not expect to obtain an order to have the trial at Lindsay. *Leach* v. *Bruce*, 4 O. W. R. 441, 9 O. L. R. 380.

Laying in Wrong County—Rule 529 (b)—Opposition to change—Fair trial—Prejudice — Jury — Costs of motion. *Brown* v. *Hazell*, 2 O. W. R. 784.

Motion to Change—Malicious prosecution—R. S. C. c. 185, s. 1. *Canada Biscuit Co.* v. *Spittal*, 2 O. W. R. 387, 735.

Omission to Lay — Amendment—Charge—Convenience — Affidavits — Jury notice. *Meiers* v. *Stern*, 2 O. W. R. 392.

Patent for Invention —Action for infringement — Statutory venue—Corporation defendant. *Overend* v. *Eclipse Manufacturing Co.*, 6 O. W. R. 438.

Plaintiff Resident out of Jurisdiction — Change to place where defendants reside and cause of action arose. *Appleyard* v. *Mulligan*, 6 O. W. R. 929.

Preponderance of Convenience—Personal injuries—Place of injury—Expense—Witnesses — View — Discretion — Appeal. *Forster* v. *Hook*, 6 O. W. R. 591, 697, 928.

Provision of Contract as to Venue—Application of statute—County Courts—Division Courts. *Goodison Thresher Co.* v. *Wood*, 5 O. W. R. 717, 6 O. W. R. 19.

Recovery of Land — Violation of Rule 529 (c)—Motion to change—Onus — Fair trial. *Bank of Hamilton* v. *Anderson*, 2 O. W. R. 1127.

Residence of Defendant—Irregularity in statement of claim — Leave to amend. *Tierney* v. *Tierney*, 3 O. W. R. 350.

Residence of Parties—Change—Sheriff a party — Affidavits — Solicitors—Costs. *Harcus* v. *Macdonald*, 3 O. W. R. 411, 445.

Venue — *Change — Preponderance of Convenience—Cause of Action—Residence of Parties — Defendants out of the Jurisdiction.*]—Held, Rule 529, as to naming and changing the place of trial of an action, contains the general provision of clause (a) that the plaintiff shall name the place of trial, as qualified by clause (b), "where the cause of action arose and the parties reside in the same county, the place so to be named shall be the county town of that county." The Court held that the equity of the Rule governed a case in which the cause of action had arisen in a county in which all the parties to it who were within the jurisdiction resided, although there are other parties who reside outside of Ontario. *Saskatchewan Land and Homestead Co.* v. *Leadley*, 25 C. L. T. 227, 5 O. W. R. 449, 9 O. L. R. 556.

VERDICT.

See CRIMINAL LAW—NEW TRIAL—RAILWAY —TRIAL.

VESTING ORDER.

See ADMINISTRATION.

VESTRY BOARD.

See CHURCH.

VEXATIOUS ACTION.

See STAY OF PROCEEDINGS.

VICE REDHIBITOIRE.

See SALE OF GOODS.

VIS MAJOR.

See NEGLIGENCE—TIMBER.

VOLUNTARY ASSIGNMENT.

See BANKRUPTCY AND INSOLVENCY — COMPANY.

VOLUNTARY CONVEYANCE.

13 Eliz. c. 5 — *Solvent Vendor—Action by Mortgagee.*]—A voluntary conveyance of land is void under 13 Eliz. c. 5, as tending to hinder and delay creditors, though the vendor was solvent when it was made, if it results in denuding him of all his property, and so rendering him insolvent, thereafter. A mortgagee whose security is admittedly insufficient may bring an action to set aside such conveyance, and that without first realizing his security. Judgment in 7 B. C. R. 189, reversed; Gwynne, J., dissenting. *Sun Life Assurance Co.* v. *Elliott*, 21 Occ. N. 154, 31 S. C. R. 91.

See LIEN.

VOLUNTARY WINDING-UP.

See COMPANY.

VOTERS' LISTS.

See MUNICIPAL ELECTIONS — PARLIAMENTARY ELECTIONS.

VOTING.

See CONSTITUTIONAL LAW — LIQUOR ACT OF ONTARIO — MANDAMUS — MUNICIPAL ELECTIONS—PARLIAMENTARY ELECTIONS—PENALTIES AND PENAL ACTIONS.

WAGER.

See GAMING.

WAGER POLICY.

See INSURANCE.

WAGES.

See BANKRUPTCY AND INSOLVENCY—COURTS —MASTER AND SERVANT.

WAIVER.

See ARBITRATION AND AWARD — BANKRUPTCY AND INSOLVENCY — BILLS OF EXCHANGE AND PROMISSORY NOTES — CONTRACT — COSTS — COURTS — COVENANT IN RESTRAINT OF TRADE—CRIMINAL LAW — EVIDENCE — INSURANCE—INTEREST — JUDGMENT — MALICIOUS PROSECUTION — PLEADING — SALE OF GOODS.

WAREHOUSEMAN.

Cold Storage of Fish — Liability for spoiling—Duty of warehousemen—Examination — Negligence. *Doyle Fish Co. of Toronto* v. *London Cold Storage and Warehousing Co.*, 5 O. W. R. 40.

Negligence — *Damages — New Trial.*] —In an action against the owners of a grain elevator for negligence in the care of grain, one of the grounds of negligence found by the jury was, that the grain had been taken into the elevator from the vessel while rain was falling, and the hatches had not been protected:—Held, that the responsibility of the defendants did not commence till the grain was delivered to them; that therefore there was no duty cast upon them to protect the grain during unloading; and a new trial was properly ordered. Judgment in 26 A. R. 389, 19 Occ. N. 266, affirmed. *Dunn* v. *Prescott Elevator Co.*, 30 S. C. R. 626.

Storage of Goods — Advances—Failure to repay—Sale of goods—Purchase by warehousemen — Assent — Acquiescence — Price — Interest — Storage charges. *Palmer* v. *Christie* (Y.T.), 2 W. L. R. 561.

Storage of Goods — *Damage by Rats —Goods Lost or Stolen—Dampness.*]—Articles of household furniture were stored under lock and key in a separate compartment of a brick warehouse, but were afterwards removed by the warehousemen, without the owner's consent, first to another compartment in the same building, and then to a frame building, formerly used as a boathouse, and part of which was used as a stable:—Held, that the warehousemen, in the absence of reasonable precaution to prevent injury therefrom, were liable for injuries caused by rats in the last named building, the existence of which the warehousemen were aware of, and were also liable for certain of the goods which were lost, as the removal of the goods had been without the owner's consent and from a place of comparative safety, and that they were not protected by a condition in the warehouse receipt which relieved them from the responsibility for loss or damage caused by irresistible force, or inevitable accident, or from want of special care or precaution; but they were not liable for damages caused by alleged dampness, in that it might have been due to changing temperature, which it did not appear would not have had the same effect in the original place of storage. *Miall* v. *Olver*, 24 Occ. N. 356, 8 O. L. R. 66, 3 O. W. R. 749.

WAREHOUSE RECEIPTS.

See COMPANY.

WAR RISK.

See INSURANCE.

WARRANT OF ATTORNEY.

See JUDGMENT.

WARRANT OF COMMITMENT.

See CRIMINAL LAW — LIQUOR ACT OF ONTARIO.

WARRANTY.

See CONTRACT—DAMAGES—DOWER — PARTICULARS—PLEADING—SALE OF GOODS—VENDOR AND PURCHASER.

WARRANTY OF TITLE.

See VENDOR AND PURCHASER—WAY.

WASTE.

Charge of Annuity — *Life Tenant and Remainderman — Apportionment — Damages — Security — Timber.*] — A testator seised in fee of land, subject to a mortgage, to secure an annuity for his wife, devised the land to one for life, with remainder over in fee. After his death, the life tenant paid the annuity to the widow. She also sold the timber on the land, and the purchaser having begun to cut the timber, this action was begun by the remainderman to restrain waste. The life tenant contended that she was entitled to be subrogated to the rights of the mortgagee in respect to so much of the annuity as she had paid, and that being so subrogated, the land was an insufficient security for her claim, and that she therefore had a right to cut down the timber:—Held, following Yates v. Yates, 28 Beav. 637, that the periodical payments of the annuity must be treated partly as interest which the tenant for life had to pay, and partly as principal for which she would have a charge on the inheritance, in the proportion which the value of the life estate bore to the value of the reversion:—Held, also that, on the evidence, the land was adequate security for the claim of the life tenant against it in that regard, and that the purchaser of the timber having purchased in good faith, an injunction could not be granted, but the life tenant was liable for damages in respect of the timber cut. *Whitesell* v. *Reece*, 23 Occ. N. 107, 5 O. L. R. 352, 1 O. W. R. 516, 2 O. W. R. 160.

Cutting Timber — Injury to reversion —Injunction — Damages. *Ryan* v. *Ryan*, 1 O. W. R. 824.

Life Tenant — Tenant in common — Timber — Account — Statute of Limitations. *Asselstine* v. *Fraser*, 2 O. W. R. 628.

Life Tenant — Timber — Remainderman — Injunction — Payments on mortgage —Annuity — Subrogation. *Whitesell* v. *Reece*, 5 O. L. R. 352, 2 O. W. R. 160.

Tenant for Life—Sale of timber—Proceeds to be used in repairs — Injunction— Damages—Reference. *Hixon* v. *Reavley*, 4 O. W. R. 437.

Tenant for Life — *Repairs — Sale of Timber.*] — All the niceties of the ancient learning as to waste which obtain in England are not to be transferred without discrimination to a new and comparatively unsettled country like this province. It is laid down in the English authorities that tenant for life cannot cut down trees for repairs, and sell the same, but that he must use the timber itself in making repairs, and that to sell it is waste. Where, however, the house and buildings were in need of repairs, and proper timber and shingles were obtainable from a dealer, whereas the timber on the place was unsuitable for the repairs needed, and the tenant for life proposed to sell a sufficient amount of timber off the palce to pay for what was required, and for that purpose only, and an injunction was sought to restrain him:—Held, that no case of waste was made out to justify an injunction, nor could damages be awarded if the timber was cut with due regard to the situation of the bush and the cleared land, and no unreasonable amount was taken off to recoup the cost of the timber used, or to be used in the repairs, but that the parties if they wished might have a reference to ascertain to what amount and in what locality the timber should be cut. *Hixon* v. *Reavley*, 25 Occ. N. 14, 9 O. L. R. 6, 4 O. W. R. 437.

See LANDLORD AND TENANT—PARTITION.

WATER AND WATERCOURSES.

I. DAMS, 1656.

II. DITCHES AND WATERCOURSES ACT, 1659.

III. DIVERSION OF WATER, 1661.

IV. INJURY TO NEIGHBOUR'S LANDS, 1662.

V. NAVIGABILITY, 1662.

VI. RIPARIAN RIGHTS, 1664.

VII. WATER RECORDS, 1666.

VIII. OTHER CASES, 1667.

I. DAMS.

Consent Judgment—Construction. *Moffatt* v. *Canada Lumber Co.*, 2 O. W. R. 571.

Flooding Land — *Damages—Summary Procedure—Costs of Action—Dam—Owners —Tolls—Persons Using Dam.*] — A certain dam was the property of an improvement company incorporated under the Timber Slide Companies Act, R. S. O. c. 194, and the original defendants had used it for the purpose only of floating logs down the river. The improvement company were added as defendants. The action was for flooding the plaintiffs' lands by such dam:—Held, that, although (as decided in Blair v. Chew, 21 Occ. N. 404), a plaintiff is not bound to proceed summarily upon such a claim, under R. S. O. c. 85, but has a right to bring an action in the ordinary way, yet, in the absence of any good reason for not proceeding under the special Act, a plaintiff who brings an action should not be allowed the costs of it. 2. There is nothing in the Act under which the added defendants were incorporated which confers upon them any right to flood private property unless they have first taken the steps authorized by the Act for expropriating the property or settling the compensation to be paid for flooding it which these defendants had not done. 3. Nor were the defendants assisted by ss. 15 and 16 of R. S. O. c. 140, for, even if the dam was erected before the plaintiff's purchase of his property from the Crown, there was nothing to shew that the price he paid was reduced in consequence. 4. But s. 1 of R. S. O. c. 142 places the public advantage of allowing lumbermen to use rivers and streams as highways for carrying their logs to a market, above the private damage and inconvenience which may necessarily be caused to individual riparian proprietors by their doing so; and the original defendants were not liable for any damage sustained by the plaintiff by reason of their having, during any spring, autumn, or summer freshet, caused damage to the plaintiff by using or repairing or maintaining any

dam necessary to facilitate the transmission of their timber down the stream. 5. The rights given to persons desiring to float their own timber down a stream should not, however, be extended to companies incorporated for the purpose of making a profit by improving streams and charging tolls to lumbermen desiring to use them; and this view is strengthened by s. 15 of R. S. O. c. 194. Neely v. Peter, 22 Occ. N. 297, 4 O. L. R. 293, 1 O. W. R. 499, affirmed, and, in addition to the damages awarded to the plaintiff against the added defendants, an injunction was granted restraining those defendants from penning back the waters of the river in question, but the operation of the injunction was suspended for a year to enable those defendants to acquire the right to overflow the plaintiff's land, under the provisions of R. S. O. 1897 c. 194, or otherwise. *Neely* v. *Peter*, 23 Occ. N. 166, 5 O. L. R. 381, 2 O. W. R. 114.

Injury by — *Statutory Authorization—Water Commissioners—Act of Incorporation—Construction — Appropriation of Water.*]—The Act for construction of waterworks in the city of London empowered the commissioners to enter upon any lands in the city or within 15 miles thereof and set out the portion required for the works, and to divert and appropriate any river, pond, spring, or stream therein:—Held, Sedgewick and Killam, JJ., dissenting, that the water to be appropriated was not confined to the area of the lands entered upon, but the commissioners could appropriate the water of the river Thames by erection of a dam and setting aside of a reservoir; and that such water could be used to create power for utilization of other waters, and was not necessarily to be distributed in the city for drinking and other municipal purposes. Judgment of Court of Appeal, 1 O. W. R. 567, 2 O. W. R. 763, reversed. *Saunby* v. *London Water Commissioners*, 24 Occ. N. 201; *London Water Commissioners* v. *Saunby*, 34 S. C. R. 650.

Injury to Flow of Water — *Riparian Owners — Damages — Remedy — Action—Arbitration.*]—In 1876 C., owner of two lots bordering on a river, sold one to the respondents, with all ways, watercourses, etc., "as such purchaser may choose to disturb, impede, and cause to rise by any dams or other artificial means." The vendor reserved his right to damages which might be caused by the construction of dams by the purchaser, such damages to be fixed by arbitration. In 1880 C. sold to the appellants a lot situated 1,500 feet above that of the respondents, opposite to a natural fall, and the appellants constructed a dam there. The respondents having raised their dam, the appellants claimed damages resulting from the penning back of the water, and especially from the fact that the height of their fall was diminished:—Held, that in spite of the fact that s. 5535, R. S. Q., provides for the fixing of the amount of such damages by experts, the party injured has the right of recourse directly to the Courts, and that such right was not in this case taken away by the arbitration clause in the act of sale of 1876. 2. That, in spite of the concession by C. to the respondents of the right of utilizing the water power and of constructing dams, the appellants, the assigns of C., could claim not only the damage caused to their lands and buildings, but also that caused to their water power; and that, upon this head, although they had not yet made use of the water power otherwise than in constructing a dam, they could claim the depreciation in the commercial value of such water power. *Bannerman* v. *Hamelin*, Q. R. 10 Q. B. 68.

Injury to Land—*Assessment of Damages—Jurisdiction of Equity—Diversion of Stream—Riparian Owner—Mandatory Injunction.*]—A dam erected in 1858 across a natural stream upon land owned by the defendants, and used for the defendants' purposes, was in 1891 altered in respect of its devices for carrying off surplus water by the defendants' immediate predecessors in title, contrary to the protest of the plaintiff, a riparian owner since 1880. In 1900 a portion of the dam was carried away by a freshet, owing, it was alleged by the plaintiff, to the insufficiency of the alterations in the dam, and it was alleged that material damage was done to the plaintiff's land, but the evidence as to its precise nature and extent was slight and unsatisfactory, and the defendants denied any liability:—Held, that the questions involved being the liability of the defendants, and the extent of the injury sustained by the plaintiff, and the Court doubting its jurisdiction to assess the damages, the bill should be dismissed, and the plaintiff left to his remedy at law. A diversion of a natural stream from its natural channel in front of the land of a riparian proprietor is actionable at his instance without proof of actual or probable damage. A mandatory injunction will not be granted except in cases where extreme or very serious damage will ensue if the injunction is withheld. The form of a mandatory injunction adopted in Jackson v. Normanby Brick Co., [1899] 1 Ch. 438, approved of. *Saunders* v. *Richards Co.*, 21 Occ. N. 510, 2 N. B. Eq. Reps. 303.

Injury to Land — *Damages—Statutory Compensation — Action — Prescription.*]—The statute which permits owners of mills to construct dams upon watercourses, for the purpose of working their mills, creates in their favour a legal servitude over the lands upon which such dams make the waters flow. The exercise of such servitude makes them responsible to the riparian proprietors for the damages which it causes to them. 2. The special mode indicated by art. 5536, R. S. P. Q., for determining the amount of compensation there mentioned does not take away from the complainant the right of recourse to the ordinary tribunals. 3. The damages caused not being the consequence of a tort, the action to recover such damages is not prescribed in two years. *Larochelle* v. *Price*, Q. R. 19 S. C. 403.

Injury to Lands of Riparian Owners —Rights as to dam under judgment in previous action—Absence of injury for many years — Exceptional season—Waste gates—"Reasonable expedition" — Failure to shew negligence. *Bradley* v. *Gananoque Water Power Co.*, 2 O. W. R. 716, 3 O. W. R. 913.

Line Fences and Watercourses Act —Award of fence viewers — Appeal—"Adjoining" lands. *Re Bowker and Richards* (B.C.), 1 W. L. R. 194.

Mineral Claims — Right to flow of water—Easement or license — Acquiescence

—Diversion of water — Injunction—Damages. *Racine* v. *McGinnity* (Y.T.), 1 W L. R. 265.

Municipal Corporation — Dam —Absence of by-law — Finding — Reference—Costs — Trespass. *Lawrence* v. *Town of Owen Sound*, 5 O. L. R. 369, 1 O. W. R. 559, 2 O. W. R. 189.

Obstruction to Flow of Stream — Rights of riparian owner—Interference with power — Evidence. *Ahern* v. *Booth*, 2 O. W. R. 852, 696, 3 O. W. R. 852.

Prescription — *Servitude — Aggravation.*]—The owner of a dam, which has been standing for more than 30 years, cannot oppose a 30 years' prescription to an action brought by a riparian proprietor to recover damages caused by waters backed down by such dam, during the five years preceding the date of the suit, especially when the owner of the dam has during these five years changed and aggravated the exercise of his legal servitude. *Roy* v. *Royal Paper Mills Co.*, Q. R. 21 S. C. 533.

Riparian Proprietors — *Servitude — Pleading — Petitory or Possessory Action.*]—The plaintiff had sold to the defendant's grantor a lot bounded by a river, with the right to build a mill there, to construct a dam, and to place such dam upon the property of the vendor on the other side of the river, and to pass and repass over the property of the defendant to communicate between the dam and a bridge. The dam built by the purchaser having been carried away by the waters, the defendant, in spite of the protest of the plaintiff, built a new one up the stream, one end of which rested upon the land of the plaintiff. The latter then began a possessory action against the defendant, claiming an injunction, the demolition of the dam, and $150 damages. The defendant pleaded that he had only exercised the right which the plaintiff had given to his grantor. The plaintiff replied on grounds of law that the defendant was joining a petitory action with a possessory one, and also replied that the defendant's grantor by building the old dam where he built it had fixed the place where the servitude was to be exercised:—Held, that the plea of the defendant was bad in law in that it combined the petitory and possessory. 2. That before building the new dam the defendant should have obtained permission from the plaintiff or from the Court. 3. That arts. 503, C. C., and 5535, R. S. Q., do not authorize a riparian proprietor to build a dam upon the land of another riparian proprietor upon the other side of the river, without the permission of the latter, but are applicable only to the use of the watercourse. *Demers* v. *Beauregard*, Q. R. 22. S. C. 273.

River — License to dam — Patent—Reservation — Navigation — Crown — Attorney-General — Easement — Plan — Deed—Injunction. *Attorney-General for Ontario* v. *Wynne*, 2 O. W. R. 1132.

II. Ditches and Watercourses Act.

Construction of Culvert — Flooding land—Ditches and Watercourses Act—Award —Appeal to County Court Judge—Finality —"Sufficient outlet." *Chapman* v. *McEwen*, 6 O. W. R. 164.

Construction of Ditch — Deepening — Jurisdiction of Engineer. *Lamphier* v. *Stafford*, 1 O. W. R. 329.

Drains — *Increasing Flow of Natural Stream—Outlet—Engineer's Award—Parties —Joinder of Defendants—Joint Tort-feasors —Damages — Injunction.*]—The owner of land on the banks of a natural stream has no legal ground of complaint if riparian owners above him use the stream as an outlet for drains made by them in the reasonable agricultural use of their lands, although the result is to increase the amount of water in the stream and to flood part of his land. But this principle does not apply to persons not riparian owners, who, by proceedings under the Ditches and Watercourses Act, obtain an outlet to the stream; and they are liable to a person injured by the increased amount of water. A proper outlet under the Ditches and Watercourses Act is one which enables the water to be discharged without injuriously affecting the lands of another, and, if the outlet chosen by the engineer is not in fact a proper outlet, his award is no protection to the persons acting under it as against a person not a party to it. An action to recover damages for flooding his land was brought by a riparian owner against a number of persons who were respectively parties to the construction of several drains under the Ditches and Watercourses Act, the allegation being that by means of the drains the flow of water had been unlawfully increased to the plaintiff's injury. Evidence was given as to the quantum of the plaintiff's damage, and judgment was given against all the defendants, for the whole amount:—Held, that, while the defendants who were parties respectively to the construction of each drain were jointly liable for any damage attributable to that drain, the different sets of defendants were not joint tort-feasors, and had been improperly joined as defendants; that a joint assessment of damages was improper; and that, there being no evidence of the proportion of damage attributable to each set of defendants, only nominal damages and an injunction could be awarded. *McGillivray* v. *Township of Lochiel*, 24 Occ. N. 346, 8 O. L. R. 446, 4 O. W. R. 193.

Railway.]—An award under the Ditches and Watercourses Act directed that a drain should be built through the land of private owners as far as a highway of the defendants, then by the defendants along the highway to a point opposite the land of a railway company, and then by the railway company along the highway, or across the highway and through their own land, as far as might be necessary to give a proper outlet. The drain was built by contract under the Act as far as the point opposite the railway company's land, but the railway company whose railway had been declared to be a work for the general advantage of Canada, refused to recognize the award or do the work directed. The defendants then built a culvert across the highway and brought the water to the railway company's land, and the railway company thereupon built an embankment to keep it back, the result being that it overflowed from the highway

ditches and caused damage to the plaintiff:—Held, that there was no jurisdiction under the Ditches and Watercourses Act, as far as the railway company were concerned; that the award was therefore no protection to the defendants; that the damage resulted from the construction of the culvert; and that the defendants were liable therefor. *McCrimmon* v. *Township of Yarmouth*, 21 Occ. N. 19, 27 A. R. 636.

III. Diversion of Water.

Change in Course of Stream—Accretion — Reliction — Easement — Possessory Title. *Massey-Harris Co.* v. *Elliott*, 1 O. W. R. 465.

Dam — Diversion of waters — Riparian proprietor—Order of Judge—Notice. *McCready* v. *Gananoque Water Power Co.*, 1 O. W. R. 438.

Powers of Waterworks Company—*Approval by Lieutenant-Governor in Council—Condition Precedent—Damages—Injunction — Acquiescence — Laches.*] — By s. 9 of the Sandon Waterworks and Light Company Act (B. C., 1896, c. 62), the company were authorized to divert water from certain creeks and to use so much of the water of the creeks as the Lieutenant-Governor in council might allow, with power to construct such works as might be necessary for making the water power available, but the powers were not to be exercised until the plans and sites of the works had been approved by the Lieutenant-Governor in council. The company got their plans and sites approved, and proceeded with the construction of a tank and a flume on the plaintiffs' lands for the purpose of diverting water:—Held, that the authority of the Lieutenant-Governor in council to divert was a condition precedent to the company's right to interfere with the plaintiffs' soil, and that the plaintiffs were entitled to damages and a mandatory injunction. Mere submission to an injury, such as the erection of a building by another on one's land, for any time short of the period limited by statute for the enforcement of the right of action, cannot take away such right: to amount to laches raising equities against the person on whose land the erection was placed, there must have been some equivocal conduct on his part inducing the expenditure by the person erecting it. Judgment of Irving, J., 24 Occ. N. 39, reversed. *Byron N. White Co.* v. *Sandon Waterworks and Light Co.*, 10 B. C. R. 361.

Proces-verbal — *Servitude — Artificial Watercourse—Municipal Corporations — Parties.*] — A procès-verbal establishing an artificial watercourse to bring water from a higher land to a lower, which would not flow there naturally, is illegal and will be annulled. 2. In an action to annul such a procès-verbal, it is not necessary to make a county council which, sitting in appeal, had amended the said procès-verbal, a party to the suit. *Brouillet* v. *Parish of St. Severin*, Q. R. 22 S. C. 159.

Surface Water—Diversion to neighbouring land—Trespass—Specific act—Damages—Injunction—Costs. *McConachie* v. *Galbraith*, 2 O. W. R. 1048.

IV. Injury to Neighbour's Lands.

Discharging Water on Neighbour's Land—*Remedy—Landlord or Tenant—Servitude.*]—Where a lessee of the defendants' land, being in possession thereof and having a contract for future purchase contained in his lease, raised for the purpose of building operations for his own benefit, and not as mandatary of the defendants, the lower part of the leased land, with the effect of diverting to the plaintiff's adjoining land, and thereby causing him damage, the water which would otherwise have been discharged over the defendants' land:—Held, that the plaintiff's remedy was against the lessee, and that an action négatoire against the defendants, who claimed no servitude over the plaintiff's land, was unnecessary. Judgment of Court of King's Bench, Quebec, Q. R. 11 K. B. 173, reversed. *Kieffer* v. *Le Seminaire de Québec*, [1903] A. C. 85.

V. Navigability.

Dam—*Riparian Proprietors—Public Right—Mistrial—New Trial.*]—The owner of the alveus of a navigable river and of the land on both sides of it upon which a dam stands, has an absolute right to maintain it for the purpose of operating his mill by the use of the flowing water, and he has this right as an incident to the ownership of the property. Such right must be exercised subject to the rights of other riparian proprietors to a reasonable use of the water and to the public right of passage. The public right is not a paramount right, but a right concurrent with that of the riparian owners; and if, in the exercise of their public right, the defendants, in driving their logs down the river, injured the plaintiff's dam, the onus is upon them to shew that they adopted all reasonable means and used all reasonable care and skill in order to avoid the injury: per Barker, J. Per Tuck, C.J., McLeod and Gregory, JJ., that where the clear weight of evidence is against the plaintiff's claim, and important questions involved have not received due consideration on the trial, the case should be sent down for a new trial. Per Hanington, Landry, and Barker, JJ., that if there is evidence to justify the jury in finding for the plaintiff on the material point in dispute, the verdict should not be disturbed, even though the case was not tried out with due regard to other important points. *Roy* v. *Fraser*, 36 N. B. Reps. 113.

Floatable Stream—Obstruction by dam—Removal to allow timber drive to pass—Paramount right—Statutory apron—"Such dam or other structure"—Construction of statutes—History of legislation—Convenient opening—Sluiceway — Counterclaim — Negligence—Costs. *James* v. *Rathbun Co.*, 6 O. W. R. 1005, 11 O. L. R. 271.

Floatable Stream — *Timber Driving — Carrying away of Bridge—Negligence—Damages.*]—The owner of logs who floats them down a stream, suitable only for floating logs at random and not in rafts, across which a bridge has been constructed by a fisherman, in virtue of a license of the Lieutenant-Governor (art. 863, C.M.), the councils of the municipalities not having concurred in granting same (arts. 861, 862, C.M.), is bound

to so properly order, guide, and oversee the flotation of such logs as not to injure this bridge, which offers every necessary facility for the floating of such logs; and if, by the negligence of the owner of such logs, in not properly guiding them and not having for this purpose a sufficient number of men, they carry away the bridge, the owner of the logs will be liable for the value thereof. *Vézina* v. *Drummond Lumber Co.*, Q. R. 26 S. C. 492.

Possession—*Title.*]—By the law of the province of Quebec, as by the law of England, no waters can be deemed navigable unless they are actually capable of being navigated. An arm or inlet of a navigable river cannot be assumed to be either navigable or floatable in consequence of its connection with the navigable stream, unless it be itself navigable or floatable as a matter of fact. The land in dispute formed part of the bed of a stream called the Brewery creek, which was originally a narrow inlet from the Ottawa river, dry during the summer time in certain parts:—Held, affirming the judgment appealed from (see Q. R. 24 S. C. 59), that, as the Brewery creek was neither navigable nor floatable in its natural state, the subsequent overflow of the waters of the Ottawa river into it could not have the effect of altering the natural character of the creek. 2. That, as there was no reservation of the lands covered with water in the original grant by the Crown in 1806, the bed of the creek passed to the grantee as part of the property therein described, whether the waters of the creek were floatable or not. 3. That the uninterrupted possession of the bed of the creek by the grantee and his representatives from the time of the grant with the assent of the Crown, was evidence of the intention of the Crown to make an unqualified conveyance of all the lands and lands covered with water described in the grant. *City of Hull* v. *Scott*, 24 Occ. N. 264; *Attorney-General for Quebec and City of Hull* v. *Scott*, 34 S. C. R. 603.

River—*Floatability—Minister of Crown—Admission—Third Party—Misc-en-cause.*]—The principles of the old French law govern the question of the navigability or floatability of rivers in the province of Quebec. 2. Navigable and floatable rivers form part of the public domain of the province, and cannot be alienated except by an express grant from the Crown. 3. It is otherwise with rivers which are unnavigable or unfloatable; they belong to the riparian owners unless there is an express reservation to the contrary. 4. A river may be declared navigable and floatable as to part only. 5. The admission of a minister of the Crown in an answer to a question or an address in the legislature cannot bind the Crown, and proof may be given that such an admission has been made by mistake. 6. A party has a right to bring before the Court a third party interested, in order to have it declared that the latter is subject with the former to the judgment upon an intervention. *Procureur-General* v. *Fraser*, Q. R. 25 S. C. 104.

Stream—*Question of Fact—Crown Grant — Reservation — Prescription — Acquiescence.*]—It does not follow that, because a river is navigable and floatable, all its branches or channels must be considered so. The navigability of a stream cannot be established by any rule of law; it is a question of fact. 2. The grant of land from the Crown includes the bed of a non-navigable creek running through it, and no specific grant of the bed of the creek is necessary. Moreover, in this case, the reservation of gold and silver mines in favour of the Crown, contained in the grant, indicated that everything outside of this reservation was granted. 3. Although there is no prescription against the Crown, yet the conduct of the constituted authorities in allowing a creek to be used by the patentees, and their successors and assigns, openly, publicly, peaceably, and uninterruptedly for 96 years, is evidence of acquiescence in their pretensions. Judgment in Q. R. 24 S. C. 59 affirmed. *City of Hull* v. *Scott*, Q. R. 13 K. B. 164. Affirmed 24 Occ. N. 264, and S. C. sub nom. Attorney-General for Quebec and City of Hull v. Scott, 34 S. C. R. 603.

VI. Riparian Rights.

Accretions—*Right to, as "Alluvion"—Formation.*]—On the 27th March, 1894, a considerable mass of earth, which had crumbled away at St. Alban, was carried by the river Ste. Anne to its mouth. The mass of earth grounded in a shallow at the mouth of this river, which was navigable, and dried up a part of its bed, which remained dry for a distance of 2,280 feet in a straight line, dividing the old bank of the river (the property of the plaintiff) from the new bank thereof:—Held, that this accretion did not constitute an "alluvion:" that the addition of land to the bank of a navigable river belongs to the adjoining owner only where it is formed by imperceptible degrees; and the only exception to this rule is in the case where a considerable and noticeable part of a field on a river bank is carried suddenly towards a lower field or on the opposite bank; but, even in this case, the new land will belong to the riparian owner at that point only if the former owner does not reclaim it within the time the law allows. *Germain* v. *Price*, Q. R. 27 S. C. 101, 188.

Dumping Rocks into River—Impeding flow of water—Rights of lower riparian proprietors—Sensible injury—Injunction. *West Kootenay Power and Light Co.* v. *City of Nelson* (B.C.), 2 W. L. R. 66.

Floatable River—*Timber Driving—Obstruction — Mandatory Injunction—Costs—Injunction for Apprehended Injury—Damages.*]—The defendant, the owner of a saw-mill on a floatable river, erected booms in connection therewith, which, with logs of the defendant, impeded the passage of logs of the plaintiff. The obstructions were removed before the hearing, but after notice of motion had been given for an interim mandatory injunction, which was granted:—Held, that the bill should be dismissed, but without costs, and with costs to the plaintiff of the taking out and service of the injunction order. An injunction to perpetually restrain the defendant from closing or obstructing the river refused. The owner of land on a floatable river is entitled to erect booms and piers necessary for reasonable use of the river in operating a saw mill. The Court refused to assess the plaintiff's damages, as

he had a remedy at law, and at the time the bill was filed the grounds for an injunction had ceased. *Watson* v. *Patterson*, 23 Occ. N. 268, 2 N. B. Eq. Reps. 488.

Flooding Lands—*Driving Saw Logs—Action.*]—Action by the owner of lands on both sides of a stream used by the defendants for the purpose of driving saw logs, for damages for penning back the water on his land by means of a dam, including the road allowance reserved along the banks of the stream in question, and for an injunction to remove the obstruction. The defence raised was that the defendants were not liable by reason of the reservation in the grant from the Crown of the road allowance and by reason of the provisions of s. 1 of c. 142, R. S. O. 1897, an Act for protecting the public interest in rivers, streams, and creeks:—Held, that the plaintiff was in such possession of the road allowance along the banks of the stream as entitled him to recover damages for flooding the same; that the defendants were liable for all damages caused by the dam complained of; and that c. 142, R. S. O. 1897, does not prevent a plaintiff recovering for unnecessary damage or for damages accruing after spring and fall freshets; and awarded damages accordingly and an order for removal of the dam, the defendants admitting they had done with it:—Held, also, that there is nothing in c. 85, R. S. O. 1897, compelling a defendant to proceed under it if he chooses his ordinary remedy of action. *Blair* v. *Chew*, 21 Occ. N. 404.

Railway—Diversion of water—Sale — Injury to owner below—Injunction—Declaration of right—Damages. *Maughn* v. *Grand Trunk R. W. Co.*, 4 O. W. R. 287.

Right to Flow—Artificial waterway — Prescription — Interruption — Defence — Amendment. *Harrington* v. *Spring Creek Cheese Mfg. Co.*, 2 O. W. R. 143.

Right to Supply of Water—Contract by owner of waterworks with riparian proprietor—Evidence — Injunction. *Harrison and Sons Co.* v. *Town of Owen Sound*, 3 O. W. R. 745.

Rivers and Streams—*Floating Logs—Damage to Riparian Owners—Procedure.*]—The Nova Scotia statute R. S. N. S. 1900 c. 95, s. 17, gives to persons engaged in the transmission of saw logs and timber down rivers and streams the reasonable use of and access to the same for their business, and relieves them from liability for any but actual damage thereby, unless caused by their own wilful act:—Held, affirming the judgment appealed from, 36 N. S. Reps. 40, that such persons are liable for all actual damage caused in transmitting logs, even without negligence, and the owner of the logs is not relieved from liability though they were transmitted by other persons under contract with him. On motion for a new trial one of the grounds was misdirection in the charge to the jury. The trial Judge reported to the full Court that he did not make the direction on which this objection to his charge was based, and gave a correct report of what he said:—Held, that this was not an objectionable course for the Judge to pursue, and in any case it was a matter for the Court appealed from, whose ruling was not subject to review. Judgment in 36 N. S. Reps. 40 affirmed. *Dickie* v. *Campbell*, 24 Occ. N. 50, 34 S. C. R. 265.

Trespass to Land—*Conveying Timber and Lumber on Stream.*]—The plaintiff was the owner of land bounded on one side by a stream, above tidewater and not navigable. The defendant was a lumberman, and, in order to assist his operations in driving logs down stream, erected a permanent dam, one end of which rested on the plaintiff's land. To an action by the plaintiff for damages the defendant pleaded inter alia that the entry complained of was a reasonable use of the land and was a use authorized by R. S. N. S. 1900, c. 95, "of the conveying of timber and lumber on rivers and the removal of obstructions therefrom," and amending Acts:—Held, that the erection of the dam was clearly a trespass and could not be justified under c. 95, or under the Acts of 1902 c. 33, no commissioner having been appointed for the stream in question or for the river into which it ran; that s. 15 of c. 95, which gives the right to construct dams necessary to facilitate the floating of logs down streams during freshets, is subject to the provisions of s. 6, which requires the assent of the owner of land entered upon to be obtained, and can only be construed to apply to temporary erections, and not to permanent erections, such as the one in question; that s. 17 of c. 95, as amended, only gives the right to enter for the purpose of driving or removing logs and not for the purpose of making erections; and that, as the plaintiff had failed to prove any substantial damage, there should be judgment in his favour for $5 damages and costs. *Deal* v. *Cook*, 23 Occ. N. 70.

Unnavigable Pond—*Fishing Rights.*]—The plaintiffs, with three others, are the owners, under grants from the Crown prior to Confederation, of certain lots of land which extend to, or are partly covered by, an enclosed sheet of water known as "Brome Pond." There was no reservation by the Crown of the bed of the pond or of the fishing rights connected with the water. The plaintiffs sought to recover damages from a person who had fished in the pond:—Held, that the riparian owners of a non-navigable water or pond, the bed of which was granted by the Crown to them or their auteurs before Confederation, have the exclusive right of fishing therein. 2. Where land granted by the Crown before Confederation to a number of proprietors extends into and includes the bed of a pond, the fishing rights of the whole pond do not belong to all in common, but the rights of each are limited to the water covering the portion of the bed to which each is entitled by his deed. *Tetreault* v. *Lewis*, Q. R. 19 S. C. 257.

User of Water of Stream—Interim injunction—Modification — Terms. *Eddy* v. *Booth*, 6 O. W. R. 1001.

VII. Water Records.

Applications for—*Mining Companies—Gold Commissioner—Land Commissioner—Water Notice — Posting — Evidence.*] — Where an application for a record of

water for mining purposes is pending before a Gold Commissioner, an application for a record of the same water for domestic, mechanical, and industrial purposes should not be adjudicated upon by an Assistant Commissioner of Lands and Works without express notice to the applicants before the Gold Commissioner. A water notice posted on a board usually used for such notices, in a hall leading to the rooms occupied by the Commissioner and his staff, is posted in the office of the Commissioner within the meaning of s. 9 of the Water Clauses Consolidation Act. Where an application is not contested, the Commissioner need not take evidence, but where it is contested he should have the evidence taken in shorthand. *In re Water Clauses Consolidation Act, War Eagle Mining Co.* v. *British Columbia Southern R. W. Co.*, 22 Occ. N. 247, 8 B. C. R. 374.

Joint Application for—*Purpose for which Water Required — Duty of Gold Commissioner.*] — Mine owners, in a notice for application to the Gold Commissioner for water records, stated, as one of the purposes for which the water was required, a purpose not authorized by s. 10 of the Water Clauses Consolidation Act, i.e., "domestic and fire purposes." At the hearing before the Gold Commissioner the applicants requested him to deal with the application as one for mining purposes only, but he refused the request and dismissed the application:—Held, on appeal, that the Gold Commissioner was not justified merely on this ground in refusing to exercise his powers; and the matter should be referred back for rehearing. Held, also, that water records, under part II. of the Water Clauses Consolidation Act, may be held jointly. Quære, whether a supply of water for fire purposes would be necessary as being directly connected with the working of a mine or incidental thereto. *Centre Star Mining Co.* v. *British Columbia Southern R. W. Co.*, 21 Occ. N. 491, 8 B. C. R. 214.

Pending Applications—*Duty of Officer.*]—Where two different officials are called upon to exercise their functions in regard to applications for water rights in respect of the same water, the official who is determining the later application should stay his hand until the final result of the prior application before another official is known. *In re Water Clauses Consolidation Act, War Eagle Mining Co.* v. *British Columbia Southern R. W. Co.*, 8 B. C. R. 381.

Validity of—*Ditch—Continuation into United States.*]—The fact that a ditch constructed in intended compliance with the provisions of s. 41 of the Land Act (C. S. B. C. 1888), runs partly through United States territory, does not of itself prevent the ditch from being a good ditch within the meaning of the Act. Held, also, applying Martley v. Carson, 20 S. C. R. 634, that the plaintiff's water record was valid. *Covert* v. *Pettijohn*, 22 Occ. N. 308, 9 B. C. R. 118.

VIII. Other Cases.

Easement—Right of way — Repairs—Dominant and servient tenements—Water—Right to flow of — Injunction—Infant — Guardian—Authority. *Burrell* v. *Lott*, 3 O. W. R. 115.

Foreshore of Harbour—*Grant from Provincial Government.*]—In an action for damages for trespass the evidence shewed that the locus was a water lot in Sydney harbour, and that the plaintiff's title thereto was derived under a grant from the Crown as represented by the government of the province of Nova Scotia:—Held, following Holman v. Green, 6 S. C. R. 707, that the grant under which the plaintiff claimed was inoperative and void, and that the plaintiff could not recover. *Kennelly* v. *Dominion Coal Co.*, 24 Occ. N. 93, 36 N. S. Reps. 495.

Government Ditch—Contractors—Overflowing land — Justification — Negligence. *Sisty* v. *Larkin*, 2 O. W. R. 639.

Grant of Water Power—*Dam—Ownership by Two Persons in Common—Agreement—Construction—Rights in Regard to Water—Surplus Water—Injunction—Damages.*]—The plaintiff and defendant owned grist mills on the Grand river, and were each seised in fee of an undivided half of dam No. 5, and both had the right, by agreement between them, to draw water therefrom "for their own purposes." The agreement provided for the maintenance and repair of the dam at the joint and equal expense of the parties, and that both should be equally interested in rents derived from supplying water to others. For many years the parties and their predecessors had used the water as they required it. The owner of a saw mill above the defendant's grist-mill had, under a lease from the common grantor of plaintiff and defendant, the right to use "surplus waters" stored by the dam and not required by the grist-mills. The right was continued by the separate owners of the grist-mills, and the plaintiff and the defendant, under the agreement referred to, shared equally in the rentals derived from this source. Then the defendant acquired the saw-mill and the trouble began. Anglin, J., was of opinion that each party had an absolute right to use, in a reasonable manner, for their own purposes, so much of the dammed water which might properly be used for generating power as he required, not exceeding one-half of the whole, and so much of the remaining water which might be property so used, as would not interfere with or impair the user in a reasonable manner by the other party of the water to which he was entitled, and which he from time to time required. "Their own purposes" he construed as meaning any lawful uses to which the water might reasonably be put in a business owned and conducted by the party, as distinguished from a grant or lease to a third party of the right to use such water. Any water not required by either party for "their own purposes," thus defined, was "surplus water." *Caledonia Milling Co.* v. *Shirra Milling Co.*, 25 C. L. T. 154, 5 O. W. R. 170, 9 O. L. R. 213.

Improvements on Streams — *Logs Floated over Stream—"Reasonable Tolls"—Action for—R. S. O. c. 142—Restriction to Future Tolls—Previous Binding Decision.*]—The right to demand reasonable tolls upon logs floating over improvements on a stream

proceeds entirely upon ss. 11 and 13 of R. S. O. 1897, c. 142, and such tolls are only chargeable upon logs going down after an order under the later section has been made and not those going down before such order was made. *Beck Manufacturing Co.* v. *Ontario Lumber Co.*, 6 O. W. R. 54, 1 O. L. R. 193.

Injunction — *Nuisance—Construction of Road—Flooding Neighbouring Land—Accumulation and Discharge of Water—Damages—Injunction—Scope of—Culverts—Municipal Corporation.*]—A farmer consented to water, which came through a culvert, being carried off by means of a drain which he dug himself, across one corner of his farm. There was no agreement in writing, nor was there any expenditure of public money on the drain, and there was no consideration given for the use of the drain:—Held, there was only a license to use the drain and such license was revocable, and that the plaintiff was also entitled to an injunction. Damages of $100 were also allowed. The cause was a recurring one which would ripen into an easement by prescription if permitted to continue long enough to become such. *Taylor* v. *Township of Collingwood*, 6 O. W. R. 261, 10 O. L. R. 182.

Lessees of Watercourse—*Right to Flow of Water—Title—"Proprietors' Committee."*]—The plaintiffs claimed to be lessees in possession of a watercourse running through a pond in the vicinity of the town of L., and, as such, entitled to the flow of brook and the use of a dam at the pond to regulate the flow of water in connection with the working of a grist-mill situated upon a lot of land owned by the plaintiffs further down the stream. The plaintiffs' claim was based upon a resolution passed at a meeting of the "proprietors' committee" of the township of L. in 1895. There was no evidence to shew who the persons were who called themselves the "proprietors' committee" at that time, nor how, or when, or by what authority the "proprietors' committee" was appointed. The township grant, which bore date the 26th November, 1764, under which both parties claimed, shewed that the township contained 200 rights or shares of 500 acres each, of which only 157 appeared to have been granted at the time. It appeared from the grant that before it was issued, a division was made but none was proved, and it was impossible to say whether the land covered by the brook passed under the grant, or was included in the ungranted shares or rights. Evidence was given, however, to shew that, from the first, the grantees had assumed to control the management of the brook, and that from time to time they had passed resolutions for that purpose; but no authority was shewn for these proceedings, and it did not appear that the grantees had any:—Held, assuming that the original grantees had authority to so deal with the brook and pond, that, in the absence of evidence that their rights were transferred to the persons who, in 1895, assumed to exercise such authority, no right or title to the brook, pond, or dam passed to the plaintiffs, as lessees or otherwise, and they must fail in their action. *Moore* v. *Ritchie*, 33 N. S. Reps. 216.

Logs Floated over Stream — Tolls — Summary order fixing—Evidence—Consent—Improvements—R. S. O. c. 142. *Re Beck Manufacturing Co. and Ontario Lumber Co.*, 3 O. W. R. 333.

Municipal Corporation — Sewerage works—Construction of dam and ditch—Overflow of private lands—Liability—Acquiescence—Leave and license — Evidence. *Passmore* v. *City of Hamilton*, 6 O. W. R. 847.

Water Rights—*Decision of Gold Commissioner—Appeal from—Evidence on—Petition—Trial.*]—A County Court Judge refused to hear new evidence on an appeal before him under s. 36 of the Water Clauses Consolidation Act, which provides that the appeal should be in the form of a petition setting forth the facts and law relied on, which petition, along with an affidavit verifying it, should be filed and served, and to which the respondents should file and serve their answer:—Held, that the fact that there was to be a petition and an answer contemplated the raising of issues, and that the appeal should be a trial de novo. *Ross* v. *Thompson*, 23 Occ. N. 342.

Water Rights—*Water Clauses Consolidation Act, B. C.—Jurisdiction of Gold Commissioner—Statutes.*]—Under s. 11 of the Rossland Water and Light Company Incorporation Act, 1896, the rights of the city of Rossland, which purchased the waterworks system of the company, to the waters of Stoney Creek, are paramount but not exclusive, and the Gold Commissioner has jurisdiction to adjudicate on an application under s. 18 of the Water Clauses Consolidation Act for an interim record of the surplus water not used by the city. *Centre Star Mining Co.* v. *City of Rossland*, 9 B. C. R. 403.

See INJUNCTION—JUSTICE OF THE PEACE—MUNICIPAL CORPORATIONS—NEGLIGENCE—TIMBER—WAY.

WATERWORKS

See ASSESSMENT AND TAXES — MUNICIPAL CORPORATIONS.

WAY.

I. BOUNDARY LINES, 1670.

II. DEDICATION, 1672.

III. INJURY FROM NON-REPAIR OF HIGHWAY, 1678.

IV. OBSTRUCTION AND CLOSING, 1691.

V. PRIVATE WAY, 1693.

VI. OTHER CASES, 1696.

I. BOUNDARY LINES.

County Road — *Boundary Between Local Municipalities.*]—Where one side of a road runs along the boundary line between two local municipalities, although such road is wholly situate in one of them, it is a county road, under the provisions of art. 755, paragraph 2, of the Municipal Code. *Walsh* v. *Corporation of St. Anicet*, Q. R. 25 S. C. 319.

Deviations — *Substitute for Boundary Line between Counties — Declaration — Mandamus.*]—The question was whether a "deviation" road came within s. 617 (1) of the Municipal Act, 1903, (3 Ed. VII. c. 19), so as to be regarded as a boundary line between counties. The deviation in question was rendered necessary owing to a sharp bend in the river Madawaska, where the boundaries between the township of Fitzroy in the county of Carleton, the township of McNabb in the county of Renfrew, and the township of Pakenham in the county of Lanark, meet:—Held, by Court of Appeal, Justice Osler dissenting, that the deviation road was to be regarded as a boundary between Pakenham and McNabb, and between Fitzroy and McNabb, but not between Fitzroy and Pakenham. The history and the meaning of the boundary line road legislation discussed. *Township of Fitzroy* v. *County of Carleton*, 25 C. L. T. 292, 5 O. W. R. 615, 9 O. L. R. 686.

Public Highway between Townships — *Survey — Road Allowance — Evidence — Departure from Instructions and Plan.*] — The township of Lochiel forms part of the original township of Lancaster laid out and partly surveyed about the year 1784 or 1785, as composed of 17 concessions. Subsequently an 18th concession was added, and, in 1818, concessions 10 to 18 of Lancaster were detached as the township of Lochiel. During the year 1798, the township of Hawkesbury (now divided into East and West Hawkesbury) was laid out and partly surveyed by a deputy provincial surveyor named Fortune, who returned his plan and field notes without the double lines generally in use to shew road allowances between Hawkesbury and the lands now lying upon the northerly and easterly limits of Lochiel. In completing the survey of portions of Lancaster and Hawkesbury, in 1816, a deputy provincial surveyor named McDonald planted posts on the ground, but also returned plans and field notes without indicating road allowances at the points in question. The departmental instructions, under which these surveys were made, directed that the mode of survey, etc., should be according to a model plan shewing rectangular townships surrounded by double lines. None of these reservations were shewn on the plan of Hawkesbury, and, in the Lancaster boundary, the rectangular form was broken:—Held, that there could be no inference from the instructions and model, in view of the other circumstances, that road allowances were intended to be reserved on the eastern and northern boundaries of Lancaster where the rectangle was broken:—Held, also, that, even if the work subsequently performed on the ground by McDonald or other Crown officers might afford some evidence of an intention on the part of the Crown to dedicate as a highway certain portions which may have been reserved for the purpose, yet, having regard to the decisions in Tanner v. Bissell, 21 U. C. R. 553, and Boley v. McLean, 41 U. C. R. 271, officers employed for the survey of an old line could not conclusively establish a road allowance along the boundary, if none had been reserved by the original survey. Judgment in 1 O. W. R. 64, 1 O. W. R. 664, affirmed. Township of Lochiel v. Township of East Hawkesbury, 24 Occ. N. 261; *Township of East Hawkesbury* v. *Township of Lochiel*, 34 S. C. R. 513.

Repair — *Municipality — Strip between Ditch and Fence.*]—A municipal road consists of all the land comprised between the fences which bound it, provided that the width is not more than that prescribed by statute; and therefore the owner of land bordering on a road, when he is not obliged to keep the road in repair, cannot be called upon in respect of work done in the strip of land between the ditch and the fence, which is part of the road. *Corporation of St. Constant* v. *Miron*, Q. R. 25 S. C. 316.

Substitute for Boundary Line between Counties — Deviations — Declaration — Mandamus. *Township of Fitzroy* v. *County of Carleton*, 3 O. W. R. 280.

II. DEDICATION.

Acceptance — Acquiescence — Tax deed —Description — Estoppel. *Piper* v. *Township of Paipoonge*, 6 O. W. R. 287.

Acquisition by Municipality — *User — Opening — Fences.*]—Besides the modes prescribed by the Municipal Code, municipalities may acquire lands for public roads: (1) by dedication or abandonment by the owner of the land with the object of opening and establishing a public road; (2) by user and public and continuous possession of such land as a road by the public during thirty years; (3) by the opening and user as such by the public of the whole road, without contestation of the right, for the space of ten years or more, according to the provisions of 18 V. c. 100, s. 40, s.-s. 9 (Q.) 2. Fences erected by the ancient proprietors fencing off a public road are recognized according to Quebec usages and presumed to have been established by such proprietors with the object of separating their properties from the road, and that in the interests of good administration and also with a view of protecting the crops and the property itself generally, and such fences will serve and aid considerably in determining the question of dedication. *Jones* v. *Village of Asbestos*, Q. R. 19 S. C. 168.

Evidence — By-law — Dedication — Statute labour — Municipal corporation. *Andrews* v. *Township of Pakenham*, 4 O. W. R. 6.

Highway — Plan — Prescription —User — Railway — Estoppel. *City of Toronto* v. *Grand Trunk R. W. Co.*, 2 O. W. R. 3, 4 O. W. R. 491.

Highway Laid out by Private Person —*Assumption for Public User — Expenditure on Sidewalk.*]—A highway in the township of York laid out by a private person had been used as such for many years, and a sidewalk had been built upon it by the defendants under the supervision of their pathmaster, and the council had by by-law appropriated money to pay for the construction of it, and payment had been duly made to the persons who built it:—Held, that this was sufficient to establish that the highway had been assumed for public user by the corporation within the meaning of s. 607 of the Municipal Act, 3 Edw. VII. c. 19 (O.) The purpose of s. 598 is to declare that certain classes of roads are public highways; and

it has no bearing on the question whether an actual highway laid out by a private person has been assumed for public user. *Holland* v. *Township of York*, 24 Occ. N. 290, 7 O. L. R. 533, 3 O. W. R. 287.

Lease to Municipality — Contract — Construction — Express restrictions — Exclusion of others — Forfeiture — Injunction. *University of Toronto* v. *City of Toronto*, 5 O. W. R. 504.

Maintenance — *Cost of Work — Action to Recover from Land-owner — Work done by Inspector — Evidence of Inspector — Account — Report — Authorization — Percentage.*]—It is the imperative duty of a municipal corporation and its officers to put its roads in good order without delay. 2. The testimony of the inspector who has done the work is a sufficient proof, if not contradicted, that the work has been executed, that the sum claimed is the value of it, that the formalities required have been followed, and that the defendant in an action to recover the cost of the work is the person bound by law to pay such cost. 3. It was not necessary to give the defendant in this case a municipal notice, she residing in England, nor to give notice to her agent, who resided at Quebec, inasmuch as no writing had been deposited at the office of the municipal council giving the address of the defendant or of her agent. 4. A road crossing the defendant's lots and other lots in the 4th range of Gosford having been for a great many years open and free to the public as a road in front of such lots, and being governed by a procés-verbal which declared such road to be the road in front of such lots and to be at the charge, as to its maintenance, summer and winter, of every land-owner in the 4th range whose land abutted thereon, should be maintained by the defendant as regards the part which crossed her lots, and there was no ground for an act of apportionment to execute such part of the procés-verbal, for there were no works to apportion. 5. Even if there was need of any act of apportionment, in default of such an act, art 824, M. C., would apply until such act was made. 6. The inspector of roads himself did the work which the defendant should have done; he rendered an account for it without adding the statutory 20 per cent.; and he did the work without first having made the report required to the council and without the authorization of the council. Later the plaintiff corporation paid the inspector the amount of his account without the 20 per cent.:—Held, that the corporation had a right to pay the amount of the account; in paying it, they paid the defendant's debt. (b) The corporation had an action against the defendant to recover what they had paid. (c) But they had not the right to recover the 20 per cent. from the defendant. (d) The corporation would have no right in their own behalf to the 20 per cent. except in cases falling under arts. 399, 400, and 401, M. C. *Corporation de St. Raymond* v. *Prior*, Q. R. 21 S. C. 172.

Ownership of Part not Used — *Servitude — Litigious Rights — Warranty.*]—The plaintiff, by petitory action, claimed the ownership of a strip of land, under deed of purchase in 1897. It appeared that a street in the village of Hochelaga was opened in 1874 or 1875, and the width proposed was 100 feet. In 1884 the village of Hochelaga was annexed to the city of Montreal, and the city reduced the width of the proposed street from 100 feet to 60 feet, leaving a strip 40 feet wide which was not used, as originally contemplated, for street purposes. The question was, in whom did the ownership of this strip vest. The plaintiff relied upon her title by purchase from the parties who held the title prior to the proposed widening. The defendant called in her vendors, the Banque Jacques Cartier, in warranty, and also pleaded possession for over ten years. The defendant further pleaded to the action, alleging ownership; that the strip in question had formed part of Ontario street for more than ten years; that when the width of the street was, in 1887, reduced to 60 feet, the excess, 40 feet, reverted to her as the adjoining proprietor, and that the defendant had ever since been in possession. To the action in warranty the defendants in warranty pleaded that, when they bought the property subsequently sold to the principal defendant, it was bounded in front by the proposed street, and that the subsequent action of the city in reducing the width to sixty feet could not make them liable to an action in warranty—Held, (in the principal action):—1. That when the width of the street was reduced, the possession of the forty feet deducted reverted to the parties who owned the land before the improvement was projected, viz., in this case, the plaintiff's auteurs, and that the title on which the plaintiff rested existed at the date of the sale by the bank to the defendant. 2. The special laws and usages applicable to the dedication of streets can only be resorted to where it is proved that the owner has, in fact, voluntarily and gratuitously abandoned his property to the public use. Otherwise, the principle that no servitude can be established without a title governs. 3. The plea of litigious rights cannot avail the defendant unless the price and incidental expenses of the sale, with interest on the price from the day that the buyer has paid it, be tendered with such plea (art. 1582, C. C.). 4. The defendants in warranty, having sold the land in question to the principal defendant, sous les garanties de droit, as fronting on the street, whereas, at date of the sale, a strip forty feet wide intervened, were liable for the damages thereby occasioned to the principal defendant. *Gauthier* v. *Monarque*, Q. R. 19 S. C. 93.

Plan.]—The plaintiff's predecessor in title bought a certain lot according to a plan (then unregistered), on which was shewn a strip 33 feet in width, running along one side of the lot. The plaintiff alleged that this strip had been dedicated, either as a public highway or a private way for the use of the owner of the lot, and claimed a declaration to that effect and an injunction. On the evidence, the Court found for the plaintiff and gave judgment accordingly. *Daly* v. *Robertson*, 1 Terr. L. R. 427.

Plan—*Crown—Obstruction — Nuisance — Injunction.*]—The defendants, claiming under the original squatter on certain Dominion lands, erected a building thereon fronting on claims of himself and his assigns, registered an old trail; the original squatter subsequently, in expectation of the Crown recognizing the claims of himself and his assigns, registered a plan of the entire land, whereon was shewn a highway approximately conforming

to the lines of the old trail, but so that the building in question projected into the highway shewn on the plan. The Crown did, afterwards grant a patent to the original squatter for the entire land, excepting the portions shewn on the plan, as reserved for the defendants and others in like position. These excepted portions as they appeared on the plan approximately conformed in size and position to the portions which the squatter had assumed to convey to the defendants and others. Patents for these excepted portions were granted by the Crown to the defendants and others, respectively:—Held, that the Crown, by issuing patents in accordance with the registered plan, had adopted it, and thereby dedicated to the public the highway as shewn thereon; that the plaintiff municipality, within which the land lay, having demanded of the defendants the removal of the building, so far as it encroached on the highway as shewn on the plan, and the defendants having refused to comply with the demand, the plaintiff municipality were entitled to a mandatory injunction to abate the nuisance:—Held, also, that the defendants were consequently not entitled to compensation as owners or occupiers under the provision of the Municipal Ordinance. *Town of Edmonton* v. *Brown*, 1 Terr. L. R. 454, 23 S. C. R. 308, 27 S. C. R. 510n.

Plan—*Opening and Laying Out—Sidewalks—User—Selling Lots—Acceptance by Public and Municipality.*]—Dedication of a road in a municipality as a public street or road is sufficiently established by the following facts: 1, registration by the proprietor of a subdivision plan, and deposit of book of reference, on which the road is indicated and described as a street or road; 2, the opening and laying out of the land by the proprietor as a street, and the placing of sidewalks thereon; 3, the free and uninterrupted use of the street by the public for more than ten years; 4, exploiting of the adjacent land by the proprietor and selling lots as bounded by a public street; 5, use of the street by the public as the only direct access to the railway station; 6, acceptance of the dedication by the public and the municipality—the uninterrupted use of the street being a sufficient acceptance. *Shorey* v. *Cook*, Q. R. 26 S. C. 203.

Plan—*Other Acts—Servitude—Violation.*]—The proprietors of certain land prepared an official subdivision plan of the property, dividing it into lots and tracing a street thereon. They registered this plan as the official plan, and sold lots described as fronting on the street indicated on the plan. They also constructed a sidewalk along the street, and permitted the public to pass freely without objection. They also petitioned the municipal council to annex the property in accordance with the plan, which petition was granted:—Held, that there was a valid dedication of the property as a public street. 2. In any case, the acts above mentioned constituted at least a servitude of right of way over and through the property, in favour of the purchasers of lots described as fronting on such street, and the erection of platforms thereon was an illegal obstruction, and a violation of the servitude. *Geoffrion* v. *Montreal Park and Island R. W. Co.*, Q. R. 20 S. C. 559.

Private Person—*Necessity for Writing—Plan—Registration—Priorities—Rights of Creditors.*] — The indication of a proposed street upon the official homologated plan of a city is not equivalent to the writing required by art. 551, C. C., for the creation of a servitude par destination du père de famille; such dedication must be by writing and not otherwise. 2. The homologation of such plan does not give a title to the property; such title can be acquired only by expropriation, compulsory or voluntary. 3. A servitude created par destination du père de famille is effective as against third persons only by registration indicating the lands subject to the servitude, in conformity with art. 2168, C. C., and is not valid as against claims previously registered. 4. In this case the claim of the petitioner was already registered at the time of the creation of the pretended servitude, and the city of Montreal not having carried out its project for the extension of Hutchinson street, the petitioner had a right to require that the land should be sold in insolvency proceedings to satisfy his claim. *In re Thomson, Hatton, and Lafond*, Q. R. 19 S. C. 329.

Private Way — Temporary road — Railway—Deed of grant — Construction — Farm crossings—Entrance gates—Agreement to provide — Right of way. *Toronto, Hamilton, and Buffalo R. W. Co.* v. *Hanley*, 6 O. W. R. 921.

Public Highway — Private way — Removal of obstruction—Injunction—Mandatory order—Parties—Attorney-General — Consent. *Scott* v. *Barron*, 2 O. W. R. 124.

Public User—*Crown Lands — Acquiescence of Locatee and Equitable Owner—Subsequent Grant without Reservation of Way—Rights of Public—Continuous User for 70 Years.*]—In 1834 an order of the Quarter Sessions was made for the opening of a highway from the township of Percy through several lots in the township of Seymour. One of the lots had been recently occupied under a location ticket by the ancestor of the plaintiff, but the title to it was still in the Crown. The road described in the order of the Sessions was never opened, but another road, following the same general direction, was opened across this lot and the others, in 1835 or 1836, and from the time it was opened was regularly travelled and used as a highway. The title to the lot in question remained in the Crown until 1904, when the plaintiff, claiming as successor in title to the original locatee, obtained a patent for it, in which no reservation or mention of any road was made. It was quite plain that the plaintiff and his predecessors had acquiesced in the user of the road, but it was contended that there was no dedication by the Crown, and that the acts of the locatee before the patent were not binding upon him after its issue. Street, J.:—"From the time the road was laid out, between 60 and 70 years ago, it has been a recognized, well travelled public highway, connecting locally important centres, fenced off from the farm in question, improved from time to time by statute labour and public money, and treated by the plaintiff and his predecessors in the equitable title to the farm as being an undoubted public highway. In these circumstances, there is evidence of dedication by the equitable owner, acquiesced in by the Crown; and the fact that a Sessions order was made for the establishing of a highway, but never acted upon, and abandoned at

once, is no reason why the establishment and user of a road parallel to it should not be treated as evidence of a dedication." *Fraser v. Diamond*, 25 C. L. T. 218, 5 O. W. R. 436, 10 O. L. R. 90.

Trail — *Crown Land — User — Squatter's Right — Patent — Reservation — Arbitration and Award—Estoppel—Trial—Judge's Findings — Appeal — Inferences of Fact.*] — The Edmonton settlement was surveyed by the Dominion government in 1882. At that time there were numbers of persons in occupation of different parcels of the land forming the settlement. McD. was in occupation of the parcel shewn on the government plan of survey as river lot 8, and had been so for some years previously. McD.'s rights as a "squatter" under the Dominion Lands Act, R. S. C. 1886 c. 54, s. 33, were recognized by the government, and he was given a right to purchase the lot outright at $1 an acre. He exercised this right, and a patent was eventually issued to him, on the 30th September, 1889. It appeared that at the date of the survey there were two well defined trails crossing the lot, and that both had been used as public roads for a period of more than 20 years previous to the attempted closing by McD.'s successor in title of the trail in question in this action—the southerly trail of the two above mentioned. Per Scott, J.:—The fact that the patentee before the issue of patent never interfered with the user by the public of the trails crossing the lot, or that he permitted such user, would not constitute an implied dedication by him of such trails as highways. Having no legal right or title of occupation, he was not in a position to prevent such user, and it would be unreasonable to hold that a dedication should be implied as against him merely because he permitted an act to be done which he was powerless to prevent. The patent contained the following words: "Reserving thereout the public road or trail one chain in width crossing the said lot:"—Scott, J., held that this reservation was not void for uncertainty, but that the defendants, upon whom the onus of proof lay, had failed to shew that the trail in question was that one of the two trails which was intended by the reservation. In the year 1894 the defendant municipality expropriated a part of river lot 8. McD. was then the owner of the portion expropriated. The plaintiff represented McD. on the arbitration proceedings. Upon the arbitration it was material that the arbitrators in order to arrive at the amount of the compensation should ascertain whether the trail in question was a highway. His counsel contended that it was a highway. The award found that it was a highway:—Scott, J., held that the plaintiff was estopped from denying that the trail in question was a highway. On appeal, Richardson and Wetmore, JJ., held, that taking into account all the facts, and applying the principles laid down in Turner v. Walsh, 6 App. Cas. 636, a dedication of the trail in question ought to be presumed, and on this ground agreed in dismissing the appeal. Rouleau, J., dissented, and was of opinion that the appeal should be allowed. Section 569 of the Judicature Ordinance, 1893, provides, amongst other things, that the Court on appeal "shall have power to draw inferences of fact, and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require:"—Per Wetmore, J.:—The exercise of these powers is discretionary with the Court, and possibly the Court ought not to find facts not found by the trial Judge, unless they are clearly established by the evidence, if the weight of testimony is manifestly in favour of the finding. Where such is the case, however, the legislature intends that the Court shall dispose of the case without sending it back for a new trial. *Heiminck v. Town of Edmonton*, 2 Terr. L. R. 462. (Reversed, 28 S. C. R. 501.)

Trespass — Road—Survey — By-law — Notices—Presumption—Public user — Expenditure of public money — Statute labour — Acquiescence by owners—Temporary closing —Fences—Injunction — Declaration. *Township of Elmsley South v. Milier*, 6 O. W. R. 726.

User— *Plan—Deed—Estoppel—Evidence.*] — In an action for obstructing a highway there was conflicting evidence as to its location and user by the public. In support of the defendants' title a lease and an assignment thereof were produced, both of which had a plan attached exhibiting the highway as located where the plaintiffs claimed it to be. Neither the lease nor the assignment made any reference to the plans. The defendants' evidence shewed the highway as actually used in a location differing from that shewn by the plans. The jury found in favour of the defendants, both as to location and user. The trial Judge held that, as the deeds and plans must be read together, the defendants were estopped from disputing the location of the highway, and, disregarding the findings of the jury as to its location and user, ordered a verdict to be entered for the plaintiffs:—Held, that the verdict was properly so entered. *Woodstock Woollen Mills Co. v. Moore*, 34 N. B. Reps. 475. Reversed Moore v. Woodstock, &c., Co., 19 Occ. N. 301, 29 S. C. R. 627.

See CROWN.

III. INJURY FROM NON-REPAIR OF HIGHWAY.

Accumulation of Snow — Liability of township corporation. *Hogg v. Township of Brooke*, 1 O. W. R. 568, 2 O. W. R. 139.

Acts of Wrong-doers—*Relief Over.*]—A highway had been for a long time in a very bad state of repair, so covered with water at certain seasons that it was impossible for a pedestrian to pass from one side to the other without wading through mud and water. The plaintiff was injured by reason of cinders which the third parties had, about a week before the accident, spread upon the road in order to afford a passage across it:—Held, that the defendants ought to have anticipated that some such means of passing from one side to the other would be adopted by the third parties, and were liable for negligence in the performance of their statutory duty to keep the highway in repair, but the third parties were liable over to the defendants. *Holland v. Township of York*, 24 Occ. N. 290, 7 O. L. R. 533, 3 O. W. R. 287.

Approach to Railway Crossing — *Fence—Municipal Corporation.*] — By s. 611 of the Municipal Act, R. S. O. 1897 c. 223, first introduced in 1896, no liability is now

imposed on a municipal corporation by reason of want of repair of railway crossings through there being too high a grade and the omission to fence, the obligation therefor being under s. 186 of the Dominion Railway Act, 51 V. c. 29, imposed on the railway company. Where, therefore, under s. 180, the approach to a railway crossing must not be more than one foot rise or fall for every twenty feet of the horizontal length of such approach, unless a good and sufficient fence shall be made by the railway company on each side thereof, and in this case the grade line was four feet without any fences, the municipal corporation was held relieved from liability to a person who was injured. *Holden* v. *Township of Yarmouth*, 23 Occ. N. 181, 5 O. L. R. 579, 1 O. W. R. 557, 2 O. W. R. 130.

Bridge—*Absence of Railing — Negligence of Municipality — Notice of Accident — Requirements of—Mistake in Date—Damages.*]—Actions for damages sustained by plaintiff, who was crossing a bridge in the defendants' township during a thunderstorm between 9 and 10 o'clock at night on the 6th May, 1902, when a sudden flash of lightning caused his horse to swerve, and the horse's foot went into a gap in the logs of which the bridge was constructed, close to the edge of the bridge, and, there being no railing at the side of the bridge, they all fell over into the water, which was within 18 inches of the bottom of the bridge, and the plaintiff sustained injury. On the 26th May the plaintiff gave notice to the defendants of the accident as having occurred on the 7th May, instead of on the 6th May, describing the circumstances and stating it was during a thunderstorm, and also that he had rescued his horse by the aid of a certain neighbour, whom he named:—Held, that the cause of the accident as a matter of law and fact was the negligence of the defendants in not providing the bridge with a proper railing, and that the thunderstorm was one of those ordinary dangers which ought to have been thus provided against, and that the notice given to the defendants was sufficient within s.-s. 3 of s. 606 of the Municipal Act, and the defendants were liable, and the damages ($200) were not excessive. *McInnes* v. *Township of Egremont*, 23 Occ. N. 193, 5 O. L. R. 713, 2 O. W. R. 382.

Bridge—Injury to infant playing—Notice to public that bridge not safe. *Farrell* v. *Grand Trunk R. W. Co.*, 2 O. W. R. 85.

Bridge—*Threshing Engine—Traction Engine.*]—An engine used for the purpose of operating a thresher or grain separator, is not a "traction engine" within the meaning of R. S. O. 1897 c. 242; and a municipality is bound to keep its bridges in such a condition that they will bear the weight of such an engine. *Pattison* v. *Township of Wainfleet*, 22 Occ. N. 364.

Bridge across Ditch—Defective condition—Misfeasance—Nuisance—Injury to person. *Rogers* v. *Town of Petrolia*, 2 O. W. R. 709.

Cause of Injury—Finding of trial Judge—Appeal. *Anderson* v. *City of Toronto*, 4 O. W. R. 485.

Condition of Sidewalk during Construction Work. *Rellcisle* v. *Town of Hawkesbury*, 4 O. W. R. 271.

Contributory Negligence—Knowledge of non-repair—Reasonable care. *Galloway* v. *Town of Sarnia*, 3 O. W. R. 361.

County Corporation—Railway company—Relief over—Proximate cause. *Summers* v. *County of York*, 2 O. W. R. 381, 1 O. W. R. 137.

Dangerous Condition—Wall and ditch—Injury to person—Misfeasance—Want of guard—Contributory negligence—Liability of municipality. *Dickson* v. *Township of Haldimand*, 2 O. W. R. 969.

Death—Action by widow — Negligence of municipal corporation — Dangerous condition of highway — Proximate cause—Contributory negligence — Damages. *Boyle* v. *City of Guelph*, 3 O. W. R. 322, 4 O. W. R. 220.

Death Caused by — Municipal corporation—Negligence—Proximate cause — Contributory negligence. *Gaby* v. *City of Toronto*, 1 O. W. R. 440, 606, 635, 711.

Defect in Roadway — Weather conditions—Exceptional circumstances. *Cochrane* v. *City of Hamilton*, 3 O. W. R. 739.

Excavation—Want of guard—Construction of public works—Liability of contractors—Municipal corporation — Negligence—Dangerous place—Absence of warning—Contributory negligence. *Vassar* v. *Brown*, *Fina* v. *Brown*, 3 O. W. R. 6, 4 O. W. R. 490.

Failure of Municipality to Remove Snow—*Negligence — Agreement with Street Railway Company—Breach — Liability.*]—A railway company acquired a street railway in 1894, subject to the obligations of keeping in repair the streets in which the railway ran, as provided by s. 10 of 50 V. c. 33 (N.B.), and also the obligation of removing the snow and ice as provided by s. 10 of 55 V. c. 29. In 1895 58 V. c. 72 was passed, s. 6 of which authorized the company to agree with the city of St. John to pay the city an annual sum to be agreed upon as a consideration for taking care, etc., of the streets and the removal of the snow thereon, relieving the company from all liability for the same during the continuance of the agreement. Acting under the authority of this section, the company and the city entered into a contract by which the city undertook to do what, by the section, it is authorized to do:—Held, in an action for damages for injury to the plaintiff caused by the defendants' negligence in not removing the snow in a street through which the railway ran, that s. 6, and the agreement made thereunder, imposes upon the city no greater liability in respect to the care of the streets than otherwise attaches to them as a municipal corporation, and neglect to remove the snow was a mere nonfeasance for which they were not liable at the suit of a private individual; and a nonsuit should be entered. *McCrea* v. *City of St. John*, 36 N. B. Reps. 144.

Ice and Snow—Municipal Corporation—Gross negligence. *Mann* v. *City of St. Thomas*, 1 O. W. R. 480.

Injury to Pedestrian—*Sidewalk—Non-repair—Negligence—Supervision—Notice.*]—Action for damages for injuries from a fall upon a sidewalk that was out of repair. The

street in question was somewhat frequented by workmen, but it was not a very important street of Bracebridge, and those who frequented it did not consider it in a dangerous state; no complaint was made at any time, and the break in the plank where the plaintiff stumbled had not existed longer than 6 days. The plaintiff had passed over the walk in the morning and had noticed the broken plank, which caused an angular depression of not more than two inches; at this spot she fell in the evening. There was evidence of a weekly supervision of the sidewalks of the town. "Taking it then," says the Chancellor, "that this condition of disrepair existed 6 days before on the particular street, and was not actually noticed by any of the officials of the municipality, and that no notice or complaint as to its state was lodged with them, can it, as a matter of law, be inferred that the corporation had notice of the breakage, and delayed to make repairs for an unreasonable time? In Rice v. Town of Whitby, 25 A. R. 191, 200, it is laid down that where there is no actual notice, the inferring of such notice after the lapse of a reasonable time, dating from the origin of the defect, is proper and permissible; but the question as to the length of time sufficient to raise such inference depends altogether on the circumstances of the case and varies accordingly." And he held that notice was not in this case to be attributed to the town corporation. *McNiroy v. Town of Bracebridge*, 25 C. L. T. 398, 6 O. W. R. 75, 10 O. L. R. 360.

Injury to Pedestrian — Negligence — Street crossing in town—Unexpected rise — Defect. *Dodds v. Town of Aurora*, 6 O. W. R. 510.

Injury to Pedestrian — Defect in sidewalk—Liability of municipality—Negligence —Contributory negligence—Damages. *McKay v. Village of Port Dover*, 6 O. W. R. 878.

Injury to Person — Portion of roadway occupied by street railway—Liability of railway company — Misfeasance — By-law of municipality. *Van Cleaf v. Hamilton Street R. W. Co.*, 5 O. W. R. 278, 628.

Injury to Person Driving—Logs piled on highway—Notice to municipal corporation —Negligence—Contributory negligence. *Kelly v. Township of Whitchurch, Baker v. Township of Whitchurch*, 6 O. W. R. 839, 11 O. L. R. 155.

Injury to Person Driving — Snow on highway—Alternative route — Contributory negligence—Identification of person injured with driver of vehicle. *Wallace v. Ottawa and Gloucester Road Co.*, 6 O. W. R. 652.

Injury to Watchman — Negligence — Contributory negligence — Breach of duty — Knowledge of non-repair—Reasonable care—Appeal on questions of fact. *Galloway v. Town of Sarnia*, 5 O. W. R. 458.

Knowledge of Municipal Corporation — Causa causans — Findings of trial Judge—Appeal—Excessive damages. *Luton v. Township of Yarmouth*, 1 O. W. R. 40.

Knowledge of Municipal Corporation — Negligence — Damages. *McGarr v. Town of Prescott*, 4 O. L. R. 280, 1 O. W. R. 53, 439.

Liability for Death Arising from Defective Approach to Bridge — *Notice of Claim — Time Within which to be Given — Form of Notice — Signature by Solicitor.*]—C. attempted to cross a bridge that had been purchased, rebuilt, and kept in repair by the defendants, with a traction engine weighing 9 tons. The spans of the bridge at the approach broke under the weight of the moving engine, which fell to the ground, carrying with it C., who was killed. After the accident it was found that one of the joists had rotted nearly through. Within a month after the occurrence, C.'s widow obtained letters of administration to her husband's estate and served defendants with a notice of action under s. 607 of the Municipal Act, R. S. M. 1902, c. 116:—Held, following Manley v. St. Helens, 2 H. & N. 840, and Lucas v. Moore, 3 A. R. 602, that the duty to repair cast on the city required the city to keep the bridge of such strength as would make it safe for such heavy traffic as was known to the city officials to be carried on over it and to keep increasing that strength in order to make safe the increasingly heavy traffic from year to year. To carry out the intent of the statute, words must be read into the section: The words "after the happening of the alleged negligence" should be construed to read "after the happening of the injury or damages resulting from the alleged negligence." The notice given in this case was given within the time required, and was sufficient in form. The act does not say that the notice must be signed by the claimant personally or that it shall be signed at all. Signature by a solicitor for the claimant is quite sufficient. *Curle v. City of Brandon*, 24 Occ. N. 279.

Liability of Municipal Corporation — Nonfeasance — Limitation of Actions. *Minns v. Village of Omemee*, 1 O. W. R. 90, 302.

Liability of Municipal Corporation — *Proximate Cause of Injury — Precautions.*]—It is not sufficient for a plaintiff, claiming damages from a municipal corporation on account of injuries received in an accident upon a road under the control of the corporation, to prove that the road was in a bad condition; he must prove that the bad condition of the road was the direct and immediate cause of the accident, and that he could not have avoided it by taking the precautions which would be expected from a prudent man. *Beaulieu v. Corporation of St. Urbain Premier*, Q. R. 22 S. C. 208.

Municipal Corporation — Carriageway — Footway — Finding of fact — Interference on appeal. *Belling v. City of Hamilton*, 3 O. L. R. 318, 1 O. W. R. 124.

Municipal Corporation — Gas Company — Relief over. *McIntyre v. Town of Lindsay*, 4 O. L. R. 448, 1 O. W. R. 492.

Municipal Corporation — Diversion of road — Removal of Bridge — Neglect to warn — Contributory negligence. *Johnston v. Village of Point Edward*, 2 O. W. R. 687.

Municipal Corporation — *Liability for Death Arising from Defective Approach to Bridge — Misfeasance — Notice of Action — "Happening of the Alleged Negligence"*

—*Action by Administratrix — Expectation of Pecuniary Benefit.*]—Where a heavy traction engine broke through rotton timbers in the approach of a bridge on one of the highways of the defendants, on which work had been done and improvements made by them, and over which such engines had for two years previous been accustomed to pass, to the knowledge of the defendants' officials, and no attempt had been made to stop such traffic or warn those in charge of it of any danger, the bridge in question being one of the strongest across the river in many miles:—Held, that the defendants were liable for damages under s. 667 of the Municipal Act, R. S. M. 1902 c. 116, but that they could not be held to have been guilty of negligence amounting to misfeasance, so as to make them liable in damages independently of the statute, by reason of having failed to stop up a spike hole in one of the joists in the approach, in consequence of which it had rotted more than the others on account of water lodging in the hole; that the notice of action required by the Act need not be signed by the claimant personally, or shew that she was claiming in the capacity of personal representative of the deceased; that the words "happening of the alleged negligence," in the section referred to, should either be construed to read, "happening of the injury or damages resulting from the alleged negligence," or it should be held that the negligence continued to "happen" up to the time that the damages resulted from it, otherwise no notice of the action or claim could be given, in compliance with the statute, in any case where the negligence had existed for more than a month before the injury resulted from it; and that the plaintiff could recover nothing on behalf of a son of deceased, who, in the circumstances and position of his father, could have had no reasonable expectation of pecuniary benefit from the continuance of the life, nor on behalf of a nephew or an adopted child, as they do not come within the provisions of R. S. M. 1902 c. 31, or any other enabling Act. *Currie* v. *City of Brandon*, 24 Occ. N. 279, 15 Man. L. R. 122, 1 W. L. R. 76.

Municipal Corporation — Negligence — Bridge — Traction Engine. *Pattison* v. *Township of Wainfleet*, 1 O. W. R. 407.

Municipal Corporation — *Negligence — Condition of Sidewalk During Construction Work — Plaintiff's Knowledge.*]—The defendants were taking up an old board sidewalk and putting down a new one on one of their streets, and had completed the work up to a point somewhere in front of the plaintiff's shop, when the men were taken away to perform some urgent work in another part of the town, and were away part of a Saturday and the whole of the following Monday. The plaintiff, who was aware of what was being done and the uncompleted state in which the work was left, drove up in a cart with goods for his shop, and in alighting slipped off the unfinished end of the sidewalk and was injured:—Held, that the defendants, as far as they had constructed the walk, did so in a proper manner and were complying with a statute in improving the condition of the street; that they were not negligent; that the walk was not, at the time the accident happened, unsafe for persons lawfully using it or going upon it; that it was not dangerous or a trap to persons having ordinary eyesight; that there was no duty on the defendants to put up barriers to prevent persons walking across it; that, as the plaintiff knew about its condition, a printed notice was not required; that the accident was a mere misadventure; and the plaintiff could not recover. *Belleisle* v. *Town of Hawkesbury*, 25 Occ. N. 16, 8 O. L. R. 694, 4 O. W. R. 271.

Municipal Corporation — *Negligence — Injury to Traveller — Steep and Narrow Road — Want of Rail-guards — Contributory Negligence — Defect in Harness of Horses Driven by Plaintiff's Mother — Absence of Knowledge of Plaintiff — Damages.*]—Meredith, J., held that the failure of the defendants to place guard-rails on the sides of a road at a place where it was narrow—from 11 to 17 feet wide—with banks sloping down on both sides, was a breach of the defendants' statutory duty to keep the road in repair, and that they were liable to the plaintiff on account of injuries which she received in an accident which would not have occurred had there been guard-rails at the place. There was some question as to contributory negligence, and the learned Judge held that the driver of the vehicle, the plaintiff's mother, was negligent, and that if she had sued she could not have recovered, but that the mother's negligence was not to be attributed to the daughter, who was the guest of her mother, and had no knowledge of the facts constituting the mother's negligence. *Plant* v. *Townships of Normanby and Minto*, 25 C. L. T. 398, 6 O. W. R. 31, 10 O. L. R. 16.

Municipal Corporation — *Negligence — Injury to Person — Subsidence of Roadway — Indications on Surface — Faulty Construction — Omission to Inspect — Notice of Accident — Reasonable Excuse for Want of.*]—The question of what is reasonable excuse for failure to give the notice of accident required by the Municipal Act as a preliminary to an action against a municipal corporation for non-repair of a highway, upon which there was a difference of opinion among four of the Judges of the High Court, but the remarks made by Mr. Justice Osler were certainly unfavourable to the plaintiff's excuse being regarded as reasonable—"the plaintiff was not misled by any one into not giving notice, and was under no disability except that of ignorance (of the law), which can hardly be invoked as excuse for omitting to observe the requirements of the Act." The case in the Court of Appeal was decided in favour of the defendants upon the ground that there was no actionable negligence on their part. While the plaintiff was engaged in driving a watering cart along the street, the surface suddenly gave way, and the cart falling into the hole thus caused, the plaintiff was thrown out and injured. The break in the street was caused by the falling in of a sewer pipe laid 12 feet below the surface. The negligence alleged was the disregard of alleged surface indications of mischief below and negligence in the original construction of the sewer or the absence of subsequent examination and inspection, and the Court found that these allegations were negatived by the evidence. Lambert v. Corporation of Lowestoft, [1901] 1 K. B. 590, was referred to as much in point. *O'Connor* v. *City of Hamilton*, 25 C. L. T. 458, 6 O. W. R. 227, 10 O. L. R. 529.

Municipal Corporation — *Negligence — Injury to Person — Proximate Cause — Obstacle in Road — Warning — Liability.*]—Where a road is so constructed or altered as to present at one part two paths, both of which exhibit the appearance of having been used by travellers, and one of them leads to a dangerous place, it is the duty of those in charge of the road to indicate in a manner not to be mistaken, by day or by night, that the unsafe path is to be avoided, and, if it cannot otherwise be done, to put up such an obstruction as will turn the traveller from the wrong track. The barrier in this case was a mere stick of wood laid across the road, and it was held by the Divisional Court that it was insufficient for the purpose, and that the defendants were liable for injuries to the plaintiff, although there was a "concurring cause of injury," in the horse driven by the plaintiff's father becoming unmanageable because of the unhitching of a trace, owing, however, to no fault or negligence of the driver. *Thomas* v. *Township of North Norwich*, 25 C. L. T. 398, 6 O. W. R. 13, 9 O. L. R. 666.

Notice of Accident — 3 Edw. VII. c. 18, s. 130, s.-s. 5 — Failure to give notice — Reasonable excuse. *Biggart* v. *Town of Clinton*, 3 O. W. R. 625.

Notice of Accident — *Reasonable Excuse for Want of — Knowledge of Corporation — Prejudice — Appeal from Ruling of Trial Judge.*]—In an action against a municipal corporation to recover damages for injuries sustained by reason of non-repair of a highway, the ruling of the Judge at the trial as to whether there is reasonable excuse for the want or insufficiency of a "notice in writing of the accident and the cause thereof," and whether the defendants have been prejudiced in their defence, under s. 606 of the Municipal Act, 3 Edw. VII. c. 19 (O.), is subject to appeal. The defendants had actual knowledge of the accident to the plaintiff and its cause on the day it happened. It was caused by the cave-in of a well travelled public street in the centre of a city. The plaintiff's left and only remaining arm was broken and he sustained other injuries. He was in a hospital, suffering great pain, during the seven days allowed by the statute for giving notice, and notice was not given until the eleventh day after the accident:—Held, Meredith, J., dissenting, reversing the judgment of Meredith, C.J., at the trial, that there was reasonable excuse for the want of a notice in due time; and, affirming the judgment of Meredith, C.J., that the defendants had not thereby been prejudiced in their defence. Armstrong v. Canada Atlantic R. W. Co., 2 O. L. R. 219, 4 O. L. R. 509, applied and followed. *O'Connor* v. *City of Hamilton*, 24 Occ. N. 370, 8 O. L. R. 391, 3 O. W. R. 918.

Notice to Municipal Corporation — 3 Edw. VII. ch. 18, sec. 130, sub-sec. 5 — Failure to give notice — Reasonable excuse. *Biggart* v. *Town of Clinton*, 2 O. W. R. 1092.

Objects Placed on Highway—Neglect of municipality to remove — Frightening horse — Liability — Character of horse — Contributory negligence. *Hemphill* v. *Township of Haldimand*, 3 O. W. R. 605, 4 O. W. R. 163.

Open and Unguarded Trench — Injury to person — Nonfeasance — Statutory limitation of action — Time — Liability of municipal corporation. *Cook* v. *Town of Collingwood*, 2 O. W. R. 966.

Opening in Street — *Injury to Person — Municipal Corporation — Nonfeasance — Limitation of Actions — Negligence of Licensee.*]—Section 606 of the Municipal Act, R. S. O. 1897 c. 223, which requires an action against a municipal corporation for neglect to keep the streets in repair to be brought within 3 months, applies to an action against a corporation for an injury occasioned by the failure properly to guard an opening made, with the corporation's permission, in the sidewalk adjoining certain premises for access to the cellar thereof; at all events it was never intended that the granting of such permission, authorized by s. 639 of the Act, should render the corporation liable for the acts and omissions of its licensee, except subject to the requirements of s. 606. Judgment of Boyd, C., 21 Occ. N. 561, 2 O. L. R. 579, affirmed. *Minns* v. *Village of Ommemee*, 8 O. L. R. 508.

Person Crossing Street Railway Track — Negligence of street railway company — Excessive speed of car — Failure to give warning — Proximate cause — Contributory Negligence — Evidence — Improper admission of — Trial without jury — No substantial miscarriage — Damages — Reduction. *Marsh* v. *City of Hamilton*, 3 O. W. R. 525.

Proximate Cause — Repair of road — Obstacle — Warning — Liability. *Thomas* v. *Township of North Norwich*, 4 O. W. R. 517.

Proximate Cause — *Snow — Township Corporation — Notice — Pathmaster — Statute Labour.*] — The plaintiff in travelling on a highway under the control of the defendant corporation, with a team of horses and waggon, came to a place where the road was impassable on account of drifted snow for more than half a mile. At the side of the road between the ditch and a farm fence was a temporary track made by the travelling public which was safe while the frost lasted and the snow was hard. But a thaw was in progress which had commenced three days before, and when those in the waggon sought to use the track the horses broke through and the waggon was in danger of being upset. The plaintiff got out and in assisting the horses was injured by one of them:—Held, that, under the circumstances, it was the duty of the defendants to have opened up a way through the drift sufficient to enable vehicles such as the waggon in which the plaintiff was travelling to have passed in safety along this highway; that the defendants had notice that the highway was out of repair; that the non-repair was the proximate cause of the injury; and that the plaintiff was entitled to recover:—Semble, that it was the duty of the pathmaster to use statute labour to make a safe track. Judgment of a Divisional Court (2 O. W. R. 139) reversing judgment of Falconbridge, C.J. (1 O. W. R. 568), affirmed. *Hogg* v. *Township of Brooks*, 24 Occ. N. 171, 7 O. L. R. 273, 3 O. W. R. 120.

Public Highway — *What Constitutes.*] —A winter road, open to everybody, over

which a great number of persons pass and which has nothing about it to indicate that it is a private road, is a public road, and the corporation of the municipality in which it is situated are liable for injuries caused by non-repair. *Duchêne* v. *Corporation of Beauport*, Q. R. 23 S. C. 80.

Roadway—*Defect in—Findings of Trial Judge.*]—The plaintiff, in crossing at night on foot a busy street in the city, did so at a point thirty feet distant from the crossing, proceeding in a diagonal direction across the carriage way. There was a hole or depression in the asphalt pavement from one and a half to one and seven-eighths inches deep at its nearest part, and the plaintiff slipped upon the edge and was injured. In an action against the city corporation for damages for negligence, the trial Judge found that the accident was caused by the defendants' negligence in allowing the pavement to be and remain dangerously out of repair; that the plaintiff was not guilty of contributory negligence in crossing the street diagonally; that the street was not sufficiently out of repair to be dangerous to horses or vehicles; and assessed damages to the plaintiff:—Held, Falconbridge, C.J., dissenting, that the plaintiff, using the carriage-way when on foot, had no right to expect a higher degree of repair than would render the way reasonably safe for vehicles; and the last finding of the Judge put the plaintiff out of Court. Boss v. Litton, 5 C. & P. 407, explained and distinguished. Semble, per Street, J., that the defect in question was not one from which a reasonable man would have apprehended danger to any person either on foot or in a carriage, and therefore the corporation could not be guilty of negligence in regard to it. *Belling* v. *City of Hamilton*, 22 Occ. N. 110, 3 O. L. R. 318, 1 O. W. R. 124.

Roadway — *Obstruction — Injury to Traveller — Contributory Negligence.*] — Action for damages for injuries caused through the alleged negligence of a municipal corporation in permitting a mound of earth about eight inches in height to remain at the filling over a trench dug to lay a pipe across a public street. In passing over the obstruction during the night, the plaintiff's horse stumbled and fell, throwing the plaintiff from the vehicle, and causing the injury complained of:—Held, affirming the judgment in 33 N. S. Reps. 291, that there had been no negligence on the part of the defendants; that the obstruction was not serious or unusual; and that the accident occurred through want of proper care by the plaintiff in approaching, in the darkness, the dangerous place which he had previously seen in the same condition by daylight. *Messenger* v. *Town of Bridgetown*, 31 S. C. R. 379.

Roadway — *Obstruction — Telephone Pole — Negligence — Proximate Cause — Third Party — Costs.*]—A person driving on a public highway who sustains injury to his person and property by the carriage coming in contact with a telephone pole, lawfully placed there, cannot maintain an action for damages if it clearly appears that his horses were running away, and that their violent, uncontrollable speed was the proximate cause of the accident. The defendants, the city corporation, were ordered to pay the costs of the telephone company, the third parties, it being shewn that the company placed the pole where it was, lawfully and by the authority of the corporation. Decisions in 18 Occ. N. 310, 29 O. R. 518, 19 Occ. N. 382, 26 A. R. 521, reversed. *Atkinson* v. *City of Chatham*, 21 Occ. N. 135; *S. C., sub. nom. Bell Telephone Co.* v. *City of Chatham*, 31 S. C. R. 61.

Roadway — *Vis Major — Action — Security for Costs—Deposit — Preliminary Exception.*]—The failure by a plaintiff who is not a ratepayer to deposit $10 as security for costs of an action against a municipal corporation, in accordance with art. 793, M. C., must be raised by preliminary exception and not by plea to the merits. 2. In regard to the deposit required by art. 793, M. C., there is no distinction between actions for penalties and actions for damages. 3. A municipal corporation is bound to keep roads at all times in good order, and can only be relieved by proving force majeure. *Young* v. *Township of Stanstead*, Q. R. 21 S. C. 148.

Sidewalk—*Defect in—Notice of Defect —Damages—Quantum.*]—Where a sidewalk on one of the principal streets of a town, on which there was considerable traffic, had been laid down for so long a period as to become unsound, the scantling or stringers being so rotten as to be unable to hold the nails fastening the boards placed across them:—Held, that its condition was such as to impose on the corporation a constant care and supervision over it; so that when one of the boards was proved to have been missing for a week, leaving a hole some six or eight inches deep, into which a person fell and was injured, notice to the corporation of such defect in the sidewalk must be assumed, and liability for the damage occasioned by the accident imposed on them. The damages assessed at the trial, $1,500, were reduced to $900, the Court being of opinion that the latter was the more reasonable amount, having regard to the injuries sustained, a sprained ankle and an affection of the sciatic nerve, from which recovery might be expected at no distant date. *McGarr* v. *Town of Prescott*, 22 Occ. N. 281, 4 O. L. R. 280, 1 O. W. R. 54, 439.

Sidewalk — *Excavation — Municipal Corporation — Gas Company — Joint Liability — Negligence — Relief Over.*] — A municipal corporation having placed a barrier round a portion of a sidewalk in course of repair, the plaintiff, at night, passing around the barrier, fell into a trench dug by a gas company, with consent of the corporation, under an agreement for indemnity and to properly warn and protect the public. No light was put up by the corporation or company:—Held, that both were liable to the plaintiff, the corporation for non-repair and not warning the public, and the company under their special contract with the corporation and under R. S. O. 1897 c. 199, s. 26; but that the corporation should have judgment over against the company. *McIntyre* v. *Town of Lindsay*, 22 Occ. N. 292, 4 O. L. R. 448.

Sidewalk — *Excavation Insufficiently Protected—Municipal Corporation — Negligence.*]—The defendant company made an excavation across a sidewalk on a public street, in the city of Halifax, for the purpose of laying cables underground. The

excavation was protected after working hours by a number of barrels, with planks laid across the tops from one to another. Plaintiff, while passing along the sidewalk, after dark, in the absence of the watchman, fell into a portion of the excavation, from which the barricade had been removed after it had been placed in position, and was severely injured. The evidence given on the trial of an action for negligence shewed that the barrier erected was of a frail and insufficient character, and that the place was insufficiently lighted, and that if it had not been for the want of care on the part of defendant in these particulars, the accident would not have happened:—Held, that plaintiff was entitled to a verdict. *Cox* v. *Nova Scotia Telephone Co.*, 35 N. S. Reps. 148.

Sidewalk — *Snow and Ice—Liability of Municipality.*]—The obligation devolving upon a city corporation to keep the sidewalks of the city in a safe condition is temporarily suspended where the climatic conditions—such as a heavy rainfall accompanied by high temperature, followed by strong wind, sudden frost and low temperature—are such that the city could not, by the exercise of reasonable diligence, have remedied the condition of the sidewalk in question before the accident happened. 2. The fact that the sidewalk in question, which was in front of vacant lots, had not been properly attended to throughout the winter, does not affect the decision of such case, the city not being responsible for damages in consequence of negligence which does not apply to the particular circumstances when the damages were incurred. *D'Estimonville* v. *City of Montreal*, Q. R. 18 S. C. 470.

Sidewalk — Snow and ice — Municipal corporation — Gross negligence. *Stevens* v. *City of Chatham*, 1 O. W. R. 199.

Sidewalk — *Snow and Ice — Municipal Corporations—Negligence — Maintenance of Streets — "Gross Negligence."*] — About 10.30 on a morning in January a man walking along a street crossing in Toronto slipped on the ice and fell, receiving injuries from which he eventually died. His widow brought an action for damages under Lord Campbell's Act, and on the trial it was shewn that there had been a considerable fall of snow for two or three days before the accident, and on the day preceding there had been a thaw followed by a hard frost at night. There was evidence, also, that early in the morning of the day of the accident employees of the city corporation had scattered sand on the crossing, but the high wind prevailing at the time had probably blown it away:—Held, affirming the judgment of the Court of Appeal, 27 A. R. 410, 20 Occ. N. 300, that the facts in evidence were not sufficient to shew that the injury to the deceased was caused by "gross negligence" of the corporation within the meaning of R. S. O. 1897 c. 223, s. 606 (2). *Ince* v. *City of Toronto*, 21 Occ. N. 365, 31 S. C. R. 323.

Sidewalk — *Opening in — Injury to Pedestrian —Want of Guard — Municipal Corporation — Relief Over.*]—The plaintiff, whose eye-sight was defective, was walking in a city street, when, stepping towards a doorway leading into a tavern, he stubbed his toe against the step or door-sill, and, stumbling back, fell into an area in the sidewalk used by the tavern-keeper, by the permission of the municipality, for the purpose of putting beer into his cellar, and then open and being used for such purpose. A keg had been placed at each of the outside corners of the opening to warn passers-by:—Held, that the municipality were liable for negligence in leaving the opening without an adequate guard; that contributory negligence could not be imputed to the plaintiff; and that the tavern-keeper was liable over to the defendants. *Homewood* v. *City of Hamilton*, 21 Occ. N. 206, 1 O. L. R. 266.

Sidewalk — *Opening in — Injury to Pedestrian — Want of Guard — Municipal Corporation — Non-feasance — Limitation of Actions — Trap-door — 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, considered. But, supposing the corporation liable, it could only be for nonfeasance, and not for misfeasance, and the action failed because not brought within three months after the damages had been sustained. *Minns* v. *Village of Omemee*, 21 Occ. N. 561, 2 O. L. R. 579.

Sidewalk — *Voluntary Subscription — Statute Labour.*]—A township municipality was held liable in damages for an injury arising through the non-repair of a sidewalk on a highway within its limits, notwithstanding the fact that the sidewalk was built by voluntary subscription and statute labour, and although the municipality never assumed any control over it, nor was any public money or statute labour expended on it with the knowledge of the council, where the latter was aware of the existence of the sidewalk, and there had been opportunity and time to repair it. *Madill* v. *Township of Caledon*, 22 Occ. N. 175, 3 O. L. R. 66, 555, 1 O. W. R. 299.

Snow — Notice. *Hogg* v. *Township of Brooke*, 2 O. W. R. 139

Snow and Ice — Injury to pedestrian—Preponderance of evidence — Condition of sidewalk — Failure to light street of town — Nonfeasance. *Evans* v. *Town of Huntsville*, 3 O. W. R. 108.

Snow and Ice — Gross negligence. *Mahoney* v. *City of Ottawa*, 3 O. W. R. 695.

Street Railways—Negligence—Contributory negligence — Municipal corporation. *Marsh* v. *City of Hamilton*, 2 O. W. R. 480.

Township Corporation—Bridge—Notice of accident—Damages. *McInnes* v. *Township of Egremont*, 2 O. W. R. 382, 5 O. L. R. 713.

IV. Obstruction and Closing.

By-law of Township Council—Conveyance of land to private person—Action against—Inconvenience to plaintiffs—Inconvenience to public—Parties — Attorney-General. *Logan* v. *Logan*, 3 O. W. R. 558.

Conviction — *Old Trail — Hudson's Bay Company—Transfer to Territories—Crown—Expropriation — Compensation—Petition of Right.*]—When a statute authorizes the expropriation of private land, the owner is not entitled to compensation, unless the statute so provides. Even where compensation is payable by the statute, the party expropriating may (unless the statute otherwise provides) enter upon the land for the purposes expressed by the statute, without being liable to an action for damages; the owner must take such proceedings as may exist for obtaining compensation—in the case of expropriation by the Crown by petition of right in the Exchequer Court. Where land, which was part of the lands reserved to the Hudson's Bay Company, was sold in a state of nature to a purchaser, who obtained a certificate of ownership therefor under the Territories Real Property Act, and cultivated and enclosed it, thus preventing the use of an old trail, which, subsequently, was surveyed and transferred to the Lieutenant-Governor for the use of the Territories:—Held, that the purchaser was rightly convicted of obstructing a public highway. *Regina* v. *Nimmons*, 1 Terr. L. R. 415.

Dwelling House — Survey — *Lowering Grade — Compensation.*]—A survey of the town of Cornwall was confirmed by 47 V. c. 50 (O.). This Act declared the survey to lay down correctly the lines of the street as originally laid out, and provided that:—"Where any dwelling house or shop . . . had been before the 1st January, 1888, partly built upon any street as ascertained by said survey, it shall not be incumbent upon the owner or occupant of such dwelling house, shop, or building to remove the same off such street until the rebuilding of such dwelling house, shop, or building, or the repairing thereof to the extent of 50 per cent. of the then cash value thereof; but this proviso shall not apply to any fence, steps, platform, sign, porch, or projection attached to any such dwelling house or shop." The survey shewed that a certain dwelling encroached four feet upon the street, and that the verandah attached to it encroached three feet six inches further on the street. This verandah was made of wood, rested on stone pillars, had its own roof, and was firmly attached to the house:— Held, that the verandah was an integral part of the dwelling house and not a porch or projection attached to it, and was not to be considered an obstruction on the street which should be removed, within the above proviso:—Held, therefore, that the position of the dwelling house and verandah did not bar the owner from applying for compensation under the Municipal Act for damages sustained by reason of the corporation having lowered the grade of the street in front to an extent interfering with his access. *Williams* v. *Town of Cornwall*, 20 Occ. N. 457, 32 O. R. 457.

Municipal Corporation — *By-law — Power to Close Roads.*]—The roads mentioned in s.-s. 127 of s. 50 of the Municipal Clauses Act, which may be closed by by-law, are not only such roads as are wholly situate within the limits of the municipality, but include also highways or trunk roads leading into the districts beyond the boundaries. *Styles* v. *City of Victoria*, 8 B. C. R. 406.

Nonfeasance—*Municipal Corporation — Knowledge—Pleading.*]—The declaration alleged that the defendants wrongfully and negligently allowed a sidewalk in one of the streets to be obstructed by a pile of lumber, and wrongfully and negligently allowed it to remain there for an unreasonable time, without lights or other signals thereon, whereby the plaintiff was thrown down and sustained the injury complained of:—Held, that, as the declaration did not allege that the defendants had knowledge of the obstruction, it disclosed a mere nonfeasance, and was bad on demurrer. *Rolston* v. *City of St. John*, 36 N. B. Reps. 574.

Proof of Abandonment—*Obstruction—Action to Compel Removal—Owner of Abutting Land.*]—The appellant removed a fence and took possession of a strip of land which originally had been detached from his property, but which for many years had formed part of a public highway, and had served to give the respondent access to his property. The respondent brought suit asking that the appellant be ordered to cease his disturbance, and replace the fence as it was:—Held (affirming the judgment in Q. R. 20 S. C. 26, but omitting one considérant), that it was incumbent on the appellant, in order to make good his pretension that the strip in question had ceased to be a public road, to prove that by some act of duly constituted and competent authority qualified to act on behalf of the public, the road had been closed or abolished and the rights of the public thereto renounced, or, at least, such a total cessation of use by the public of the road as a public road, and such a conversion thereof to other uses, acquiesced in by competent authority, as would constitute a total abandonment by the public and such competent authority, of all rights thereto as a public road. 2. A person owning land abutting on such road, and who is deprived of the direct access which he previously had thereto, suffers special damage by the closing and obstruction of the road, and has in consequence a right of action in his own name to compel the removal of the obstruction. *Meloche* v. *Davidson*, Q. R. 11 K. B. 302.

Railways—*Fences — Municipal Corporation—By-law—Railway Act of Canada—Railway Committee of Privy Council—Injunction —Removal of Obstruction — Jurisdiction.*]—The allowance for a road made by a Crown surveyor, is a highway, within the meaning of s. 599 of the Municipal Act, and, although not an open public road, used and travelled upon by the public, it is a highway within the meaning of the Railway Act of Canada. 51 V. c. 29. 2. Although the road allowance had not been cleared and opened up for public travel and had not been used as a public

road, it is not necessary for the municipality to pass a by-law opening it before exercising jurisdiction over it; the council may direct their officers to open the road, and such direction will be sufficient. 3. The right of a railway company under s. 90 (g) of the Railway Act to construct their tracks and build their fences across the highway is subject to s. 183, which provides against any obstruction to the highway, and s. 194, which provides for fences and cattle-guards being erected and maintained; and, therefore, the defendants had no right to maintain fences which obstructed the highway or interfered with the public user or with the control over it claimed by the municipality. 4. That the Railway Committee of the Privy Council had no jurisdiction to determine the questions in dispute; s. 11 (h) and (g) of the Railway Act not applying. 5. That the Court had jurisdiction to grant the relief sought. Fenelon Falls v. Victoria R. W. Co., 29 Gr. 4, and City of Toronto v. Lorsch, 24 O. R. 227, followed. 6. That the highway, being vested in the township corporation, who desired to open and make it fit for public travel, the plaintiffs were entitled to have the defendants enjoined from obstructing it and ordered to remove the fences. *Township of Gloucester* v. *Canada Atlantic R. W. Co.*, 22 Occ. N. 63, 284, 3 O. L. R. 85, 4 O. L. R. 262, 1 O. W. R. 18, 63, 485.

Right of Municipality—*Restoration of Land and Fences.*]—The right of property of a municipal corporation in a public road is a conditional right, which exists only so long as the road is used as such; after the closing of the road, the land comprised in it is restored to the property from which it was detached, and the fences to those who made them. *Corporation of Beauharnois* v. *Patenaude*, Q. R. 25 S. C. 326.

V. Private Way.

Agreement — Specific performance—Injunction — Obstruction — Easement—Tenant for life — Uncertainty — Acquiescence — Part performance—Costs. *Farnham* v. *Bradshaw*, 3 O. W. R. 77.

Building—Mandatory injunction. *Scott* v. *Barron*, 1 O. W. R. 558.

Claim to Right of Way—Evidence—Dedication — Prescription — Trespass—Injunction — Damages — Grant — "Assignee." *Doran* v. *McLean*, 3 O. W. R. 662.

Conveyance of Right of Way—*Possession—Right of Cultivation—Deed—Rectification.*]—A conveyance of a right of way to a power and light company for a pole line and any other purpose which it may use it for, and the sole and absolute possession of the right of way, does not divest the grantor of his right to cultivate the right of way in such a manner as will not interfere with the company's poles or pole line. A claim for rectification of the conveyance was dismissed. *Tarry* v. *West Kootenay Power and Light Co.*, 11 B. C. R. 229, 1 W. L. R. 186.

Easement — Implied grant — Intention. *Styles* v. *Towers*, 1 O. W. R. 523.

Easement—*Prescription — Railway—Station Grounds — Implied Grant — Powers of Company — Benefit — Superfluous Lands — Necessity.*]—The defendant claimed a right of way through the plaintiffs' station grounds at M. by virtue of open, continuous, and uninterrupted user for more than 30 years:—Held, that the right must rest upon the presumption of a grant, and if an actual grant would have been illegal and void, a grant implied from 20 years' user could not be valid. The user on which the defendant relied began in 1872. At that time the Northern Railway Company of Canada, through whom the plaintiffs derived title, had no power to make a sale or grant of any of their property otherwise than for the benefit and account of the railway. 12 V. c. 196 (C.) In 1868 the Northern Railway was declared to be a work for the general advantage of Canada, but none of the general Railway Acts passed by the Dominion Parliament was made applicable to it until the passing of the Railway Act, 1888, ss. 3 and 5; and by s. 90 (d) the power of a railway company to sell and dispose of lands and other property was limited to so much thereof as was not necessary for the purposes of the railway. The land in question was acquired for use by the company as a railway station, and the area was within the quantity which they were authorized to acquire for the purpose:—Held, that neither at the time when the user on which the defendant relied began, nor since, was there power in the railway company to make a grant of such a right; it was not for the benefit of the railway; neither was it of lands not required for its purposes; and the defendant had, therefore, failed to establish his right. Between the lot owned by the defendant and the station grounds there was a strip of land laid out as a street which he was occupying as part of his premises:—Held, that, even assuming that he had acquired title to the strip by possession, that did not carry with it any right to a way, of necessity or otherwise, over the plaintiffs' lands in order to give him an outlet. Judgment of Boyd, C., 1 O. W. R. 695, reversed: Osler, J.A., dissenting. *Grand Trunk R. W. Co.* v. *Vallieau*, 24 Occ. N. 207, 7 O. L. R. 364, 3 O. W. R. 98.

Easement — *Way of Necessity — Parol Grant—Prescription—Constructive Notice.*]—The defendant asserted a right to cross the plaintiff's land in going from his farm to the travelled road. The plaintiff's predecessor in title, as part of an agreement for an exchange of lands with the defendant, had promised verbally to allow the latter to cross the parcel in question, and the defendant had exercised the right for four or five years. After that, the user ceased for six or seven years and until about 1886, when the defendant began to use the trail for heavy loads, but in 1892 the defendant himself built a fence, without any gate, across the trail. There was no evidence to shew that the plaintiff had any notice of the verbal agreement when he bought:—Held, that the intermittent use of a convenient old trail was not sufficient to affect the plaintiff with constructive notice of the alleged agreement. 2. That the defendant was not entitled to use the trail as a way of necessity, although there were natural obstacles to his reaching the highway by any other road. 3. That there was no such continuous enjoyment of the way as is necessary to establish an easement by prescription under 2 & 3 Wm. IV. c. 71, s. 2. Carr v. Foster, 3 Q. B. 581, and Hollins v. Verney, 13 Q. B.

D. 308, followed. 4. That the evidence was not sufficient to establish a definite agreement for a perpetual right of way or to warrant the interference of a Court of equity by way of specific performance, as the agreement was made when the country was sparsely settled and the road allowances were not expected to be speedily made passable, and the passage across the intervening land not owned by either party might have been shut off at any time. *Huddleston* v. *Love*, 21 Occ. N. 447, 13 Man. L. R. 432.

Grant of Right — Exception — Reservation—Evidence — Onus — Prescription. *Reid* v. *Goodwin*, 6 O. W. R. 944.

Passage-way between Houses — Easement — Prescription — Leave and license — Fences — Boundary — Injunction — Costs. *Stewart* v. *Rogers*, 6 O. W. R. 195.

Right of Way—Evidence—Dedication—Way of necessity—Trespass — Injunction — Damages. *Doran* v. *McLean*, 2 O. W. R. 788.

Right of Way — Easement—User—Statute of Limitations—Declaratory judgment—Injunction. *Bartle* v. *Pearce*, 4 O. W. R. 444.

Right of Way—*Severed Farm—User — Right to Place Gates at Termini—Deed.*]—The plaintiff, being the owner of a part of a farm which was subject to a right of way connecting two other portions of the farm, reserved by a former owner of the whole farm, for the use and benefit of himself, his heirs and assigns, as a lane or roadway 33 feet wide across so long as needed or required in passing to and from the other lands now owned by (the grantor), brought his action for a declaration of his right to place gates at the termini of the right of way; — Held, that he was so entitled; Osler and Maclennan, JJ.A., dissenting. Judgment of Falconbridge, C.J., 2 O. W. R. 258, reversed. *Siple* v. *Blow*, 24 Occ. N. 392, 8 O. L. R. 547, 3 O. O. W. R. 855.

Right of Way Appurtenant to Land — *Prescription — Enjoyment for 50 Years — Interruptions—Life Estate—Pleading.*] — In an action by the plaintiff for trespass to land, of which the plaintiff was the admitted owner, the defendant justified under an alleged right of way appurtenant to land owned by his father, J. W., which J. W. and the defendant were farming jointly at the time the alleged trespasses were committed. The evidence shewed that J. W. became the owner of and went into possession of his land in 1855, at which time A., the plaintiff's predecessor in title, was owner of and in possession of the servient tenement. That in April, 1856, J. W., with the knowledge and assent of A., made use of the way claimed, being informed by A. that he had the right to do so, and that the way had been given by the previous owner, P. A., for the benefit of the lots owned by J. W. That there had been a user, at various times in each year, as required, from 1856 down to 1890, the time of action brought, without any interference by plaintiff or others, until 1896, when, and in 1897, 1898, and 1899, the plaintiff obstructed the way, and sought to prevent the defendant from using it. That the obstructions placed by the plaintiff were, in each instance, removed, or protested against, by the defendant. Evidence was given on the part of the plaintiff to shew that a gate had been maintained across the way, and that the user was permissive, but the trial Judge found that the gate was maintained with the defendant's permission, and that its purpose was to avoid the expense of fencing, and to prevent cattle straying at certain seasons of the year. As to the character of the way, the evidence shewed that it was a well defined road, with deep wheel tracks over its entire length, except for a few feet close to the gate, where the ground was hard and stony. Also, that the road had been in the same condition throughout the whole period during which it had been used; —Held, that the defendant was entitled to the way claimed: — Held, also, (following Symons v. Leaker, 15 Q. B. D. 629), that the period from 1871 to 1895, during which a life estate was outstanding in the plaintiff's mother, was not to be excluded in computing the period of forty years referred to in R. S. N. S. 1900 c. 167, s. 36, although it should be excluded in computing the shorter period of twenty years. Semble, that the tenancy for life, being a matter in respect to which the defendant would not ordinarily have knowledge, and the plaintiff would, should have been replied by the latter. Held, also, that the occasional attempts at interruption by the plaintiff in 1897, 1898, and 1899, not acquiesced in by the defendant, were not sufficient to defeat the operation of the statute. *Eisenhauer* v. *Whynacht*, 35 N. S. Reps. 295.

Sufferance—*Floatable River — Improvements — Riparian Proprietors — Damages — Malice—Threat.*]—A way of sufferance is not a public road, and the owner may forbid the use of it to any one he pleases. 2. A floatable river is part of the public domain, and the riparian proprietors cannot hinder the doing of work thereon for the purpose of facilitating the floating of logs. 3. The exercise of a right within permitted limits cannot serve as a basis of an action for damages; and the forbidding of a certain thing, accompanied by a threat of instituting proceedings, in case it is done, in order to cause one's right to be recognized, implies no malice which can afford ground for an action for damages. *Pierce* v. *McConville*, Q. R. 12 K. B. 163.

VI. Other Cases.

Accumulation of Ice — Negligence of owner of building—Climatic changes—Injury to pedestrian — Liability. *Malsolm* v. *Brantford Street R. W. Co.*, 4 O. W. R. 249.

Ornamental Trees — *Destruction of, by Street Railway Company under Statute — Rights of Owners—Injunction—Construction of Statutes.*]—The plaintiffs were owners of land, and as such claimed ownership by virtue of s. 688 of the Municipal Act, Manitoba, of all shade trees, shrubs, and saplings growing on the road opposite to their lands; the defendants cut down and destroyed a number of the trees, and, as the plaintiffs asserted, intended to cut down the remainder. The plaintiffs claimed an injunction and damages. The defendants were incorporated by an Act of the Manitoba Legislature, 1 & 2 Edw. VII. c. 71, and authorized to construct an electric railway along such parts of the highways in

the municipality of Assiniboia as might be required, provided the permission of the municipality was first obtained. An agreement was entered into between the company and the municipality authorizing the company to proceed with the construction. A plan of the roadbed, including the portion opposite the plaintiffs' land, was approved by the council: —Held, that the plaintiffs had such an interest in the trees in question and in the eight feet of the highway adjoining their land, as would entitle them to maintain an action to prevent destruction of the trees and encroachment upon the eight-foot strip by an unauthorized person. Where a statutory right has been conferred, the legislature will not be deemed to have taken away that right by a later statute, unless the plain language of the statute shews the intention so to do. It did not appear that the intention of the legislature in the present case was to put an end to the plaintiff's rights summarily, but rather to give to the railway company the right of way and power to construct; the disposal of the plaintiffs' rights forming the subject of another consideration and of other provisions contained in the Acts embodied in and forming part of the special Act. The plaintiffs' rights formed a subject of compensation which might be dealt with in the manner provided by the Manitoba Railway Act and the Manitoba Expropriation Act embodied in the Railway Act. *Bannatyne* v. *Suburban Rapid Transit Co.*, 24 Occ. N. 380, 15 Man. L. R. 7.

Removal of Sand from Street Laid Out on Plans—No dedication or acceptance as highways—Mortgage—Foreclosure—Extinguishment of mortgagors' rights—Resolution of council—By-law. *Birney* v. *Scarlett*, 3 O. W. R. 136.

Removal of Sand from Streets—Plans—Dedication—Mortgage—Foreclosure. *Birney* v. *Scarlett*, 2 O. W. R. 300.

Toll Road — *Avoiding by Private Way — Damages.*]—A person whose land abuts upon a toll road upon one side, and upon the other side upon a public road upon which no right of toll exists, may open upon his land a road communicating with the latter road, and thus avoid passing over the toll road and paying toll, and the commissioners of the road cannot claim from him, as damages, the tolls which he would have had to pay if his vehicles has passed over the toll road. *Commissioners of Roads at the Barriers of Montreal* v. *Pennis-ton*, Q. R. 23 S. C. 40.

WEIGHTS AND MEASURES ACT.

See CONTRACT—LIEN.

WIDOW.

See DOWER—SUCCESSION.

WIDOW'S BENEFIT.

See DEVOLUTION OF ESTATES ACT.

WILFUL DESTRUCTION OF FENCE.

See CRIMINAL LAW.

WILL.

I. ADMINISTRATION AND DISTRIBUTION OF ESTATES, 1698.
II. CONSTRUCTION, 1704.
III. EXECUTION, 1742.
IV. LEGACIES AND DEVISES, 1745.
V. TESTAMENTARY CAPACITY AND UNDUE INFLUENCE, 1749.
VI. WIDOW'S ELECTION, 1751.
VII. VALIDITY OF CONDITIONS, 1752.
VIII. OTHER CASES, 1753.

I. ADMINISTRATION AND DISTRIBUTION OF ESTATES.

Accumulation of Revenues.] — Where the trustees under a will, to whom the entire estate is bequeathed in trust, are directed by the testator to apply certain amounts for specified purposes until a division of the estate shall be made at a time prescribed by the will, it is their right and duty to retain and accumulate the surplus revenues of the estate although not specially instructed by the testator to do so. 2. The fact that the estate is much larger at the date of the testator's death than it was when the will was made, is an extraneous circumstance which cannot be taken into account by the Court in the interpretation of a will, so as to change its meaning from that fairly deducible from the contents of the entire instrument itself. *Ogilvie* v. *Ogilvie*, Q. R. 21 S. C. 130.

Annuity — *Ademption — Evidence.*] — A testator gave by his will to each of two daughters an annuity for life of $6,000. After making the will he gave to one daughter absolutely bonds sufficient to produce an income of a little more than $1,200 a year, and by a codicil reduced her annuity by that amount. He subsequently also gave to the other daughter absolutely bonds sufficient to produce an income of a little more than $1,200 a year, and instructed his solicitor to alter his will so as to reduce her annuity by that amount. He died suddenly, and the will was not altered:—Held, that the doctrine of ademption applied, and that, notwithstanding the different natures of the two gifts, and even without the evidence of intention, the second daughter's annuity must be treated as reduced pro tanto. Held, also, however, that the evidence of intention was admissible and was conclusive. Judgment of Ferguson, J., 1 O. L. R. 364, 21 Occ. N. 187, affirmed. *Puckett-Lawry* v. *Lamoureaux*, 22 Occ. N. 174, 3 O. L. R. 577, 1 O. W. R. 295.

Annuity—Change on land — Life tenant and remaindermen—Apportionment—Division of money in Court—Account—Sums charged against life tenant. *Reece* v. *Whitesell*, 6 O. W. R. 566.

Annuities — *Purchase of — Assets of Estate.*]—Motion under Rule 938 for directions to executors of a will as to the distribution of the estate among the residuary legatees and as to providing for the payment of annuities bequeathed by the will: — Held,

that the parties interested in the residue were entitled to have sums set apart to answer the annuities from time to time, as sufficient assets should be in the hands of the executors, or to have sums applied in the purchase of Government annuities in the same way from time to time, as should seem most expedient to the Master if the parties (including the annuitants) differed. *In re McIntyre*, 21 Occ. N. 380.

Bequest to Charity—Misnomer—Cy Près doctrine — Division among charities. *Re Graham*, 4 O. W. R. 90.

Bequest to Charity—Object "Diocesan institution"—Local or parochial institutions. *Re Gilmour*, 3 O. W. R. 541.

Bequest to Charity—*Religious Order—Refusal of Ecclesiastical Authority — Discretion of Executors — Cy Près Application — Attorney-General — Costs.*] — Judgment in Attorney-General v. Power, 35 N. S. Reps. 526, varied by declaring the direction in the will at present impracticable, and adjudging that the unapplied income of the residue should, from a date named, be applied semi-annually by the defendants to the promotion and support, in the city of Halifax or its vicinity, of such charitable institutions and religious orders in connection with the Roman Catholic Church, and in such manner and in such proportions as the executors, in their discretion, might think proper, in accordance with the terms of the will and the powers thereby conferred upon them; reserving further directions, with leave to apply to the Court below, costs of all parties out of the estate. *Power* v. *Attorney-General for Nova Scotia*, 35 N. S. Reps. 182.

Blanks in Will—*Charitable Gift—Trust for Benevolent Purposes — Uncertainty — Failure of Trust.*]—A testator by will provided for a bequest of money to the defendants, to be paid yearly or at such times as his executor should think advisable, but omitted to fill in the amount. In the same paragraph of the will it was then declared that, when "Home Missions" were considered more needy, an amount might be given to them, or to any such good and benevolent Christian objects as the executor should consider most deserving. The will then directed the executor to sell a part of the testator's real and personal estate, "and the proceeds to be placed, so as to be conveniently drawn to assist in aiding good and worthy objects:"—Held, that the gift of an unnamed amount of money to the defendants was void, and that the gift in the rest of the will was not a gift to charitable, but to benevolent, uses, and failed for uncertainty. *Brewster* v. *Foreign Mission Board of Baptist Convention of Maritime Provinces*, 21 Occ. N. 131, 2 N. B. Eq. Reps. 172.

Charitable Bequest—*Religious Order—Refusal of Ecclesiastical Authority—Application of Bequest Cy-près—Attorney-General.*]—A will contained a direction that the executors should apply a portion of the income "in the introduction and support of the Jesuit Fathers" in the city of H. The same clause of the will gave the executors a discretion, "notwithstanding anything in this clause hereinbefore expressed," to apply the income in the promotion and support in the city of H. "of such charitable institutions and religious orders in connection with the Roman Catholic church as my said executors shall think proper." The testator died in 1881. The Archbishop of H. made unsuccessful efforts from 1883 to 1889 to induce the Jesuits to establish a college in H. A few years later another religious order was introduced. In 1897 the Jesuits were willing to come to H., but the Archbishop refused his assent. This action was brought by the Attorney-General, on the relation of the Archbishop, against the executors, for a declaration and directions:—Held, that the refusal of the Archbishop to give his assent to the introduction of the Jesuits rendered that mode of applying the residue impossible. As to matters within his ecclesiastical jurisdiction, he was the sole judge. He was not precluded from taking these proceedings as relator. The executors were ordered to formulate at once a scheme for the application of the income for the benefit of some charitable or religious order. In default of their doing so, the Court would take upon itself to formulate such a scheme as would best agree with the testator's wishes as expressed in the will. *Attorney-General* v. *Power*, 22 Occ. N. 397. Affirmed on appeal by the Supreme Court of Nova Scotia. *Attorney-General* v. *Power*, 35 N. S. Reps. 526.

Devise—*Minority of Devisee—Application of Rents — Accumulation — Allowance for Maintenance.*] — By his will testator bequeathed to his grandson D. his farm, implements, etc., but by a codicil provided that, until D. attained the age of 21 years, the executors should keep, control, and manage the farm, and expend the net revenue arising therefrom in the improvement and cultivation of the land, without accounting to D. or anyone else for such revenue. D. applied, through his next friend, to have an annual allowance made to him for his support and education:—Held, that, the testator having directed the surplus revenue to be used in the improvement of the farm, that disposition could not be legally interfered with and the money diverted to another purpose. *Re Waddell, Lynch* v. *Waddell*, 35 N. S. Reps. 435.

Direction to Set Sum Apart and Pay Income to Life Tenant.] — A testator directed his executors to set apart and invest $50,000 out of his estate and pay the income semi-annually to his wife during her lifetime, with power to appoint, and in default of appointment, over. He then gave the residue equally amongst his children. The estate consisted of income producing securities to the value of $30,000, and a large amount of unproductive land: — Held, that the executors were bound to reserve sufficient productive assets for the preservation of the lands and payment of necessary expenses; and that the widow was entitled to the income of the balance from the expiration of a year from the testator's death, and to have such balance set apart towards the fund of $50,000, ultimately to be made up to that sum as the lands were sold according to the following rule:—As lands or other assets were sold the proceeds should be apportioned between capital and income by ascertaining the sum which, put out at interest at the date of the expiration of one year from the testator's death, and accumulated at compound interest with half-yearly rests, would, with the accumulations of interest, have produced, at the day of receipt, the amount actually received from the sale of the lands or other

assets; the sum so ascertained to be treated as capital and added to the sum theretofore set apart towards the $50,000, and the residue to be treated as income and paid over to the widow. In re Chesterfield's Trusts, 24 Ch. D. 643, and In re Morley, [1895] 2 Ch. 738, applied. *In re Cameron*, 21 Occ. N. 593, 2 O. L. R. 756.

Executors—Power to carry on business of testator—Sale of business—Lease of premises. *Re Brain*, 4 O. W. R. 263.

Gift of Income — *Insufficiency—Sale or Mortgage of Land.*]—A testator by his will gave to his wife the income derivable from his real and personal estate, and directed that, if this was not sufficient to supply her wants, the executors might for such purpose draw upon any of his property:—Held, that to supply such wants the executors were empowered to sell or mortgage the real estate. *Re Crawford*, 4 O. L. R. 313, 1 O. W. R. 470.

Gifts to Issue—*Lapse—Gifts to a Class—Executors—Shares in Company—Purchase by Executor.*]—Section 36 of the Wills Act, R. S. O. c. 128, which provides that gifts to issue who leave issue on the testator's death, shall not lapse, applies only to cases of strict lapse, and not to the case of a gift to a class, such as a residuary bequest "equally among my children share and share alike." A testator died possessed of shares in a company. Afterwards, upon a fresh allotment of stock being made, his executrix took up the additional shares, paying the premium out of her own money as to some of the shares, and selling her right to others:—Held, that she was entitled as against the estate to such new shares, but only to a lien thereon for the amount advanced by her to take them up. *In re Sinclair—Clark* v. *Sinclair*, 21 Occ. N. 501, 2 O. L. R. 349.

Legacy—*Acceptance—Legatee-executor.*]—The fact that a universal legatee has claimed from an insurance company moneys due by the company to the heirs of the testator, does not import acceptance of his legacy, if the legatee is also executor. *Renouf* v. *Turner*, Q. R. 24 S. C. 194. See also *Turner* v. *Renouf*, 6 Q. P. R. 175.

Legacy — *Ademption — Evidence.*] — A testator bequeathed annuities of $6,000 each to his two daughters. Subsequently having transferred to one of the daughters securities producing $1,200 a year, he, by codicil, reduced, for that expressed reason, her annuity to $4,800. A few months later he assigned securities of similar value to the plaintiff, the other daughter, and by private memorandum intimated that there was to be a corresponding deduction from her share of his estate. Evidence was adduced of his having instructed his solicitor to alter the will accordingly, but that he died almost immediately after so doing, before any alteration was made:—Held that the evidence was admissible to shew and did shew that the assignment of the securities to the plaintiff was intended to operate as an ademption pro tanto of the legacy to her, as had been provided in regard to her sister. *Tuckett-Lawry* v. *Lamoureaux*, 21 Occ. N. 187, 1 O. L. R. 364.

Legacy — *Charge on Land—Interest — Statute of Limitations — Legatee also Administrator with Will Annexed.*]—A legatee of money charged on land, whose legacy was to be paid six months after the death of the testator, was appointed administrator with the will annexed, but did not sell the land to pay herself the legacy, and held it till it could be sold advantageously at a greatly advanced price, to the benefit of all parties, some eight years after the death of the testator:—Held, that the hand to pay and the hand to receive being one and the same, the Statute of Limitations had no application, and the claim for the legacy was still a subsisting claim with interest as accessory for the period till the fund was in hand for payment. *In re Yates*, 22 Occ. N. 413, 4 O. L. R. 580, 1 O. W. R. 630.

Legacies — *Overpayment of Legatees under Judgment — Mistake — Repayment — Interest.*]—A testator by his will gave to two trustees his estate, real and personal, and directed the trustees to pay: (1) to a sister a legacy of $500, and in case of her death to her daughter, and in case of the death of the daughter to the daughter's children in equal shares; (2) to a niece a legacy of $500; (3) to the children of another niece a legacy of $500; and (4) to a charitable institution a legacy of $500; with a direction that, should there not be sufficient to pay all the legacies, there should be a proportionate abatement; and then directed that should there be any residue after payment of the legacies it should be divided and paid "to and among my legatees hereinbefore named and referred to and my said trustees or the survivor of them in even and equal shares and proportions:"—Held, that the children of the niece, who were five in number, were entitled between them to one-fifth of the residue and not to one-ninth each. Proceedings were taken in the year 1882 for the administration of the estate, and, without, as was held in the previous judgment of this Court, 27 A. R. 242, proper proceedings being taken, it was assumed that there were no children of the niece, and the amount of their legacy and their share in the residue was divided among the charitable institution, the trustees, and one of the other legatees:—Held, that the trustees and the charitable institution were bound to repay the excess which they had received; per curiam, with interest from the date of proceedings taken by the children of the niece; and per Maclennan, J.A., dissenting, with interest from the date of distribution under the report in the administration proceedings. *Uffner* v. *Lewis* (*No. 2*), *Boys' Home* v. *Lewis* (*No. 2*), 23 Occ. N. 217, 5 O. L. R. 684, 2 O. W. R. 441.

Legatee Predeceasing Testatrix — *Rights of Husband and Children.*]—A testatrix by will dated 23rd March, 1901, directed her estate to be divided into four equal shares and one share to be paid to each of her four children. One of the four children predeceased her, intestate, leaving a husband and two infant children:—Held, that by virtue of s. 36 of the Wills Act, R. S. O. 1897 c. 128, the husband took one-third of a one-fourth share in the estate of the testatrix, the two infant children taking the rest. *In re Hannah Hunt*, 23 Occ. N. 95, 5 O. L. R. 197, 2 O. W. R. 94.

Legacy — *Sickness, Provision in Case of — Executors, Discretionary Power of — Personal Representatives of Deceased Legatee—*

Creditors.]—A testatrix by her will bequeathed a sum of money to a son, with a direction that her executors should invest the same and pay to the son half the interest, and in case of his sickness to advance to him such portion of the principal money as they should think necessary; and in case of his death, after paying funeral and other necessary expenses, to divide the amount equally amongst her other surviving children; and by a residuary clause, she gave the residue of her estate to her children in equal shares:—Held, that in case of sickness a trust was created, which must be exercised by the executors, when called upon to do so, though they had a discretionary power to determine the amount necessary to be so applied, and that such sum was payable to the son's personal representatives. 2. The son having taken ill and died, the trust arose; and the circumstance that the beneficiary died before the money was actually advanced or set apart did not operate to deprive his personal representatives of the right to receive it. 3. The son's creditors had no direct claim upon the executors or the fund. *In re Evans*, 22 Occ. N. 164, 3 O. L. R. 401, 1 O. W. R. 92.

Money Paid to Compromise Action for Reconveyance of Land — Realty or personalty — Construction of will — Gift — Income or corpus. *Re McVicar*, 5 O. W. R. 479.

Mortmain Act — *British Columbia — Probate Duty.*]—Petition by trustees and executors of a will to obtain the opinion of the Court on questions arising under the will:—Held, that the statute 9 Geo. II. c. 36, relating to charitable uses, and commonly known as the Mortmain Act, is not in force in British Columbia. (2) Probate duty is in the nature of a legacy duty and is payable in the first instance out of the estate. *In re Pearse, In re Brabant, Sweetman* v. *Durien*, 24 Occ. N. 162, 10 B. C. R. 280.

Power of Appointment — Restriction to class — Validity of restriction — Valid appointment with invalid conditions annexed. *Rogerson* v. *Campbell*, 6 O. W. R. 617, 10 O. L. R. 748.

Property of Absentee — *Provisional Possession.*] — An order for provisional possession of the property of an absentee will not be granted to any person interested other than a presumptive heir. *St. Denis* v. *Masson*, 6 Q. P. R. 308.

Void Legacy — *Distribution — Residuary Legatees — Next of Kin.*]—A testator gave, subject to the payment of his debts, etc., to his widow a life estate in all his real and personal estate, and, subject to bequests to a university and a mission board, gave the proceeds of his real estate (with power of sale to the executors) to certain residuary legatees. The personal property being insufficient to pay the debts, etc., sufficient of the real estate to pay those debts, etc., and the specific legacies, was sold. The bequest to the missionary society was admittedly void under the Mortmain Act:—Held, that the amount of it fell into the residue and should go to the residuary legatees, not to the next of kin. *In re Smith's Will (Carlton C.)*, 7 O. L. R. 619, 3 O. W. R. 380.

II. Construction.

"All my Children" — *Children of Predeceased Child.*]—The testator by his will directed that after the death of his wife his estate should "be divided amongst all my children." One daughter died, leaving issue, before the execution of the will:—Held, that the daughter's children did not take directly under the will, nor by virtue of s. 36 of the Wills Act of Ontario, there having been no gift to their parent. *In re Williams*, 23 Occ. N. 156, 5 O. L. R. 345, 2 O. W. R. 47.

Alternative Disposition — *Death of Testator and Wife "at the Same Time"*]—H. by his will provided for disposal of his property in case his wife survived him, but not in case of her death first. The will also contained this provision: "In case both my wife and myself should, by accident or otherwise, be deprived of life at the same time, I request the following disposition to be made of my property." . . . H. died sixteen days after his wife, but made no change in his will:—Held, affirming the decision of the Court of Appeal, 4 O. L. R. 666, 22 Occ. N. 405, which affirmed the judgment of a Divisional Court, 2 O. L. R. 169, 21 Occ. N. 434, that H. and his wife were not deprived of life at the same time, and he therefore died intestate. *Henning* v. *Maclean*, 23 Occ. N. 180, 33 S. C. R. 305, 1 O. W. R. 657.

Ambiguity — Distribution of estate — Designation of beneficiaries — Acceleration of distribution — Perpetuity. *Re Hopkins*, 5 O. W. R. 417.

Annuities — *Creation of Fund for — Right to Resort to Corpus.*] — The testator by his will made certain specific bequests and devises, and then gave to his executors all the residue of his property, real and personal, in trust to provide means to pay the expenses of administration, to pay debts, and to pay the bequests thereinafter made, with power to the executors to sell lands, etc., "to deposit at interest, lend on security of mortgages, or invest in the Dominion funds, any balance that may be on hand at any time, to form a fund to keep up the yearly payments to my sisters . . . namely, to pay to each one of my sisters . . . $250 a year, or, if there be not so much available in any year, then to divide equally between them what may be available and make up the deficiency to them when there are funds to do it with, and to pay to any of them who may have greater need on account of ill-health or misfortune a greater sum than the others, and a greater sum than $250." The will then directed the executors, after sufficient funds had been invested to keep up the payments to the sisters, to pay certain specific sums to four named persons, or in like proportions to each of them, "if there be not enough to pay them in full," and "to pay to the children of my brother . . . whatever may remain of the estate:"—Held, that the sisters of the testator had the right to resort to the corpus of the fund provided for the payment of their annuities, if the income was sufficient. Mason v. Robinson, 8 Ch. D. 411, and Illsley v. Randall, 50 L. T. N. S. 717, followed. *In re McKenzie*, 23 Occ. N. 15, 4 O. L. R. 707, 1 O. W. R. 739, 2 O. W. R. 1076.

Annuities — Shrinkage in rate of interest — Encroachment on corpus — Remainderman — Vested estates — Right to devise. *Re Crawford*, 5 O. W. R. 12.

Annuities — Succession duty — Charge on annuity. *Re Scott*, 6 O. W. R. 332.

Appointment of Executor—*Bishop — Corporation Sole.*]—Testator by his will gave his real and personal estate to the Roman Catholic Bishop of St. John, and appointed the Roman Catholic Bishop of St. John one of his executors. The Roman Catholic Bishop of St. John is a corporation by Act of Parliament:—Held, that the bishop took as executor in his personal capacity, and that it was not sought by the will to appoint him in his corporate capacity. *In re Sweeney*, 21 Occ. N. 511.

Ascertainment of Persons Entitled to Share in Residuary Estate — "The rest of my surviving children" — Period of ascertainment — Death of testatrix — Time when fund becomes divisible. *Re McCubbin*, 6 O. W. R. 771.

Bequest — *Assigned Reason for, Ill Founded — Validity — Intention.*] — The reason assigned by the testator for a gift proving ill founded will only affect the validity of the bequest in so far as the circumstances clearly shew that the desire of the testator was that the gift should depend on the truth of the reason assigned for it. *Blouin* v. *Royer*, Q. R. 27 S. C. 81.

Bequest — *Church — Trust — Mixed Fund — Perpetuity — Abatement — Mortmain Acts.*]—A testator, who died on the 12th April, 1895, by his will made the 6th September, 1894, directed land to be sold and out of the proceeds thereof and some personalty directed $2,000 to be paid to N. W. for the use of the Reformed Presbyterian Church, such sum to be expended by N. W. in the manner best calculated by him to advance the principles of that church. N. W. assigned the whole fund to the trustees of the church:—Held, a good bequest:—Held, also, that the assignment by N. W. to the trustees of the church was a valid exercise of the discretion given him by the will. *In re Johnson, Chambers* v. *Johnson*, 23 Occ. N. 189, 5 O. L. R. 459, 1 O. W. R. 806, 2 O. W. R. 289.

Bequest — *Classes of Relatives "Most in Need"—Distribution—Representation.*] — A clause of a will, directing that the surplus of assets, if any, be distributed amongst the brothers and sisters or nephews and nieces of the testator, who are most in need, in the discretion of the trustees, is not void for uncertainty. Such distribution need not be made by representation, i.e., amongst the brothers and sisters living, and the children of those deceased at the time of the testator's death, but may be made, in the discretion of the trustees, amongst the brothers and sisters, and nephews and nieces, children of brothers and sisters, even if such brothers and sisters be also living at the time of the testator's death. Judgment in Q. R. 26 S. C. 466 reversed. *Doré* v. *Brosseau*, Q. R. 13 K. B. 538. Affirmed, 35 S. C. R. 205.

Bequest for Life to Widow — Use in specie of furniture — Income. *Valleau* v. *Valleau*, 1 O. W. R. 65.

Bequest of Bonds — *Specific or Demonstrative — Succession Duty.*]—A testator possessed both at the time of making a codicil to his will and at the time of his death of a considerable number (more than 50) of $1,000 debentures, bearing interest at four per cent., of a certain city, by the codicil devised to each of two devisees "one debenture of (the city) for the sum of $1,000, bearing interest at four per cent. per annum," and directed "that, if I should deliver over any of the said debentures in my lifetime to any of the above legatees, such delivery shall be considered and taken as a satisfaction of the legacy of the person to whom it is so delivered." He had in previous clauses bequeathed to each of five named persons one debenture of (the city) for the sum of $1,000, bearing interest at four per cent:—Held, that the legacies to the two legatees were not specific legacies; and that, even if they had been, the legatees were not entitled to receive them free of succession duty, and the executors should either deduct or collect the duty before paying them the legacies. *In re Mackey*, 23 Occ. N. 297, 6 O. L. R. 292, 2 O. W. R. 230, 689.

Bequest of Interest on Payments by Devisees — Sale in lifetime of testator of land devised — Failure of bequest. *Heffernan* v. *McNab*, 1 O. W. R. 165.

Bequest of Right to a "Home" — Limitations. *Re McMillan*, 3 O. W. R. 418.

Bequest of Personal Effects—Mortgage — Liability for debts and expenses of administration. *Re Way*, 1072; 6 O. L. R. 614.

Bequest of Personalty — "*Reversion*" — *Gift Over — Life Interest — Absolute Interest.*]—The testator by his will gave, devised, and bequeathed to his father "one-half of my ready money, securities for money . . . . and one-half of all other my real and personal estate whatsoever and wheresoever with reversion to my brother on the decease of my father," and gave, devised, and bequeathed, to his brother, his heirs and assigns forever, "the remaining one-half of all my ready money, securities for money . . . and the one-half of all other my real and personal estate whatsoever and wheresoever." At the time of the testator's death there was a sum of money on deposit to his credit in a bank:—Held, that the father was entitled for his life only to the use of one-half of the money, and that, subject to the life interest of the father, the brother took the same absolutely. In re Percy, Percy v. Percy, 24 Ch. D. 616, In re Jones, Richards v. Jones, [1898] 1 Ch. 438, and In re Walker, Lloyd v. Tweedy, [1898] 1 I. R. 5, distinguished. *Osterhout* v. *Osterhout*, 24 Occ. N. 219, 390, 7 O. L. R. 402, 8 O. L. R. 685, 2 O. W. R. 842, 3 O. W. R. 249, 4 O. W. R. 376.

Bequest of Use of Chattels for Limited Period — *Sale — Interest — Executors.*]—A part of a will was as follows: "I leave my stock and implements to my son H.; he to have the use of them for ten years, at the end of that time to replace them." The stock and implements were sold by the executors, at H.'s request, and the proceeds were paid to him:—Held, that the bequest was merely of the use of the chattels

for ten years, with the right of possession vested in H. for that period only; but the executors, with H.'s consent, having done what they should have done at the end of the period, all that he could have was the interest for ten years upon the proceeds of the sale; and therefore H. should repay the proceeds, for which the executors were bound to account. *In re McIntyre, McIntyre* v. *London and Western Trusts Co.*, 24 Occ. N. 268, 7 O. L. R. 548, 3 O. W. R. 258.

Bequest to "Aforementioned Children," Their Heirs or Assigns—Child or daughter deceased at date of will. *Re Ross*, 3 O. W. R. 154.

Bequest to Grandchildren — Devise — Request for improvement of land — Revocation — Money invested in shares. *Re Gilbert*, 2 O. W. R. 135.

Bequest to Relatives — Shares — Per capita or per stirpes — "Respective." *Re Smith*, 6 O. W. R. 45.

Bequest to Wife — Dower — Election. *Re Taylor*, 4 O. W. R. 211.

Bequest to Wife — *Limited Power of Disposal — Summary Application — Rule 938—Scope of.*]—A will was as follows: "I bequeath to my wife all that I possess with full power to dispose of part or the whole as she and the children may think wisest and best at any time:"—Held, that the widow took the absolute ownership of the real and personal estate of the testator, and that the children took no interest under the will. The question whether the widow could sell without the consent of the children was not a question which could be determined upon a summary application under Rule 938. *In re McDougall*, 25 Occ. N. 18, 8 O. L. R. 640, 4 O. W. R. 428.

Bequest to Wife — *Use During Lifetime — Power to Dispose of Moiety by Will.*]—The testator by his will gave to his wife all his real and personal property for her use during her lifetime, and directed that at her death his executors should sell the real and personal property and give one-half the proceeds to his cousin, and that his wife should make her will during her lifetime instructing his executors "who she wishes to give her half to among her relations:"—Held, that the widow was entitled to one moiety absolutely and to a life enjoyment of the other moiety. *In re Bethune*, 22 Occ. N. 229, 7 O. L. R. 417, 3 O. W. R. 286.

Bequest to Wife—Whether in lieu of dower. *Re Taylor*, 3 O. W. R. 745.

Charitable Devises and Bequests — *Designation of Beneficiaries — Perpetuities—Mortmain Acts.*]—Testator bequeathed all his property "to that Presbyterian congregation where I belong to and had my first communion, Churchtown, . . . Ireland. The presiding clergyman, committee, and elders to have full control of all after me. They shall have the power to sell or rent to the best advantage. . . . The minister and committee and ruling elders shall give me a decent funeral monument not to exceed £100 sterling, and then the widow and the orphan and neglected children to be seen after by the minister, committee, and ruling elders, having succeeding authority to remember the poor of the church at Christmas every year, and to cheer the poor and the broken-hearted with the joy of Christ's death and sufferings, together with the presents presented by the minister, committee, and ruling elders at the Christmas time every year." By a codicil he appointed two persons executors and trustees, and vested all his property in them as trustees for the purposes mentioned in the will. He died within six months of the making of the will and codicil, leaving both real and personal property:—Held, that the beneficiaries, namely, the widows and neglected children and the poor, were sufficiently well designated, and came within the meaning of s. 6 of the Mortmain and Charitable Uses Act, 2 Edw. VII. c. 2, and, the gifts being charitable, the rule against perpetuities did not apply to them. The minister, committee, and elders were the almoners named for the purpose of carrying the charitable design into effect:—Held, also, that the word "assurance" in s.-s. 6 of s. 7 of that Act refers to a deed, not to a will, and therefore leaves s. 4 of R. S. O. 1897 c. 112 untouched, and under that section a devise in favour of a charity is good, though made within six months before the testator's death. *In re Kinny*, 23 Occ. N. 332, 6 O. L. R. 459, 2 O. W. R. 881.

Charitable Gift — Condition — Gift over — Interest. *Re Innes*, 945.

Charitable Use — *Bequest to Poor House—Mortmain—Void Condition—Costs.*]—A testator directed his farm to be sold and the proceeds paid over to the Bruce County Poor House Treasurer, to be expended in luxuries for the inmates, said sale to be made at the expiration of four years from the date of the will, namely, the 21st February, 1900. The testator died a few days afterwards. The House of Refuge of the County of Bruce was generally known as the Bruce County Poor House:—Held, that the county was entitled to the proceeds of the sale under R. S. O. c. 112, the bequest being a charitable use within that Act:—Held, also, that the provision postponing the sale more than two years from the death of the testator, contrary to s. 4 of that Act, was invalid, unless the period allowed by the Act were extended by the Court or Judge. Costs as upon an originating notice under Rule 938. *In re Brown—Brown* v. *Brown*, 21 Occ. N. 32, 32 O. R. 323.

"Chattels" — *Mortgage for Purchase Money.*]—A testator, after devising "all that I possess to be disposed of as follows," made two specific devises of land, and then bequeathed to his two sisters "all my chattels and movables and all moneys on hand and moneys to be received by my notes, and in case any one of my said sisters should die before me, I will and bequeath the said chattels, moneys, and notes to" the survivor. Part of his estate consisting of a mortgage for unpaid purchase money on a sale of one of the pieces of land specifically devised, sold by him in his lifetime:—Held, that the mortgage passed as a chattel under the above bequest. *In re McMillan*, 4 O. L. R. 415, 1 O. W. R. 471.

Codicil — *Annuity Payable Out of Legacy—Revocation — Lapse of Legacy — Date of Distribution.*]—Testator by his will gave

to his trustees $600 in trust to pay an annuity from the interest or corpus thereof of $300 to his son R. during his life, and upon his death to pay to R.'s children P., S. and M., one-half, one-quarter and one-quarter of said principal, respectively. In a subsequent clause it was provided that in case of the death of R. while any or either of the said children should be under the age of 25 years, the trustees should pay to their mother while such children should be under that age an annuity of $300 from said principal, "to which such child or children will be entitled on the decease of their father," for the maintenance of such child or children respectively, while he or she should be under that age. A codicil revoked the annuity to R. Testator was survived by R. and R.'s children, all being under the age of 25 years at testator's death, but S. was now of that age: — Held, that the codicil did not revoke the gift to R.'s children; that each child on attaining the age of 25 years was entitled to be paid his or her share; and that it was not the meaning of the will that the fund should be kept intact until the youngest of the children attained that age. *Lewin* v. *Lewin*, 23 Occ. N. 267.

Codicil — Bequest of life interest with power of appointment by will — Corpus to legatee in default. *Re Hanmer*, 4 O. W. R. 474.

Codicil — *Revocation of Legacy — Statute of Mortmain — Bequest to School and Poor — Validity.*]—The testator in his will gave $2,000 to his son William McMurray, and no other person named William was mentioned in it. In the codicil to the will he said: "I am sorry, my dear William, to make this alteration. I cut you off my will and leave you $200. I leave $500 to Acton school, . . . and $300 to the three oldest and poorest people in Rosedale municipality . . . . :"—Held, 1. that the bequest of $2,000 to the son was revoked and one of $200 substituted for it. 2. That the Statute of Mortmain, 9 Geo. II. c. 36, is in force in Manitoba, and the bequest to the school district of Acton, so far as it was directed to be paid out of land or the proceeds of land, was void, but that such proportion of the amount as the pure personalty of the estate bore to the whole estate should be paid, subject to abatement pro rata with other legacies if the estate should not be sufficient to pay all. Re Staebler, 21 A. R. 266, followed. Brook v. Badley, L. R. 3 Ch. 672, and Re Watts, 29 Ch. D. 947, distinguished. 3. That the gift of $300 to the three oldest and poorest people in the municipality was valid, being sufficiently certain to be carried out. *Law* v. *Acton*, 22 Occ. N. 419, 14 Man. L. R. 246.

Condition — *Vested Estate Subject to be Divested — Application under Rule 938 — Executors — Locus Standi.*]—The testatrix devised certain land to her grandson "when he arrives at the age of twenty-five years. Should he not survive till the age of twenty-five years, I give" (the same land) "to my son Andrew, and should he die without heirs of his natural body, I give" (the same land) "to my son Robert, his heirs and assigns forever:"—Held, that the land was vested in the grandson, subject to be divested in the event of his not attaining the age of twenty-five years. Doe dem. Hunt v. Moore, 14 East 601, Phipps v. Ackers, 8 Cl. & Fin. 583, and other cases cited in Theobald on Wills, 5th ed., p. 497, referred to. Semble, that the executors, having no estate in the land given to them by the will, and none under the Devolution of Estates Act, seven years having elapsed since the death of the testatrix, had no locus standi to make an application under Rule 938 to have questions arising under the will determined. *In re Young*, 22 Occ. N. 31.

Conflicting Bequests of Personalty— Reconciling — Ejusdem Generis Rule — Residuary bequest. *Re Pink*, 4 O. L. R. 718, 1 O. W. R. 772.

Contingent Legacies — *Infants — Interest as Maintenance.*] — The testator bequeathed to his two infant sons $4,000 each contingent upon their attaining 25 years of age; the only other provision for them was a gift to each of one-tenth of the residuary estate:—Held, that interest as a means of maintenance is payable out of the general residence of an estate, upon a legacy which is merely contingent, when the legatee is an infant child of the testator, and no other maintenance is provided; and it was proper in this case that an allowance should be made for the maintenance of the infants until their majority out of the interest on sums set apart to answer the legacies; the gift of a share in the residue was not intended as a provision for maintenance. The will was to be read as directing the executors to apply the income of each legacy for the benefit of the infant during minority, to the extent required for maintenance, and this involved the reserving and investing of an amount equal to the amount of each legacy, not as the legacy, but to secure the amount of it in case it should become payable. *In re McIntyre, McIntyre* v. *London and Western Trusts Co.*, 24 Occ. N. 268, 7 O. L. R. 548, 3 O. W. R. 258.

Conversion — Mortgage — Intestacy — Residuary Legatee — Executors. *Re Moore*, 1 O. W. R. 50.

Death Without Issue — Executory Devise — Power of Sale — Executors — Representatives of. *Re Fitzsimmons*, 1 O. W. R. 220.

Devise — *Absolute Gift — Conditional Gift Over — Validity — Disposition of Corpus — Income — Executor.*]—A testator by his will bequeathed a small sum for a religious object, and proceeded: "My wife shall have the whole of my estate which remains at my decease, however with the observation that should she marry again then she shall receive only the third part, and the residue shall be equally divided between my five children." The estate consisted of realty:—Held, that the words were sufficient to create a condition; that the condition was a valid one; that there was an absolute gift of the whole residue to the widow, followed by a gift over as to two-thirds if she married again; and that the executor should retain in his hands two-thirds of the estate, paying the widow the income till her death or marriage, when it would fall to be disposed of, in the latter case under the testator's will, and in the former by her own will or otherwise in due course of law. *In re Deller*, 24 Occ. N. 22, 6 O. L. R. 711, 2 O. W. R. 1150.

Devise — Absolute interest — Gift — Intestacy. *Re Chapman*, 4 O. L. R. 130, 1 O. W. R. 434.

Devise — *After-acquired Property.*] — A testator devised "all my real estate . . . being composed of the south-east part of lot 10 . . ." Afterwards he acquired the northerly half of lot 10:—Held, that the after-acquired property passed under the devise. *In re Smith*, 10 O. L. R. 449, 6 O. W. R. 390.

Devise — *Charge — Debts and Legacies — Bequest of Rents — Estate — Proceeds of Sale — Principal and Interest—Administration Expenses — Apportionment.*]—A testator devised land to his son, and in his will directed the son to pay debts and legacies:—Held, that the effect of this was to charge the payment of both debts and legacies upon the land devised. Robson v. Jardine, 22 Gr. 420, followed. McMillan v. McMillan, 21 Gr. 594, distinguished. The testator by his will gave a house and lot to his daughter, but by a codicil purported to revoke the gift, and directed as follows: "I will that the said house and lot be held by my daughter . . . who shall receive all rents and benefits therefrom during her natural life, and at her decease that all rents shall be invested for the benefit of her heirs on their coming of age:"—Held, that by the rule in Shelley's case the daughters took an estate in fee simple in the lands. Van Grutten v. Foxwell, [1897] A. C. 658, and Verulam v. Bathurst, 13 Sim. 374, followed. With reference to another parcel of land, the codicil directed that all rents derived from it were to be divided between the testator's wife and daughter equally, and that on the death of a lifetenant the property should be sold and one-half the proceeds given to his wife or her heirs, and the other half invested, the principal for the benefit of the heirs of his daughter, and interest to go to his daughter during her life:—Held, that as to one-half of this land also the daughter took an estate in fee simple. The testator did not provide for the payment of administration expenses, though he directed that his debts and funeral expenses should be paid by his son:—Held, that the estate as a whole should defray the expenses of administration, and if there was a different disposition of the real and personal parts, there should be ratable apportionment according to the respective values of the real and personal estate. *In re Thomas*, 21 Occ. N. 594, 2 O. L. R. 660.

Devise — *Charge — Maintenance — Personal Liability — Declaration — Consent Decree — Appeal — Future Payments — Partition.*] — The testatrix bequeathed the balance of moneys remaining in the banks to her credit, after payment of certain specified charges, to M. M. and E. M., share and share alike. To her son, A., she devised her half of the homestead property charged with the comfortable maintenance of M. M. and E. M. upon such homestead during their lives:—Held, that the maintenance of M. M. and E. M. under the terms of the will was made a charge upon the property, and not upon A. personally:—Held, that a declaration made in the decree, with the consent of the plaintiff, the surviving beneficiary, restricting the liability of A. to a charge upon the land, could not be varied by the Court of Appeal:—Held, that a sum of money having been set apart which would be sufficient for the support of the plaintiff for the period of 13 years, and such maintenance being a charge upon the land, binding it as effectually as a mortgage, it was not necessary to provide for securing future payments:—Held, also, no partition having been asked for in the statement of claim, that the appeal from the decree, on the ground that partition had not been ordered, must be dismissed. *McKean* v. *McKean*, 33 N. S. Reps. 310.

Devise — Charge of debts — Mortgage — Apportionment — Valuation — Costs. *Re Foster*, 2 O. W. R. 212, 895.

Devise — Condition — "Die without lawful issue" — Lifetime of testator. *Re McMichael and Doidge*, 2 O. W. R. 689.

Devise — *Condition Subsequent — Uncertainty.*]—Devise in fee provided devisee "comes to live and reside on the land devised during the term of his natural life;" with gift over "provided devisee does not come to reside on the said land so devised to him within one year after my decease:"—Held, that the condition as to residence of the devisee was void for uncertainty; and that it was a condition subsequent, and not a condition precedent to the acquisition of the land devised, but a condition of its retention. *In re Ross*, 24 Occ. N. 231, 7 O. L. R. 493, 3 O. W. R. 405.

Devise—Condition — Survival — Heirs — Title — Vendor and purchaser. *Re Henderson*, 2 O. W. R. 14.

Devise — *Directions to Executors — Controlling Condition — Gift to Church — Refusal to Accept.*]—A testator by his will appointed executors, and directed that his body should be buried by them in a designated spot on his farm, and that the greater part of his estate should be applied to the erection, on his grave, of a monument to his memory. He further directed that his executors should donate a piece of his farm comprising the grave lot to a designated church congregation, which had a cemetery then existing, adjacent to the testator's proposed burial place. The church refused to accept the donation. The executors buried the body of the testator in the place indicated in the will, and took the necessary proceedings to have the same legally constituted as a cemetery. In actions by relatives of the testator to have the bequest declared lapsed, and to set aside the transfer of the land in question to a cemetery company:—Held, that the fact that the land in question did not form a portion of any cemetery lawfully established at the time of the testator's death, did not destroy the validity of the will, nor prevent the execution of the testator's instructions as regards his burial. 2. The principal and controlling condition and requirement of the will was that the testator's body should be buried in a certain place on his farm, and that a monument should be erected over his grave. The provision that certain land comprising the burial lot should be donated to a particular church, as a cemetery, was only a detail in the mode of executing the testator's principal bequest, and not an essential and controlling condition which must be exactly complied with, and therefore the refusal of the church to accept the land did not invalidate the bequest. *Wright* v. *Bennie*, Q. R. 13 K. B. 379.

Devise—*Construction — Lapsed Devise—Failure of Objects—Residuary Clause—Wills Act, s. 27—Rules of Construction—Avoidance of Intestacy.*]—The will of a testator who devised and bequeathed all his real and personal estate to trustees to hold for the benefit of his wife for life and after her death to hold for his daughter, and after her death to divide among her children. The will then provided that, notwithstanding the directions thereinafter contained, if the testator's son returned to Toronto within 5 years from the date of the testator's death, the trustees were to hold in trust for him from the time of his return certain specified lands (being a part of those before devised), subject to the existing life estate of the testator's wife during the term of the son's natural life, and to pay over to him the rents and profits thereof, and after his death to divide the same among his children. The son returned and entered into the receipt of the rents and profits of the lands, but died without issue. The first clause of the will, containing the general devise and bequest to trustees was expressed to include all the testator's real estate, consisting of lots named and described, "and also all other real estate and the personal estate of which I may die seised or possessed." It was held that this was a residuary clause, and that the devise to the son and his children lapsed on his death without issue and was swept up by the residuary devise. *Walsh* v. *Fleming*, 25 C. L. T. 356, 5 O. W. R. 693, 10 O. L. R. 226.

Devise—*Direction to Keep and Maintain.*]—A testator directed his two sons to keep their two sisters until they married, in a suitable manner free of expense, and that so long as the sisters, or either of them, kept house for their brothers, they or she were to have control of the poultry, eggs, butter, etc., and all moneys thence derived, for their own use and benefit. He devised his farm, on which he was residing at his death, to his sons, who were compelled to sell it, as it was heavily incumbered:—Held, that all the sons were bound to do, was to offer to support and maintain the sisters, free of expense, in a suitable manner, either on the farm devised, or in the home of either of them, but that they were not bound to allow the sisters to reside wherever the latter wished, and to pay the cost of their maintenance. *In re O'Shea*, 23 Occ. N. 113, 283, 6 O. L. R. 315, 2 O. W. R. 224, 749.

Devise—Estate—"Children"—Estate tail with executory devise over—Dower of widow of deceased devisee—Division of farm—Right to remove timber and stone—Personal right—Personal property—Absolute gift. *Re Weir*, 6 O. W. R. 58.

Devise—*Estate — Defeasible Fee—Executory Devise Over.*]—A testator dying in 1833 devised land "to his loving son Alexander, during his natural life, after the demise of his mother, and after his death, then he did bequeath the same to his heir-at-law should he have any (sic); if not, he did bequeath the same to his brother John Grant:"—Held, that the gift to Alexander gave, by the operation of the rule in Shelley's Case, a fee simple or tail to him. Heir is nomen collectivum and carries the fee. But the last clause of the devise imported a defeasible estate in Alexander, should he die and have or leave no child, and, as he left no "lawful heir," or "heir-at-law," his fee tail or simple was defeated by the executory devise in fee simple in favour of John. *Grant* v. *Squire*, 21 Occ. N. 379, 2 O. L. R. 131.

Devise—*Estate—Rule in Shelley's Case.*]—"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. *In re McCallum—Hall* v. *Trull*, 21 Occ. N. 565.

Devise—*Estate—Rule in Shelley's Case—Specific Performance.*]—Action by the vendor to compel the purchaser to specifically perform a contract for the purchase of certain lands, the title to which was obtained under the following devise: "I give and bequeath to my son Francis (the plaintiff) for the term of his natural life and at his decease to his heir, all that, etc. . . ." The defence was, that, on the proper construction of the will, the plaintiff was not entitled to the lands in fee simple, but only for the term of his natural life. The will was dated the 19th July, 1881, and the testator then had a wife, three daughters, and two sons; the devise to the other son, Gregoire, who was then the father of two children, was as follows: "I give, devise, and bequeath to my son Gregoire for the term of his natural life and at his decease to be divided between the children of my said son, share and share alike, but in the event of his leaving no issue the said property shall go to the next heir," etc.:—Held, that, as it was doubtful whether the testator so used the word "heir" as to make the rule in Shelley's case applicable, and thereby confer a fee simple, the devisee could not get specific performance of a contract for the purchase of land, his title to which depended on the will. *Garriepie* v. *Oliver*, 21 Occ. N. 424, 8 B. C. R. 89.

Devise—Estate for joint lives of devisees—Remainder to heirs of both—Period for ascertainment of heirs—Mortgage by joint tenants for life. *Haight* v. *Dangerfield*, 2 O. W. R. 120, 5 O. L. R. 274.

Devise—Estate for life—Legacy—Annuity—Abatement on deficiency of assets. *Re Laur*, 5 O. W. R. 444.

Devise—Estate in fee—Condition. *Re Rooney*, 5 O. W. R. 323.

Devise—*Estate in Fee—Divesting—Executory Devise Over—Contrary Intention—Vendor and Purchaser.*]—A testator gave his widow a life estate in land and then devised it to his son P., his heirs and assigns. After devising other land to another son, he directed that, should any of his sons die leaving no children, the property given to such son should be equally divided between all his children, and should any of the children be disposed to sell, they should give the refusal to one of the family. At the time of the testator's death (1878) P. was married and had two children, and he and they were alive at the time of this action, the widow having died in 1898, and seven children of the testator having survived him:—Held, that the estate in fee in Philip was subject to being divested by his dying "leaving no children," which might still happen, and in which event the

executory devise over would take effect. Olivant v. Wright, 1 Ch. D. 346, followed:—Held, also, that the provision in the will as to any of the children of the testator being "disposed to sell" did not shew a "contrary intention."—Held, also, that a "contrary intention" was not indicated by a devise in the same will to another son subject to the same limitation and conditions, but subject also to the payment of legacies of $2,000 at the expiration of two years from the testator's death — which appeared to be inconsistent with anything short of an absolute estate in fee. Cowan I. Allen, 26 S. C. R. 292, followed:—Held, therefore, that the plaintiff's title was not one that could be forced upon an unwilling purchaser, and a decree for specific performance should be refused. *Vanluven* v. *Allison*, 21 Occ. N. 468, 2 O. L. R. 198.

Devise—*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 surviving him 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. *Chandler* v. *Gibson*, 21 Occ. N. 358, 2 O. L. R. 442.

Devise—Estate tail—"Heirs of body"—"Heirs and assigns"—"In fee simple." *Re Brand*, 4 O. W. R. 473, 5 O. W. R. 297.

Devise—Estate tail—Vested remainder in fee over—Uncertainty—Repugnancy—Absolute bequest of personalty. *Re McDonald*, 2 O. W. R. 968, 6 O. L. R. 478.

Devise—Estate tail — Male — Restrictions on sale—Repugnancy. *Re Smith*, 4 O. W. R. 226.

Devise—Event — "Or" — "And" — Executory devise over—Proof of will—Registration—Death of witnesses. *Bawtenheimer* v. *Miller*, 2 O. W. R. 393.

Devise—Executory devise over in certain events—"Or"—"And"—Estate—Vendor and purchaser. *Re Chandler and Holmes*, 5 O. W. R. 647.

Devise — Executor—Power to mortgage. *Re Webb*, 2 O. W. R. 169, 230.

Devise—"Heirs"—Fee simple—"Or"—"And"—Condition in terrorem. *Re Bray*, 2 O. W. R. 520, 711.

Devise—Incomplete form — Sufficiency—Substituted devise over—Restraint on alienation—Void condition—Annuity in perpetuity—Vagueness—Charge on land—Sale subject to. *Re Corbit*, 5 O. W. R. 239.

Devise—Intention — Supplying words to carry out—Estate—Fee simple or tail. *Re Walton and Nichols*, 2 O. W. R. 1035.

Devise—Intestacy—Rejecting surplusage. *McDonald* v. *Gollan*, 6 O. W. R. 603.

Devise—Life estate — Estate tail — Survivorship—Disentailing deed—Condition—Use of testator's name — Conveyance to trustee—Title—Vendor and purchaser. *Re Brown and Slater*, 2 O. W. R. 101, 5 O. L. R. 386.

Devise—*Life Interest — "Premises" — Election.*]—The testator devised and bequeathed all his real and personal estate to his wife and children in the manner set out in his will, in which were the following provisions:—"To my wife, Marie Martin, in lieu of dower and at her own option, the sum of two hundred dollars yearly, or the use of the premises she now lives in and furniture therein during her natural life." "To my son Joseph Martin the south-west half of the north-west half of lot 10 . . . containing 50 acres . . also the south-west quarter of lot 10 . . fifty acres . . subject to the following conditions . . . that he will have to pay the allowance due to his mother in lieu of dower, also to pay," etc. "My said son Joseph Martin to have the whole above mentioned property at his age of majority, but is not to sell, bargain, or mortgage . . before he attains his thirty-fifth birthday." "Marie Martin to have the full and whole sole control of my property real and personal till my sons are full age of majority." The testator and his wife lived on the 100 acres devised to Joseph. After the testator's death and before the majority of Joseph, the widow leased the 100 acres, reserving the dwelling-house and outbuildings and four acres for herself:—Held, Meredith, J., dissenting, that "premises" meant the whole 100 acres, and the devise to Joseph must be read as subject to the interest of his mother for life:—Held, also, upon the evidence, that the widow had not elected to take $200 a year in lieu of "the use of the premises." *Martin* v. *Martin*, 24 Occ. N. 367, 8 O. L. R. 462, 3 O. W. R. 930.

Devise—*Life Estate—Devise in Fee—Covenant—Restriction on Alienation.*]—A testator devised to his widow for life, and then to D. for life, with the power to D. to devise in fee:—Held, that the widow and D. and the heirs of the testator, ascertained at the time of his death, could make a good title in fee simple to a purchaser, who should be assured against exercise of the power by D.'s covenant: Held, also, that subsequent words in the will, referring to "that part I have directed not to be sold," did not import a restriction on the sale, no direction not to sell being found in the will. *In re Drew and McGowan*, 21 Occ. N. 186, 1 O. L. R. 575.

Devise—Misdescription of lots—Reference to buildings on lots—Title to land—Vendor and purchaser. *Re Vair and Winters*, 5 O. W. R. 337.

Devise — Power of sale — Executors — Devisee—Trustee Act—Devolution of Estates Act—Vendor and purchaser—Parties to conveyance. *Re Ross and Davies*, 2 O. W. R. 217.

Devise—*Repugnancy.*]—The testator gave his wife an interest for life, or until she

should marry, in his dwelling-house and lot and the furniture, etc., therein, and after her death or re-marriage, whichever first happened, he gave them to his children, living when he made his will or living at his decease, or born after his decease, share and share alike, and their heirs and assigns forever:—Held, that the gift thus made to his children was the largest the law admits of and the endeavour, by subsequent clauses in his will, to take away the gift to his children, which he had bestowed by the above clause, was fruitless. The will plainly offended against the principle recognized in Holmes v. Godson, 8 DeG. M. & G. 152; Shaw v. Jones-Ford, 6 Ch. D. 1; Bowman v. Oram, 26 N. S. Reps. 318. *Corning* v. *Bent*, 23 Occ. N. 336.

Devise — *Restraint upon Alienation — Period of—Insalssisabilité.*] — Held, that the following clause of a codicil, "I do hereby will and direct and it is my express will and intention that no part of my real property which I have bequeathed to my sons William and Richard be sold or disposed nor mortgaged or hypothecated or otherwise alienated in any way or for any cause or for any reason for and during the period of fifteen years from and after my decease, and it is my express wish that the said properties shall remain in the family and not in any way be disposed of or alienated during the said period of fifteen years, and that the same shall not be liable for any debts or claims which my said sons William and Richard may in any way contract," limited to a period of fifteen years the restraint upon alienation by the devisees, but made the property inexigible during the lives of the devisees. *Banque Jacques-Cartier* v. *Tozer*, Q. R. 10 Q. B. 81.

Devise—Restraint upon alienation—Summary application under Rule 938—Scope of. *Re Martin*, 4 O. W. R. 429.

Devise—*Restrictions against Incumbering —Mortgage by Devisee—Breach of Condition —Vendor and Purchaser.*]—A will providing for the division in specified halves of a certain farm lot, between the testator's two sons, contained restrictions against the devisees selling or mortgaging their respective halves until after the expiration of twenty-five years from the testator's death, and also against incumbering it for a like period:—Held, on a petition under the Vendors and Purchasers Act, that the later restriction was void; but, following Chisholm v. London and Western Trusts Co., 17 Occ. N. 172, 28 O. R. 347, that the former restriction was good, so that the giving of a mortgage by one of the devisees on his half constituted a breach of condition for which the heir might enter and divest the devisee; and therefore the title was not such a one as a purchaser could be compelled to take. *In re Chisholm—In re Lot Three in the Eighth Concession of the Township of Mosa*, 21 Occ. N. 525.

Devise—Restriction—Validity — Res judicata—Master of Titles. *Re Phelan*, 2 O. W. R. 21.

Devise — Revocation by codicil — Specific devises—Residuary devise—Summary application. *Re Savage*, 2 O. W. R. 491.

Devise—*Sale of Land Devised—Mortgage for Purchase Money.*] — The testator bequeathed all his personal estate to his wife absolutely, and devised his land to his executors in trust for her benefit during life or widowhood, and then over. Between the date of the will and his death, the testator sold all his land, and took back a mortgage for part of the purchase money, which mortgage was an asset of his estate at his decease:—Held, that s. 25 of the Wills Act, R. S. O. c. 128, had not the effect of making the devise applicable to the interest in the land which the testator had at the time of his death by virtue of the mortgage; the mortgage was part of the personal estate and fell under the absolute bequest to the wife. *In re Dods*, 21 Occ. N. 81, 1 O. L. R. 7.

Devise—Vested estate—Death of devisee before period fixed for transfer of land by executors—Effect of will of devisee—Forfeiture — Sale of land — Charge of legacy and maintenance — Bequest of personalty—Postponement of enjoyment. *Re Powell*, 6 O. W. R. 181.

Devise — *Vested Estate, Subject to be Divested—Rents — Expenditure for Improvements.*] — Testator devised a farm to his grandson "when he arrives at twenty-one years of age, the said farm to be kept in repair by my executors, to expend at least $50 each year in improvements," with a devise over in case of death "before receiving the share," and a residuary devise to a son and daughter:—Held, that the land vested in the grandson by the will, subject to be divested should he die before attaining twenty-one, and he was entitled to the benefit of the surplus of rents over and above what should be properly expended for repairs, which was to be not less than $50 each year, but more if necessity should, in the opinion of the executors, arise. *In re Dennis*, 23 Occ. N. 50, 5 O. L. R. 46, 2 O. W. R. 15.

Devise at Majority — Vested estate subjected to be divested — Benefit of rents during minority — Summary application — Costs — Affidavits. *Re Dennis*, 5 O. L. R. 46, 2 O. W. R. 15.

Devise for Life—*Remainder to Devisee's Children—Estate Tail.*]—Land was devised to D. for life "and to her children, if any, at her death," if no children to testator's son and daughter. D. had no children when the will was made:—Held, that the devise to D. was not of an estate in tail, but on her death her children took the fee. Judgment of the Court of Appeal, 1 O. W. R. 452, affirmed. *Grant* v. *Fuller*, 23 Occ. N. 81, 33 S. C. R. 34.

Devise for Life and that of Wife or 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. *Wilson* v. *Butler*, 21 Occ. N. 564, 2 O. L. R. 576.

Devise of all Testator's Property — *Chose in Action.*]—A devise of all "my real estate and property whatsoever and of what nature and kind soever," at a place named, does not include a debt due by the devisee, who resided and carried on business at such place, to the testator. Judgment of the Court of Appeal, 4 O. L. R. 682, 22 Occ. N. 379, affirmed. *Thorne* v. *Parsons*, 23 Occ. N. 180, 33 S. C. R. 309.

Devise of Lands Subject to Mortgages—*Devisee—Charges—Exoneration.*] — Motion by executors under Rule 938 for an order declaring the construction of the will of Alexander Goulet, who died in February, 1902, leaving a will and codicil, the material parts of which were as follows:—"1. I hereby constitute and appoint my two sons Francis Xavier and Alexander Blake to be my executors of this my last will, directing my executors to pay all my just debts and funeral expenses. 2. (a). I devise and bequeath to my wife Mary the easterly half of lot number 154 Talbot Road with everything appertaining thereto during her natural life. (b) I give to my wife Mary all household goods and chattel property of all kinds that may belong to me at the time of my death. 3. I devise and bequeath to my son Francis Xavier the easterly half of lot number 154 Talbot Road, after his mother's death, the easterly half of the northerly half of lot 7 in the 14th concession of the township of Raleigh, and the south 95 acres of lot 8 in 14th concession of the township of Raleigh. 4. I devise and bequeath to my son Alexander Blake the westerly half of lot number 153 Talbot Road, on condition that he pays $1,000 to assist in paying off the mortgage. If he fails to pay the above said amount, then I devise and bequeath the said westerly half of lot 153 to my son Francis Xavier. 5. In place of land mentioned in the 4th clause of my will I devise and bequeath to my son Alexander Blake the south 95 acres of lot 8 in the 14th concession of the township of Raleigh mentioned in the 3rd clause of will, and further will him $500 and hold the lands willed to my son Francis Xavier for the said amount. 6. I devise and bequeath to my daughter Rachel Jane the westerly half of the south 80 acres of lot number 7 in the 14th concession of the township of Raleigh, in the county of Kent. 7. I devise and bequeath to my daughter Margaret Christenna the easterly half of the south 80 acres of lot 7 in the 14th concession of the township of Raleigh, in the county of Kent. 8. I devise and bequeath to my daughter Delia Eugenie the westerly half of the northerly half of lot 7 in the 14th concession of the township of Raleigh, in the county of Kent. 9. I further will that my wife Mary shall have full use and control over all my lands for 10 years after my death in order to pay off the mortgage now standing against my real estate if not paid off at the time of decease. This is a codicil to my last will and testament. 1. I will that if at the time of my decease the mortgages on my real estate are not paid off, each of my daughters shall pay to the executors of my last will and testament the sum of $150 to assist in meeting that debt, and I charge the lands willed to each for the respective amounts. 2. I will to my wife Mary all money to be derived from a policy in the Edinburgh Life Insurance Company. In all other respects I do hereby confirm my last will and testament." The testator's wife predeceased him. At the time of his death the land mentioned in the 3rd paragraph of the will was subject to a mortgage for $750, and all the other parcels mentioned in the will were subject to a mortgage for about $4,000. Alexander Blake Goulet declined to take the lot in the 4th paragraph mentioned, and elected to take the lot in the 5th paragraph mentioned, with the charge upon the lands of Francis Xavier of $500:—Held, 1, that Francis Xavier was not bound to pay the sum of $1,000 because the will did not require him to do so in the event which happened, but substituted a payment by him of $500 to be made to Alexander Blake. Held, 2, that any trust created by that clause terminated at the death of Mary Goulet. Held, 3, that he was unable to find in the language used by the testator an intention to exonerate the daughter's lands from all but $150 of the mortgage debt. The question was governed by s. 37 of the Wills Act, R. S. O. c. 128. Under that Act every devise of land which was under mortgage was treated as a devise of the equity of redemption only, and the devisee takes subject to the obligation of paying off the mortgage, or a proportion of it, if it covers lands devised to others, unless the testator has by his will or some other document signfied a contrary intention. The three daughters by the will took therefore an equity of redemption in the land devised to them, subject to the payment of a proportion of the $4,000 mortgage. The codicil directed them to pay $150 each to the executors to assist in paying the mortgage, and created a new charge upon their land for that amount. The testator had not anywhere signified an intention that the payment of this $150 should relieve them from the liability which existed under the devise in the will of paying their shares of the $4,000 mortgage debt. The $450 to be paid by them was by the terms of the codicil to be applied in reduction of both mortgages, that for $750 as well as that for $4,000. *Re Goulet*, 6 O. W. R. 161, 10 O. L. R. 197.

Devise of West Half of Lot with Limitations—Codicil substituting east half —Implication of limitations—Estate. *Re McNicol*, 6 O. W. R. 562.

Devise to Child—Pre-decease—Rights of husband—Tenancy by the curtesy. *Re Hunt*, 5 O. L. R. 197, 2 O. W. R. 94.

Devise to Widow—Condition against remarriage—Validity—Absolute gift—Gift over —Duty of executor. *Re Deller*, 2 O. W. R. 1150.

Devise to Widow—Estate during widowhood — Fee—Residuary devise. *Re Doughty and Johnson*, 2 O. W. R. 42.

Devise to Widow of Life Estate in Third of Testator's Land—Right to dower as well—Election. *Re Hurst*, 6 O. W. R. 417, 721, 11 O. L. R. 6.

Devise to Wife — *Condition—Children.*] —A testator devised his estate to his wife absolutely for herself, her heirs and assigns forever, in lieu of dower, but upon the express condition that she make a will pro-

viding for two of his children, "and if she should fail or neglect to make the will, it's my will that instead of my said estate being so devised and bequeathed to her, the same shall be equally divided, share and share alike, between my said two children, their heirs and assigns forever. All the residue of my estate not hereinbefore disposed of I give and devise and bequeath unto my said wife:" — Held, that under the above devise the widow, who had complied with the condition by making the will in favour of the two children, took an estate in fee simple in lands forming part of the said residuary estate, but that she could not revoke the will, and the judgment should so declare. *In re Turner, Turner* v. *Turner*, 22 Occ. N. 389, 4 O. L. R. 578.

Devisee—*Use of House and Allowance—Care in Institution in the Alternative—Exercise of Judgment by Executor—Reasonableness.*]—A testator by his will gave the defendant all his estate on condition that he should pay the plaintiff $50 a month, and that she should have the use of the testator's house and furniture for her life, and by a codicil provided that if "in his (the executor's) own absolute judgment he is of opinion" that it would be best for her to be cared for in some institution, he should have the right and authority to place her there (with her consent in a specially mentioned case), and that the charges for caring for her there should take the place of the use of the house and furniture and the monthly allowance. The defendant chose an institution where the plaintiff would be a paying inmate and be cared for (not the specially mentioned case), but the plaintiff refused to leave the house, and the defendant ceased paying the monthly allowance, and the plaintiff brought this action for the arrears of the allowance and for the construction of the will:—Held, that the will, executed in 1896, indicated that the condition of the plaintiff was one that needed care and oversight; that in 1901 the defendant came to the conclusion and made it known to the plaintiff that it would be for her welfare to give up housekeeping, and take the benefit left to be brought into effect by his absolute judgment; that he had the right and authority to place her in a sufficiently adequate home (other than the specially mentioned case), without her consent, and that the choice he had made was such a one, and he was entitled to possession of the house, and to cease paying the monthly allowance. *Leduc* v. *Booth*, 23 Occ. N. 46, 5 O. L. R. 68, 1 O. W. R. 800.

Devisee Dying without Living Issue—Life estate. *Re Blackwell, Blackwell* v. *Blackwell*, 3 O. W. R. 232.

Direction to Accumulate — *Contingent Interest — Acceleration — Cancellation of Legacy if Will Attacked.*] — The testatrix, who died on the 14th February, 1892, by her will devised certain moneys and lands to her executors and trustees, with directions to invest and keep invested and re-invested (compounding interest) until the 17th March, 1915, when the whole accumulated fund was to be handed over to the plaintiff, if he was then alive; but if he died at an earlier date, leaving living issue, then to his children, and if he died without leaving any living issue, then to the other children of the testatrix:—Held, that the illegal part of the will was not that deferring payment of the corpus till 1915, but that directing the undue accumulation of income for over twenty-one years; that the plaintiff's interest was merely contingent or subject to be divested if he did not live until 1915; that the Court will accelerate payment in cases which rest on the postponement of enjoyment of property absolutely bestowed on the beneficiaries, as it is against public policy to restrain a man in the use or disposition of property in which no one but himself has any interest, but that in this case there was no acceleration in the enjoyment of any interest under the will as an effect of R. S. O. 1897 c. 332, and no such absolute vested interest in the plaintiff as entitled him to stop the accumulation in order to claim a present payment; that the executors might proceed with the conversion of the lands and the combination and accumulation of the interest for twenty-one years; that for the following two years the accumulation must cease and the income be paid out to those entitled, personalty to the next of kin and realty to the heirs-at-law if the plaintiff were then alive:—Held, also, that the plaintiff's action was to obtain a construction of the will and declaration of his rights rather than seeking a modification or changing of the will, and so did not operate a forfeiture of his share within the meaning of the prohibition in the will against action adverse to the testatrix's bounty. *Harrison* v. *Harrison*, 24 Occ. N. 222, 7 O. L. R. 297, 3 O. W. R. 247.

Direction to Pay Debts and Testamentary Expenses—*Specific Legacies—Residue — Succession Duties — Exoneration or Specific Legacies.*] — It was contended that under a direction in a will to pay debts and funeral expenses, the executors were bound to pay the succession duties out of the residue, to the exoneration of the specific legatees:—Held, by the Divisional Court, approving Kennedy v. Protestant Orphans' Home, 25 O. R. 235, Manning v. Robinson, 29 O. R. 483, and Re Holland, 3 O. L. R. 406, that succession duty does not come within the description either of a debt or a part of the testamentary expenses, and that the specific legacies not being specially exonerated by the will, were not to be exonerated from their proportion of the succession duties payable upon the whole of the estate, at the expense of the residuary legatees. *Re Bolster*, 25 C. L. T. 455, 6 O. W. R. 300, 10 O. L. R. 591.

Direction to Pay Testamentary Expenses—Devise — Succession duty — Charge against devisee—Municipal taxes—Provincial government taxes—Residuary estate—Charge. *Re Watkins* (B.C.), 1 W. L. R. 457.

Direction to Sell Land — Conversion into personalty—Death of devisees—Personal representatives — "Equal moieties." *Jordan* v. *Frogley*, 5 O. W. R. 704.

Distribution of Estate — "Heirs" of deceased children of testatrix—Widows of deceased sons — Exclusion — Compromise — Approval by Court. *Re Waldie*, 6 O. W. R. 1003.

Distribution of Estate — "*Heirs*" — "*Next in Heirship*" — *Period of Ascertainment.*] — Following a gift to the testator's widow of his real and personal estate for her life, there was this clause in a will: "My whole estate (after the death of my wife) be equally divided between my brothers Luke

Gardner, Joseph Gardner, Mrs. Catharine Walkins, and my deceased sister, Mrs. Sarah A. Hutchinson's children, or their heirs. Should no heirs of any of the above be alive, that it go to the next in heirship:"—Held, that the persons entitled in the first place were all the children of Luke, Joseph, Catharine, and Sarah, living at the testator's death or born afterwards during the life of the widow, per capita, and not per stirpes. The words "children or their heirs" meant "children or their issue," and gave the share of a child dying in the lifetime of the widow to the issue of the child so dying, in substitution for, and not by descent from, the child so dying. The shares of the children entitled to share became vested at once; but if any child died in the lifetime of the widow leaving issue, the share of that child was diverted and went to such issue, and vested at once and finally in the issue, who then became the stock of descent. The words "next in heirship" meant the heirs at law to the realty and the statutory next of kin to the personalty. The heirs or next of kin are to be ascertained at the death of the person whose vested share they took. *In re Gardner*, 22 Occ. N. 119, 3 O. L. R. 343, 1 O. W. R. 157.

Distribution of Estate—Income—Corpus. *Re Butler*, 1 O. W. R. 826.

Distribution of Estate—Period for—Acceleration — Income — Accumulation—Infant. *Re Hughes*, 4 O. W. R. 462.

Dower—*Election—Annuities—Pre-decease of First Annuitant—Rights of Subsequent — Intestacy — "Balance" of Estate.*] — The testator gave annuities to his wife and only child; the latter pre-deceased him. He gave to his wife $200 a year during widowhood, and to his daughter $200 a year as long as she remained unmarried, but in case she married, only $150, the other $50 to go to the wife. At her death the $150 was to go to a charity. Until the testator's farm was sold, his wife and daughter were to have the house and lot with furniture and chattels while they remained unmarried; at the death or marriage of either it was to go to the other, but after the death or marriage of both the house and lot were to be sold and the money was to go to a charity. The annuities were to be taken out of the farm rent. Any balance of money received from rent was to go, with the interest of money on deposit, annually to two charities until the farm was sold. The executors were to have power to sell the farm in case of increased expenses or rise in property, and the amount was to be invested, and the amount of interest required was to be used in place of rent, and the balance of interest to go to the two charities until the death or marriage of the wife or daughter. After the death of both, the estate was to be divided among charities: — Held, that the widow was put to her election between the provisions of the will and her dower. 2. That because the first annuitant died in the testator's lifetime, it did not follow that those who were to take at her death took nothing; the annuity was payable to them from the testator's death, but only $150 a year. 3. There was no intestacy as to the additional $50. 4. Upon the facts, as found by the Judge, with regard to the money on deposit, there were no reasons impelling the conclusion that there was an intestacy as to the interest therein, in the face of the testator's declaration that he disposed of all his property. 5. There was no intestacy as to the corpus or any part of it. By the word "balance" the testator meant the rest or residue of the whole of his property. 6. There was no intestacy as to the furniture and chattels, after the expiration of the interest therein given to the widow; this property was included also in the "balance." *In re Newborn, Toronto General Trusts Corporation* v. *Newborn*, 22 Occ. N. 120, 1 O. W. R. 122.

"Dying without Heirs"—*Estate.*] —A testator gave and devised to his daughter all his real and personal property, subject to the payment of certain legacies and charges, and "in the event of her dying without heirs" then to the testator's brothers and sisters:—Held, that the ulterior devisees being related to the first devisee, the "heirs" of the first devisee must be construed to be "heirs of the body," and therefore that as to the realty the daughter took an estate tail, and as to the personalty an absolute estate. *In re McDonald*, 23 Occ. N. 326, 6 O. L. R. 478, 2 O. W. R. 968.

Effect of Codicil—Decree in former suit—Annuities—Setting apart whole estate to answer — Revocation of legacies—Arrears — Interest—Reference—Costs. *Dalton* v. *Williams*, 2 O. W. R. 814, 3 O. W. R. 415.

Estate for Life—*Remainder to Heirs—"Then Surviving."*]—A testator devised land to his wife "during the full term of time that she remains my widow and unmarried," and subject thereto to two sons "during the full term of time of their natural lives, and if either of my said sons should die not leaving heirs the issue of his own body, his surviving brother shall inherit his share of the said lands for the time being, and after the decease of both my said sons, the before mentioned land and premises shall be sold and the proceeds thereof of each share shall be equally divided and given unto their respective lawful heirs then surviving them, share and share alike:"—Held, that the will gave a life estate for the joint lives of the two sons, with remainder in fee to the persons answering the description of the heirs of each son at the death of the longest liver of the two sons. *Haight* v. *Dangerfield*, 23 Occ. N. 87, 5 O. L. R. 274, 1 O. W .R. 551.

Estate Tail.]—*Re McAllister*, 1 O. W. R. 230.

Executors—*Implied Power to Sell Land — Devolution of Estates Act — Vendor and Purchaser.*]—After giving the whole of her estate, real and personal, to her stepson and his wife and their three children, the testatrix proceeds, "It is my will that the personal effects shall be kept in the family, but the real estate shall be sold and equally divided, and I appoint my stepson, Harry Roberts, and his daughter, Annie Roberts, to execute this will. Teetzel, J., held that the executors had an express power of sale, not dependent upon nor affected by the Devolution of Estates Act. *Re Roberts and Brooks*, 25 C. L. T. 400, 6 O. W. R. 49, 10 O. L. R. 395.

Executors—Mortgage—Covenant for payment—Possession. *Haight* v. *Dangerfield*, 1 O. W. R. 551.

Executors—*Power to Sell Lands—Power to Exchange—Vendor and Purchaser.*] — A testator devised her real estate to be equally divided between her children when the youngest of them attained twenty-one, with a power to the executor "to sell or dispose of any or all of the above real estate, should he think it in the interest of my children to do so, and should he pay off any debt or debts now standing against such real estate, the same to be deducted from such sale or sales:" —Held, that the executor had no authority to exchange the lands of the testatrix for other lands. *In re Confederation Life Association and Clarkson*, 23 Occ. N. 325, 6 O. L. R. 606.

Executors — Power to sell — Real estate undisposed of—Intestacy—Trust. *Re Campbell and Horwood*, 1 O. W. R. 139, 396.

Executory Devise—Period of vesting—Majority—Death of life tenant—Double event. *Evans* v. *Evans*, 1 O. W. R. 69, 233.

Fund for Payment of Debts, Etc.—Specific legacies. *Re Page*, 1 O. W. R. 849.

General Gift—*Context — Real Estate — Deleted Words.*]—By one of the clauses of his will, a testator gave to his nephew his mill, tannery, houses, lands, and all his real estate, effects, and property whatsoever, and of what nature and kind soever, at a named place, chargeable with certain legacies: — Held, that the clause, when taken by itself, would include personal as well as real property, yet when read with other clauses of the will, and the whole context taken into consideration, the gift was limited to the real estate. Quære, whether in construing a will deleted words can be looked at. *Thorne* v. *Parsons*, 22 Occ. N. 379, 4 O. L. R. 682, 1 O. W. R. 608.

Gift "during Natural Life"—*Absolute Interest.*]—A testator gave $500 to A. S., but limited the disposition of it so that she got for her own use absolutely, only the interest upon it. He provided that at her death this $500 was to be given to her eldest son, E. C. S., and that he could use this sum "for his benefit during his natural life." Then the testator purported to give to his wife all that remained after the $500 was taken out, but he limited her for her own use absolutely, to the interest only, and when the capital should be no longer needed to earn interest for his wife, he gave it to certain persons named, and in all cases "for their benefit during their natural lives:"—Held, that the testator intended to dispose of all his real estate, and had carried out his intention by a payment over of the $500 after the death of A. S., and by a division of the rest after the death of his wife; and that the sum of $500 was an absolute gift to E. C. S., and upon the death of his mother he was to be entitled to it absolutely; and the testator did not die intestate as to any portion of his estate. *In re Chapman*, 22 Occ. N. 259, 4 O. L. R. 130, 1 O. W. R. 434.

Gift during Widowhood.]—A testator devised all his real and personal estate to his wife for her sole and absolute use, and then added: "The real property while the said (wife) remains my widow. But in case my wife should again marry, I request my executors to sell all my real and personal estate when my youngest child should come of age, and that they, my executors, shall divide the proceeds between my 6 younger children." The widow did not marry again and left a will devising all her real and personal estate:— Held, that the absolute devise to the wife was not cut down by the subsequent words, which were applicable only to the widow's marriage, and that the real estate passed under her will. Order of Street, J., 3 O. W. R. 146, affirmed. *In re Mumby*, 24 Occ. N. 315, 8 O. L. R. 283, 4 O. W. R. 10.

Gift for Life — *Codicil—Bequest of Life Interest with Power of Appointment by Will —Bequest of Corpus to Legatee in Default.*] —A codicil gave Louis merely a life interest in an income, with a power of appointment by will, in default of the exercise of which the testator would be intestate as to the disposition of the corpus after Louis's death. While an unlimited gift of income carried to its donee the corpus as well, no authority could be found for holding that a gift of income for life had this effect. Nor did that superadded power of appointment, which could never be exercised in his own favour, increase in any wise the interest of the donee of this power in the fund which was its subject. By clause (e) of his will the testator had devised the rest and residue of his property to Louis. The corpus of the $10,000, of which the income by the codicil was given to Louis, would not, under the scheme of the will as originally framed, have been residuary estate. By a preceding clause, (d), which the codicil revoked, Louis E. Hanmer was given the entire principal of his father's estate, except a sum set aside to produce an annuity for his mother; the testator by this codicil revoked the gift to his son of the principal of his estate; by the same instrument he expressly confirmed, inter alia, the residuary bequest to him, which, the testator being otherwise intestate as to the corpus of the $10,000 (except that he gave his son a power of appointment by will over it), therefore, carried that corpus: —Held, the testator had in fact given the corpus of the fund to his son in default of his exercising the power of appointment. The authorities seem uniform that such provisions constitute an absolute gift entitling the legatee to have the fund paid over. *Re Hanmer*, 4 O. W. R. 474, 9 O. L. R. 348.

Gift of Personal Property for Life—*Absolute Gift—Gift over Confined to Undisposed of Property—Legacy—Death of Legatee — Time of Vesting — "Before Receiving" — Devise — Estate — Rule in Shelley's Case — Restraint on Alienation—Life Tenant—Liability for Taxes — Advancement — Interest— Use of House — Survivorship — Proceeds of Sale—Distribution.*]—Motion by executors of will of Charles Tuck for a summary order determining certain questions arising as to the construction of the will and distribution of the estate of the testator, who died on 26th May, 1877. The words of the will which dealt with this property were as follows: "Also I give, devise, leave, and bequeath to my said wife the full possession and occupation of the lands and premises now owned by me for and during her natural life, together with all my household furniture, personal property, goods and chattels, money, notes, and securities for money of every kind soever, to be for her use and behoof during her natural life, in lieu of dower, which she consents to accept instead thereof, and which

possession is to be held by her so long as she shall remain my widow. And finally I do hereby will and ordain that all the personal property consisting of goods, chattels, money, or notes receivable, of what kind soever that may be in possession of my said beloved wife at her decease, and not otherwise disposed of, shall within one year after her decease be sold by my executor hereinafter named, and the proceeds or moneys arising from the same shall be equally divided among my daughters as being part of my estate:"—Held, that the widow, May Ann Tuck, took absolutely all of the personal property which she appropriated to her own use and used up during her life, and that there was a gift over of only so much of the personal property of Charles Tuck as was in the possession of the widow at the time of her death. The part of the will referring to the daughters was as follows: "And also I hereby will and ordain that at the decease of my beloved wife the said lot shall be sold for the benefit of my daughters, the legatees hereinafter named, and the moneys arising from the sale of said lot shall be equally divided among my daughters, the legatees of this my will, share and share alike. The names of my daughters, the legatees herein named and who are alive at the date hereof, are as follows; and if any one or more of the above named legatees shall be deceased before receiving her or their interest or share in or from my estate, then and in such case her or their heirs shall inherit the same, and if any one or more of the above legatees shall have become deceased and have left no legal heirs then her or their shares shall revert to the other legatees, or their heirs, and shall be equally divided among them:"—Held, that the share of Martha had become vested at the time of her death, and that share must be paid to her estate. The words "before receiving" might in this case well be interpreted as "before time to receive." The words of the will as to William Tuck were: "Also at or upon the decease of my beloved wife, I give and devise to my son William Tuck for and during his natural life, and his lawful heirs after him, subject nevertheless to the provisoes and conditions herein contained, all that certain parcel to have and to hold the same from and after the decease of my said beloved wife, during his natural life, and subject to this express condition, namely, he the said William Tuck shall have no power to sell nor any right to dispose of the above real estate or any part thereof, but shall transmit to his lawful heirs unimpaired, if he shall have any. And I further will and ordain that should my said son William Tuck fail to have any lawful heirs, then my will is that the said lands and premises thus devised shall at his decease be sold and the proceeds arising therefrom equally divided among the other legatees or their lawful heirs. And I further will and ordain that whether my said son shall have lawful heirs to inherit after him or fail therein, the above provisions made by me in his favour shall be and constitute his entire share in my estate:"—Held, that the effect of what the testator did was, by the operation of the rule in Shelley's case, to give the fee simple in the land mentioned to William Tuck. *In re Tuck*, 6 O. W. R. 150, 10 O. L. R. 309.

Gift to Child — *Condition — Marriage — Consent of Executors — Invalidity — Mixed Fund.*]—Testator died on the 1st May, 1900, leaving a will dated 14th March, 1898, in which he gave to his son out of and from the annual income and profits of the investment and rents of his real and personal estate $300 per year while unmarried, "but, if he marries to the satisfaction of and with the consent of the executors, then he is to receive the whole annual income of the estate during his life." There was no bequest over in case the son married without consent, nor any subsequent disposal of the estate affecting these assets. The son married without consent: — Held, nevertheless that he was entitled to the whole income. With regard to personalty, the Court of Chancery long ago adopted the rule of the civil and ecclesiastical law by which such a condition is void or regarded as merely in terrorem; and according to modern rules a mixed or massed fund is to be treated in the same way as personalty. Review of English authorities. *In re Hamilton*, 21 Occ. N. 126, 1 O. L. R. 10.

Gift to Children — *Substitution in Favour of Grandchildren—Distribution per Capita.*]—Where by a will property is given to the children of the testator, a charge de substitution in favour of his grandchildren in equal shares, the division should be made per capita among those named. The "substitution" opens on the death of each heriter for life as to his share in favour of all the grandchildren living at the time of the opening of the "substitution" for each share. *Rémillard* v. *Chabot*, Q. R. 26 S. C. 408.

Gift to Class — *Ascertainment.*] — A testator bequeathed the sum of $500, as to income to be applied for the support of his grandchildren, children of his son John, and as to principal to be paid to them equally as they respectively attained the age of twenty-one years:—Held, that the members of the class entitled to share were to be ascertained at the time when the eldest of the class attained the age of twenty-one years, and that those grandchildren born after the death of the testator and before that time were entitled to share. *In re Archer*, 24 Occ. N. 230, 7 O. L. R. 491, 3 O. W. R. 510.

Gift to Class — *Death of Member Before Testator — Children of Deceased Member.*]—The testator, who at the time of making his will in 1891, had four children living at Barnstable, England, devised two houses to his "children at Barnstable, England, to be divided among them in equal shares." One of the four children died after the making of the will and before the testator, leaving children:—Held, applying the principle of Re Williams, 23 Occ. N. 156, 5 O. L. R. 345, that s. 36 of the Wills Act did not apply, and that the children of the deceased child took no share. *In re Clark*, 24 Occ. N. 399, 8 O. L. R. 599, 4 O. W. R. 414.

Gift to Members of a Class — *Substitution — Ascertainment.*]—The testator directed that the residue of his estate should be divided equally among the children of his named brothers and sisters, share and share alike, "so that each nephew and niece shall receive the same amount; and in the event of any of my said nephews or nieces predeceasing me or dying before the time for distribution arrives, leaving children, . . . that the share which would have gone to

such nephew or niece, if alive, shall be distributed equally among his or her children." The will was dated the 5th May, 1902, and the testator died on the 9th February, 1903. One of the testator's sisters named in his will, and who survived him, had a daughter who died in 1886, leaving a son:—Held, that this son was not entitled to a share of the residue. Christopherson v. Naylor, 1 Mer. 320 followed. In re Potter's Trust, L. R. 8 Eq. 52, not followed. A nephew of the testator, a son of one of the named brothers, was living at the date of the will, but died before the testator, leaving a daughter, who was held entitled to a share. *In re Fleming*, 24 Occ. N. 323, 7 O. L. R. 651, 3 O. W. R. 622.

Gift to Widow — Dower — Election — Abatement of legacies — Administration order. *Re Hunter, Hunter* v. *Hunter*, 3 O. W. R. 141.

"Including" — *"Estate"* — *Policies of Insurance.*]—By a clause in his will a testator bequeathed to his wife one-half his estate, "including policies of insurance made payable to her upon my death." The testator left three policies, one for $1,000 payable to his wife, the second providing for payment to his wife of an annuity of $250 per annum, for twenty years,, and the third payable at his death to the "legal heirs." There were no children, grandchildren, or mother, living at the time of the testator's death, but his widow survived him:—Held, that the third policy, being payable to the heirs and not to the widow as a preferred beneficiary, formed part of the testator's estate, although as a fact the widow was the legal heir; but the first two policies did not form part of the estate. By them a trust was created in favour of the wife as a preferred beneficiary, and so remained until the death of the testator:—Held, also, that "including" imported addition. *In re Duncombe*, 22 Occ. N. 167, 3 O. L. R. 510, 1 O. W. R. 153.

Inconsistent Bequests — *Reconciling—Formal Bequest of Residue.*]—A testator bequeathed all his clothing, wearing apparel, and personal effects to his brother; all his household furniture and other personal property to his sister. He then devised to his sister for life all his real estate, with remainder in fee to his nephew, subject to certain legacies and annuities which he charged upon it; and wound up his will by devising and bequeathing the rest and residue of his real and personal property to his nephew. At the time of his death the testator's personal property consisted of: household goods and furniture, $150; farming implements and live stock, about $500; book debts and promissory notes, $35; cash, $273; wearing apparel, watch, chain, etc., $25; total, $983:—Held, that all the brother took was the wearing apparel and the watch and chain; that the sister took all the remainder of the personalty; the nephew taking none of it. The proper view of the residuary clause was that the testator, having disposed specifically of all his estate, both real and personal, added the residuary clause for the sake of greater caution or as a usual form. *In re Pink*, 23 Occ. N. 16, 4 O. L. R. 718, 1 O. W. R. 772.

Insurance — Debts — "Designation" — Election — Mortgage — Charge on land — Failure of specific legacy — Devise — Estate — Term — Maintenance. *Griffith* v. *Howes*, 5 O. L. R. 439, 2 O. W. R. 293.

"Land Property" — Absence of residuary devise — Personalty — Inference — Parties — Next of kin. *Howard* v. *Quigley*, 2 O. W. R. 694.

Lapsed Bequest — Absence of residuary clause — Intestacy. *Re Nevett*, 6 O. W. R. 971.

Lapsed Devise — Effect on legacy — Charge on land devised — Effect on devise of remainder — Acceleration — Contingent remainder — Intestacy — Dower — Alimony decree — Release — Estoppel. *Re Wilson*, 3 O. W. R. 754.

Legacies — *Abatement — Devastavit.*]—Testator died in 1878 having made a will and a codicil. By the will he gave to his wife certain chattels for her life, and all the rest of his estate to his two executors upon trust to sell and out of the proceeds to pay funeral and testamentary expenses and the legacies bequeathed by the will or any codicil thereto, and to invest the residue in their own names and pay the annual income to the wife for life, and after her death to divide the estate between themselves (the executors) in the proportion of two-thirds to one and one-third to the other. By the codicil the testator gave certain specific legacies and directed that they should be paid by the executors after the decease of the wife from out of the two-thirds given to one of the executors. That executor died in 1885. After his death the other executor appropriated to his own use a part of the moneys of the estate, and died insolvent in 1900. The widow died in 1901. It was then found that more than one-third of the estate had been dissipated:—Held, that the part which remained belonged to the estate of the innocent executor, subject to the payment of the legacies given by the codicil, which should be paid in full and should not abate proportionally with the two-thirds share given to that executor. *In re Dunn*, 24 Occ. N. 295, 7 O. L. R. 560, 3 O. W. R. 311.

Legacies — Annuity — Resort to corpus of estate — Time for first payment — Priorities between legacies — Vested legacies. *Re Ashenden*, 3 O. W. R. 424, 674.

Legacies — Conditions — Defeasance — Payment before period mentioned in will. *Re Shore*, 1 O. W. R. 586.

Legacies — *Date of Vesting.*]—By his will the testator gave to his wife a life interest in all his property, and upon her death he bequeathed to an adopted daughter K. a sum of money to be invested in the name of A., her son, or any more issue of hers there might be; the interest to be hers for life; and in case of her death or her said son "leaving more issue, the remainder to be equally divided among them; and in case of her death, and her said son leaving no other issue, then the (said) sum to revert back to C." On the death of K. she was survived by her said son A. and two other

children:—Held, that the fund vested absolutely on the death of K. in her three children, and that it was not the meaning of the will that the fund vested in C. in event of A. dying, leaving no brother or sister surviving him. *Kerrison* v. *Kaye*, 23 Occ. N. 158, 2 N. B. Eq. Reps. 455.

Legacies — Interest — Commencement — Testator in loco parentis — Realization of estate. *Re Sweezey*, 2 O. W. R. 792.

Legacies—*Interest.*]—A will directed that the estate, real and personal, should be sold, and that the executors should hold the proceeds in trust to pay an annuity of $800, and then to pay all the residue of the income to the testator's widow for life, and on her death to divide the corpus, paying to two grandchildren $1,000 each, and dividing the residue among the testator's children. The will declared that the two legacies to the grandchildren were subject to the widow's life interest, and directed that they should be paid when the grandchildren should attain twenty-one, but in case the estate should be divided before they attained that age, interest should be paid on their legacies. If the grandchildren died before attaining twenty-one, the legacies were to fall into the estate. Both the grandchildren attained twenty-one before the death of the widow:—Held, that interest on the legacies should be paid by the estate only from the death of the widow. Toomey v. Tracey, 4 O. R. 708, distinguished. *In re Scadding*, 22 Occ. N. 409, 4 O. L. R. 632, 1 O. W. R. 467, 683.

Legacies — *Payment out of Real Estate.*]—A testator by his will devised a farm to each of his two sons, subject to the right of his widow to work and manage the farms for her own benefit until certain fixed dates, and subject to the payment to her after those dates of certain sums of money by the devisees. He then gave legacies to his daughters, and proceeded as follows:—"I give to my wife all the moneys that remain after paying my former 'bequeaths,' debts, and funeral expenses, and all that may accrue from the farm during her term of management, to dispose of as she pleases, but if she should die without disposing, then I order that the undisposed part be divided among my sons and daughters then living. I order my executors to sell my undisposed real estate and divide it equally amongst my children then living:"—Held, that there had not been created a blended fund composed of the residuary real and personal estate so as to make applicable the rule established in Greville v. Browne, 7 H. L. C. 689, and that, the undisposed of personal estate being insufficient to pay them, the legacies to the daughters could not be paid out of the undisposed of real estate. *In re Bailey*, 24 Occ. N. 54, 6 O. L. R. 688, 3 O. W. R. 20.

Legacies — Period of vesting — Distribution — Realty and personalty — Sale — Direction to trustees. *Smith* v. *Mason*, 1 O. W. R. 478.

Legacy — Defined payment — Executor — Mortgagee — Change of circumstances. *Re Boyd, Boyd* v. *Boyd*, 2 O. W. R. 1056.

Legacy — Interest — Accumulation — Limitation — Condition — "Against." *White* v. *McLagan*, 1 O. W. R. 59.

Legacy — Period of vesting — Direction to distribute estate — Discretion of executors. *Re Burch*, 1 O. W. R. 436.

Legacy — *Revocation of Life Interest — Acceleration — Period of Distribution.*]—A testator directed a sum of money to be set apart by his trustees, and the income paid to A. for life, and that after his death the capital should be divided among A.'s children in certain shares. The testator further directed that in the event of A. dying while any of his children should be under the age of 25 years, the income of the fund should be paid to their mother while such children respectively should be under that age "for the maintenance and education of such child or children respectively while he or she shall be under that age." By a codicil the testator revoked the "legacy and annuity" to A.:—Held, that the gift to the children was not revoked, but vested on the testator's death, and that the share of each child in the capital was payable on his attaining the age of 25 years. *Lewin* v. *Lewin*, 23 Occ. N. 267, 2 N. B. Eq. Reps. 477.

Legacy — Specific or demonstrative — Absence of source of payment designated. *Re Wildey*, 6 O. W. R. 599.

Legacy — Support and maintenance — Absolute gift — Life interest — Discretion of executors. *Re Evans*, 3 O. L. R. 401, 1 O. W. R. 92.

Legacy — *Usufruct — Substitution.*]—"I give . . . unto my daughter . . . . wife of K., the use, usufruct, and enjoyment, during the term of her natural life, of all my property, real and personal, movable and immovable, of which I may die possessed, hereby constituting my said daughter my universal usufructuary legatee and devisee, without being held to give security for such usufruct and enjoyment, and whom I exempt from taking an inventory of my said property, which said usufruct shall at all times be excluded from the community of property existing between her and her husband. And as the bequest made by this will is meant as and for her maintenance and alimentary support, I expressly exempt the same from seizure for any debts created by her or her husband . . . After the death of my said daughter . . . I order and direct that my said property, of which the use and usufruct is granted to her, shall go and belong to the child or children, issue of her marriage with the said K., or with any future husband, and in default of such issue, said property to become the absolute property of my nearest relatives or nearest of kin, in equal proportion, share and share alike." This clause in a will, held to give a legacy of usufruct and not a substitution. *Kidder* v. *Campbell*, Q. R. 20 S. C. 324.

Life Estate — Remainder — Period for ascertainment of remaindermen — Executor — Dealings with estate — Leases. *Re Gallagher*, 6 O. W. R. 28.

Life Estate. *Re Padget and Curren*, 1 O. W. R. 427.

Life Estate — *Estate Tail — Survivorship — Disentailing Deed—Condition of Devise—Bearing Testator's Name — Vendor and Purchaser.*]—A testator devised the lands

"whereon I now reside" to his son "during his natural life, and at his decease to the second male heir of him and his present wife, and his heirs male for ever, and in default of a second male heir to their second surviving female heir or child, and her male heirs for ever, provided she continues to bear my name during her life." The testator's son had by the wife mentioned in the will four children, one son and three daughters, of whom one son and one daughter survived the testator's son and his wife. One of the daughters who predeceased the testator's son had previously joined with him in a disentailing deed in which it was recited that she was the tenant in tail in remainder expectant upon the decease of her father:—Held, that the testator's son took a life estate only, and the surviving daughter an estate tail male; and that the disentailing deed did not stand in the way of that daughter making a conveyance of the lands in fee:—Held, also, that the condition as to continuing to bear the testator's name did not prevent the daughter, being unmarried, from conveying in fee. *In re Brown and Slater*, 23 Occ. N. 172, 5 O. L. R. 386, 2 O. W. R. 101.

Life Estate — Remainder — Power of disposition given to life tenant by codicil — "Dispose and deal with" — Enlargement of beneficial interests. *Re Armstrong*, 3 O. W. R. 627, 798.

Life Estate — Remainder — Vested interests of remaindermen. *Re McNichol*, 2 O. W. R. 105.

Maintenance Clause — *Lien.*]—Where a testator by his will gave his estate, consisting of a farm and dwellinghouse and personal property, to his son upon condition that he would maintain the testator's widow and daughters, excepting in the event of their marrying or leaving home, and declared that they should have a home in the dwelling while unmarried, it was held that the estate was charged with their maintenance. *Cool v. Cool*, 25 Occ. N. 66, 3 N. B. Eq. 11.

Misnomer of Legatee — Intention — Legacy — Vested interest — Condition subsequent — Divesting — Death of legatee — Foreign domicil — Distribution of legacy. *Re Mitchell*, 4 O. W. R. 43.

"Money" — Residuary personal property — Pecuniary legacies — Insufficiency of personal estate — Resort to residuary real estate — Devise — Mortgage — Exoneration. *Re Bailey*, 2 O. W. R. 888.

"My Own Right Heirs" — Period of ascertainment — "Then" — Division of residue — Specific devisee entitled to share. *Re Karn*, 2 O. W. R. 841.

Period of Distribution — *Clauses of Will—Survivors — Vested Estates.*] — By clause 3 of his will the testator devised all his real estate to his executors and directed them to pay thereout his funeral and testamentary expenses, and that all the residue should be at the disposal of his wife for her maintenance during her lifetime, and that after her decease the real estate be converted into money and divided equally among his children or the survivors. But in the event of any of the children predeceasing the wife, his or her share was in the event of him or her leaving no issue, to be divided between the survivor's other heirs, etc. But should the executors determine to sell the real estate during the wife's lifetime, the proceeds were to be invested for her maintenance during her life, and at her death to be divided equally among the three children, or the survivors, share and share alike; but if the wife elected to take her third of the proceeds instead of the annual income from the whole, the remainder was to be divided in the same way among the children. The testator died in 1880, leaving a widow, two sons, and a daughter. The widow died in 1901. The daughter died in 1892, leaving an infant child, who died in 1894. The two sons were still living. The executors sold the lands in the lifetime of the widow, and she did not elect:—Held, that the executors having acted with regard to the land under the provisions of clause 3, that clause only was to be looked at to ascertain the testator's intention, being a complete clause in itself. The period of distribution was that of the death of the widow, and the daughter's share went to the sons as survivors, and not to the daughter's child, as claimed by the child's father. Cripp v. Walcott, 4 Madd. 11, followed. Sharter v. Groves, 6 Ha. 162, distinguished. *In re Fingland—Fingland* v. *McKnight*, 21 Occ. N. 566.

"Personal Representatives" — Executors or next of kin — Part intestacy—Rights of widow — Advertisement for creditors. *Re Daubeny*, 1 O. W. R. 773.

Power of Advancement — *Exercise of, by Trustees — Division of Estate.*]—A testatrix by her will directed her trustees to pay an annuity to each of her three children, and empowered the trustees "from time to time to make such advances as they may deem proper out of the corpus or income or both of my estate for the benefit of or to my said children or any one or more of them either on their marriage or as an advancement in life or for any other purpose that may appear to them wise and reasonable." On the death of all the children of the testatrix the undisposed of residue was directed to be divided among their children then living, and in default of a grandchild living at the death of the last surviving child of the testatrix, then the undisposed of residue was to be divided among certain charities:—Held, that a division of the estate among the children made by the trustees in good faith two years after the death of the testatrix was a valid exercise of the power. *Hospital for Sick Children* v. *Chute*, 22 Occ. N. 173, 3 O. L. R. 590, 1 O. W. R. 321.

Power of Sale — Exercise by substituted trustee — Application to particular property — Release of trustee — New trustee. *Re Bell*, 5 O. W. R. 442.

Power of Sale — Vacant land — "Unproductive of a substantial net profit" — Trustees. *Re M.*, 6 O. W. R. 938.

Property Passing — "New" — Stock in trade — Furniture — Books — Legacy — Incomplete words. *Re Holden*, 5 O. L. R. 156, 2 O. W. R. 11.

Provision for Maintenance of Person — Alternative provision. *Leduc* v. *Booth*, 1 O. W. R. 800.

Residuary Bequest — Church—Amount more than sufficient to answer specified purpose — Application of balance cy-près — Intestacy — Gift for maintenance of burial plot — Perpetuity — Charity. *Re Harding*, 4 O. W. R. 316.

Residuary Bequest — Distribution among legatees in proportion to their legacies — Legatees of income — Interest — Subscription to charity. *Re Sloane*, 3 O. W. R. 848.

Residuary Bequest — *"Personal Effects" — Mortgage — Debts and Expenses of Administration — Ratable Charge on Real and Personal Estate.*]—A will was in part as follows: "My will is first that all my just and lawful debts and funeral expenses be paid by my executors . . . and the residue of my estate real and personal which may not be required for the payment of my said just debts and funeral expenses and the expenses attending the execution of this my will and the administration of my estate I give, devise and bequeath as follows: I give, devise and bequeath absolutely to my beloved wife . . . all my furniture, books, plate and other personal effects and so long as she remains my widow but no longer I give, devise and bequeath to my said wife all my real property of which I may die possessed for her sole use and benefit so long as she may live"—and then to his children. The estate consisted of household furniture and chattels, a policy of life insurance, two parcels of real estate, and a mortgage on real estate:—Held, that the beneficial interest in the mortgage passed to the widow, under the words "other personal effects." These words occurring in a residuary gift were not to be read as restricted to things ejusdem generis with those described by the preceding words, the testator's intention being to dispose of the whole of his personal estate:—Held, also, following Re Thomas, 2 O. L. R. 660, that the testator's debts and funeral expenses and the expenses attending the execution of his will and the administration of his estate should be charged ratably upon his real estate and personal estate according to their respective values:—Devolution of Estates Act, R. S. O. 1897 c. 127, s. 7. *In re Way*, 24 Occ. N. 20, 6 O. L. R. 614, 2 O. W. R. 1072.

Residuary Bequest — "Remaining children" — "Other" or "surviving" children —Grandchildren — Period of ascertainment of class. *Re Garner*, 3 O. W. R. 584.

Residuary Clause — *Power of Selection — Discretion of Trustees.*]—A devise in a will directing the distribution of the residue of the testator's estate among his brother and sisters or nephews and nieces who should be most in need of it, at the discretion of trustees therein named, is valid and confers absolute power upon the trustees of selecting beneficiaries from the classes of persons mentioned. McGibbon v. Abbott, 10 App. Cas. 653, followed. Ross v. Ross, 25 S. C. R. 307, referred to. *Brosseau* v. *Doré*, 25 Occ. N. 2, 35 S. C. R. 205.

Rights of Wife — *Usufructuary or Institute — Action by Heirs — Inconsistent Claims — Election.*]—The respondents charged against the appellant waste of certain of her deceased husband's estate, rights in which she possessed under his will, and neglect to secure the appointment of a "curator to the substitution," and it appeared that there was doubt whether under the will she was a usufructuary or an "institute;" and claimed, in case the Court should decide that the will only created a simple right of usufruct, the extinction of such right, or, in the alternative, that the estate be vested absolutely or qualifiedly in the heirs called by the will to succeed her; and, in case the Court should decide that there was a substitution, that the appellant might be "assujetie à souffrir l'envoi en possession des appelé à titre de séquestre, et que tel séquestre soit ordonné par le jugement à intervenir," and other relief appropriate to this situation:—Held, that the relief claimed was inconsistent and contradictory, and that the respondents should be required to exercise an option as to which relief they would claim. *Hurtubise* v. *Décarie*, Q. R. 13 K. B. 366.

Roman Catholic Bishop — *Corporation Sole — Devise of Personal and Ecclesiastical Property — Construction.*]—The will of the Roman Catholic Bishop of St. John, N.B., a corporation sole, contained the following general devise of his property:—"Although all the church and ecclesiastical and charitable properties in the diocese are and should be vested in the Roman Catholic Bishop of St. John, New Brunswick, for the benefit of religion, education, and charity, in trust according to the intentions and purposes for which they were acquired and established, yet to meet any want or mistake I give and devise and bequeath all my estate, real and personal, wherever situated, to the Roman Catholic Bishop of St. John, New Brunswick, in trust for the purposes and intentions for which they are used and established:"—Held, affirming the judgment in 36 N. B. Reps. 229, that the private property of the testator, as well as the ecclesiastical property vested in him as bishop, was devised by this clause, and the fact that there were specific devises of personal property for other purposes did not alter its construction. *Travers* v. *Casey*, 24 Occ. N. 169, 34 S. C. R. 419.

Separate Gifts — *Rule in Shelley's Case — Lien for Improvements.*]—Action for the recovery of land, into the possession of which the defendants had entered under an agreement of sale made between them and the plaintiff. The plaintiff alleged a title in fee to the land by a conveyance from a devisee under a will as follows: "I give and devise to my grandson J. H. the last half . . . . for the term of his natural life; after his death I devise the same to his children, lawfully begotten, in equal shares: should he die without a child living at the time of his death, then I devise said land to my son G. for the term of his natural life, and after his death to his children in equal shares, and if G. should die without a child living at the time of his death, then," &c., &c. J. H. was alive at the time of this action, aged 50 years, and had one child, a daughter, born after the death of the testator:—Held, that neither the rule in Wild's case nor that in Shelley's case applied. There were plainly two gifts, one to J. H. for life, and the other to his children in equal shares, which carried the remainder in fee to the child, or children, subject to be divested if he died without a child living at his death. The plaintiff, therefore, could not make title. The

defendants were entitled to a lien for improvements, and for purchase money paid on account, with interest, less an occupation rent. *Young* v. *Denike*, 22 Occ. N. 27, 2 O. L. R. 723.

Shares of Children — Period of vesting — Rents — Interest — Equal division. *Re Hunter*, 2 O. W. R. 791.

Speaking from Death — *Stock in Trade — "Now" — Household Furniture — Books — Legacy — Incomplete Words.*]—A testator gave all his estate of which he might die possessed in manner following: "to my sister E. the house and lands with all household furniture and all the stock and trade now in house and out of house, with all book accounts now due to me, whereever found, for her own use and benefit forever, and out of this she shall pay to my brother B. $100, also she shall pay $100 to my brother W." At his death, and when he made the will, the testator was the keeper of a country village shop, and his possessions consisted of a house and lot, where he carried on his business and lived, the capital employed in his business, his stock of goods, and what was owing to him by his customers, and his household and other effects, consisting of furniture, books, horses, harness, carriages, and sleighs. Shortly after he made his will he sold his house and lot and business and afterwards repurchased them:—Held, that although the gifts of the household furniture, the stock in trade, and the book debts, were specific bequests, nevertheless, being specific gifts of that which is generic, of that which may be increased or diminished, the will carried the household furniture, the stock in trade, and the book debts, as they existed at the time of the testator's death; and the use of the word "now" did not limit the gift to them as they existed at the date of his will. This was confirmed by the words of general bequest at the commencement, as also by certain other features of the will:—Held, also, that in the gift of the "stock and trade" the money of the testator on deposit in the bank and cash in hand and a quantity of cordwood for use in the shop and dwelling-house, two horses, harness, and vehicles, were embraced:—Held, also, that a number of books belonging to the testator passed as part of the household furniture. The incomplete words of the gift to one brother were sufficient. *In re Holden*, 23 Occ. N. 52, 5 O. L. R. 156, 2 O. W. R. 11.

Specific Bequests of Shares—Change in shares by statute — Rights of legatees. *Re Thompson*, 3 O. W. R. 627.

Specific Legacies — *Bequest of Residue — Condition — Application of.*]—There were two distinct dispositions in one clause of a will. In the first part of the clause the testator gave specific legacies of $200 each to five of his children, and in the second part he divided the residue of the moneys and book debts which he should leave at his decease among his ten children and the children of Malvina, a deceased daughter. At the end of the clause he added: "But on condition that the children of the deceased Malvina and Amable and Joseph (who were two of the five specific legatees) shall renounce the succession of the late Dame Julie Leclerc, their mother and grandmother, in order that they may be on a footing of equality with my other children, and that of the said Amable and Joseph and the children of the said Malvina claim the succession of the said dame, their mother and grandmother, the property which I have given them above shall pass to my other children above lastly named:"—Held, that this condition did not apply to both dispositions, but only to the latter disposition, namely, of the residue. *Bélanger* v. *Bélanger*, Q. R. 10 K. B. 207.

Statute Interpreting Will—*Construction — Income of Estate—Saisissabilité.*]—A statute interpreting or modifying a will should be construed as a codicil to such will. If such statute detaches from a considerable sum, to be divided later among the heirs, a certain sum to be used as income, without declaring that the latter sum shall be regarded as alimentary, the sum so detached will not be insaisissable, even if the capital would be. *Union Bank of Canada* v. *Ogilvie*, 4 Q. P. R. 157.

Subject of Devise—*After-acquired Property.*]—Testator by his will devised to his daughter "the homestead farm on which I reside," and the residue of his real estate to his wife for life. After the date of the will he acquired other real estate, including land known as lot A., upon which he resided at the time of his death. By s. 19 of c. 77, C. S. N. B., "every will shall be construed with reference to the real and personal estate comprised therein, as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will:"—Held, that lot A. was not included in the devise to the daughter. *Ayer* v. *Estabrooks*, 22 Occ. N. 328, 2 N. B. Eq. Reps. 392.

Substitution — *Clauses Creating.*] — The testator bequeathed to his wife all his property "to be enjoyed by her during her natural lifetime;" by the next clause of his will he bequeathed to his brothers and sisters all his property "to be enjoyed by them in absolute property and ownership," share and share alike, but only from and after the decease of his wife. The testator's wife survived him, and at the time of her death, B. was the only one of the brothers and sisters mentioned who was living, and she took possession of all the testator's estate. A nephew of the testator, a son of one of the brothers mentioned in the above clause of the will, brought this action for one-sixteenth of the estate, claiming that the will gave the widow only the usufruct, and that the brothers and sisters of the testator were bequeathed the naked ownership:—Held, affirming the decision of the Court of Review, that the will created a substitution, and that B., as the sole survivor of the substitutes at the death of the widow (the institute), was entitled to the whole estate. *Ryan* v. *Ryan*, 23 Occ. N. 116.

Substitution — *Opening — Legacy to Substitutes — Per Stirpes or Per Capita.*]—By his will, which created a substitution, the testator bequeathed the usufruct of all his property to his widow, and after her death to his surviving children, and then gave it to the legitimate children of his children, to enjoy and have in equal parts and portions among them from the day that the enjoyment and usufruct of his children should cease, instituting his said grandchildren his universal legatees:—Held, that all the grandchildren

participated in the legacy, and that the property representing the fifth of the revenue given to each of the testator's children, on the opening of the substitution created by the will, for such fifth portion, should be divided among all the grandchildren then living in equal shares, they taking per capita and not per stirpes. *Remillard* v. *Chabot*, 33 S. C. R. 328.

Substitution or Usufruct.] — In the interpretation of a will, if it is doubtful whether a certain provision creates a substitution or a legacy of usufruct and bare property, the decision must be in favour of a substitution. 2. There is a substitution when there are in one provision two successive gifts, a period of time between, and a successive order. 3. If the testator in disposing of his property does not say, whether it is absolutely or by way of usufruct, it will be held to be absolutely. 4. The following clause in a will creates a substitution: "I will, devise, and bequeath unto my beloved wife . . . . all my property and estate . . . to be enjoyed by her only during her natural lifetime. I will, devise, and bequeath unto . . . my beloved brothers and sisters all my property and estate . . . . to be enjoyed by them in absolute property and ownership, share and share alike, but only from and after the decease of my said wife." *Ryan* v. *Ryan*, Q. R. 22 S. C. 174.

Substitution or Usufruct.] — The following clause in a will effects a substitution and not a bequest of usufruct and bare property:—"I will and bequeath to my well beloved wife . . . the enjoyment and usufruct during her life of all the property, movable and immovable, and the proceeds and revenues thereof of whatsoever nature and of whatsoever amount and wheresoever situated and title deeds, papers, rights of action, and other things generally whatsoever I shall leave at the date of my decease without excepting or reserving anything, for my said wife to enjoy the usufruct during her life and as long as she remains my widow without being obliged to give security nor to take any inventory nor to render an account to any one; and I forbid by this my will my children or any other person in any way to force my said wife to render an account or to make an inventory; but on her re-marriage, if she should re-marry, I will and intend that she shall render an immediate account to the children born of our marriage and afterwards make a good and true inventory; and the property in all such my said effects, movable and immovable, title deeds, papers, and rights of action, shall then belong to our said children as at the death of their mother my said wife." *Cabana* v. *Latour*, Q. R. 24 S. C. 83.

Tenant for Life — *Renewal of Lease — Carrying on Business—Profits—Account.*]— A testator devised and bequeathed all his property real and personal to his wife, "to be used and enjoyed by her for and during the term of her natural life and widowhood, and after her decease or marrying again" to named members of his family. At the time of his death he was carrying on business as a brick-maker upon premises leased by him, he having the right to take clay. The widow, with the assent and co-operation of members of the family, carried on the business and developed it, using the plant and renewing it when necessary, and when the lease fell in some years after the testator's death she took a new lease of the same premises, and at her death the business had increased very much in value:—Held, that the personal estate should have been converted into money and not used in specie by the widow, but that having been so used the increased value of the business enured to the benefit of the remaindermen, and did not form part of the widow's estate. Judgment of a Divisional Court, 32 O. R. 36, 20 Occ. N. 255, affirmed. *Wakefield* v. *Wakefield*, 21 Occ. N. 367, 2 O. L. R. 33.

Trust—*Next of Kin.*]—H., by his last will, after bequeathing certain legacies, made the following bequests: — "I give and bequeath seven hundred dollars to A. of Charlottetown, in the Province of Prince Edward Island, to pay any money that I may leave an order for, and also to pay my funeral expenses, also to pay himself for his time and trouble." There was no residuary clause in the will. He appointed B. and C. executors of his will; they renounced, and administration cum testamento annexo was granted to A. Testator left no order to pay any money, and A. claimed the balance of the $700 after payment of the funeral expenses:—Held, that A. was a trustee of the sum of $700, and after payment of debts, funeral and testamentary expenses, and of a reasonable sum for his trouble in carrying out the trusts of the will, he held the balance in trust for the next of kin. *Trainor* v. *Landrigan*, 21 Occ. N. 515.

Trusts — Power to appoint new trustee — Persons to exercise power — Time for exercising — Death of trustee after death of testator — "Surviving brothers and sisters" — "Then" — Action — Parties — Cestuis que trust. *Saunders* v. *Bradley*, 6 O. W. R. 436.

Trusts — *Provision for the Appointment of New Trustee — Construction — Person to Exercise Powers — Time for Exercising.*]— A testator appointed his two brothers executors and trustees of his will, and provided that in the event of the death, liability, or refusal to act of either of them, "then my surviving brothers and sisters or a majority of them shall by an instrument in writing . . . . appoint a new trustee," etc. The testator died in 1899, and probate was granted to the two brothers, one of whom died in the same year. In 1900, by an instrument in writing, a majority of the brothers and sisters of the testator then living (one other brother having also died in 1889, after the testator) appointed the plaintiff a trustee in place of the deceased executor:—Held, that the appointment was valid. The power to appoint a new trustee became operative in case either of the events provided for happened, whether in the lifetime of the testator or after his death; and it was the survivors of the brothers and sisters at the time of exercising the power, or a majority of them, who had the power to appoint. *Saunders* v. *Bradley*, 23 Occ. N. 263, 6 O. L. R. 250, 2 O. W. R. 697.

Use of Property for Life — *Power of Disposition — Intention of Testator.*]—Testator by his will gave to his wife C. M. the use, rents, and proceeds of all his remaining

real estate, personal property, mortgages, notes, etc., for her own use during her lifetime. At the death of his wife he devised the house and contents to A. M. for her own use and benefit during her lifetime, and at the death of A. M., he devised to his nephews and niece named, the said house and contents "as well as any money or securities which may remain after the death of my wife, C. M.:"—Held, that the disposal of any property which might remain over at the death of C. M. shewed an intention to give C. M. the disposition of the property during her lifetime. In re Thompson's Estate, 14 Ch. D. 263, and Constable v. Bull, 3 DeG. & Sm. 411, followed. *Re McDonald*, 35 N. S. Reps. 500.

Vested Estates — Survivorship — Sale of land — Death of devisee before sale. *Re McIntyre*, 6 O. W. R. 392.

Vested Estates in Remainder — *Construction — "Family" — Children of Testator's Children — Distribution Per Capita — Partition or Sale.*]—Plaintiff was one of the beneficiaries under the will of deceased. Defendant George Harkness was a son of deceased, and was the sole surviving executor under the will. The testator died on 25th June, 1872, having made his last will, dated 16th June, 1870, as follows:—"I will that my son Archibald and my daughter Mary have (after the death of my wife if she survives me) the life use of all my real and personal property to hold to them jointly during their natural lives if they survive me, and to the longest liver of them." "4. I will that, after the death of my wife and my son Archibald and my daughter Mary, all real property belonging to me shall be divided into 3 equal portions and distributed as follows: one portion to my son James's family, one portion to my son George's family, and one portion to my daughter Margaret's family." Testator's widow died on 24th July, 1884, the son Archibald on 7th July, 1894, and Mary on 2nd February, 1902. Probate was granted to defendant George Harkness on 20th June, 1902: — Held, the word "family" in the 4th clause of the will meant the children of the testator's sons James and George and daughter Margaret. It was clear that the estates of the children of the testator's sons James and George and of his daughter Margaret became on the death of the testator vested estates in remainder, subject to the respective life estates of the widow and of Archibald and Mary. *Harkness v. Harkness*, 6 O. W. R. 122, 9 O. L. R. 705.

Void Devise of Life Estate — *Acceleration of Remainder.*]—A testatrix bequeathed to her adopted daughter "the whole of my real and personal estate for her sole and only use absolutely, and in the event of her decease without heirs" she directed that "whatever may remain of my real and personal estate shall go to my nephew for his sole use and disposal." The adopted daughter was one of the witnesses to the will:—Held, following Aplin v. Stone, [1904] 1 Ch. 543, that the will must be construed before the effect of the devisee being a witness could be considered; that on the true construction of the will the decease of the adopted daughter before the testatrix was the event contemplated; that "without heirs" meant without children lawfully begotten; and that there was no direct gift to heirs or children:—Held, further, that the gift to the adopted daughter being void, the gift to the nephew took effect at once. *In re Maybee*, 24 Occ. N. 399, O. L. R. 601, 4 O. W. R. 421.

III. Execution.

Acknowledgment — *Evidence—Appeal.*]—In proceedings for probate of a will the solicitor who drew it testified that it was signed by the testatrix when the subscribing witnesses were absent; that on their arrival he asked the testatrix if the signature to it was hers, and if she wished the two persons present to witness it, and she answered "yes." Each of the witnesses acknowledged his signature to the will, but swore that he had not heard such question asked and answered. The Judge of Probate held that the will was not properly executed, and his decision was affirmed by the Supreme Court of Nova Scotia, 24 Occ. N. 141, 36 N. S. Reps. 482:—Held, affirming the judgments, that two Courts having pronounced against the validity of the will, such decision would not be reversed by a second court of appeal. *In re Cullen*, 25 Occ. N. 54; *McNeil v. Cullen*, 35 S. C. R. 510.

Codicil — *Suspicious Circumstances — Testimony of Beneficiary—Competency of Testator.*]—A testator by his will among other annuities, gave one to K. of $600. By a codicil, executed in the following year, he increased the amount to $800. By a second codicil, executed some years later and shortly before his death, he increased the annuity to $1,000 and provided that, on the death of any of the annuitants, the amount should go to the survivor or survivors for life. There was evidence that K. had been actively concerned in procuring the execution of the second codicil; there were some suspicious circumstances as to the time and manner of execution; there was no evidence, except that of K., to shew that the testator had even seen the codicil before he executed; there was evidence of delusions on his part as to his will and the property he had to dispose of; and the witnesses to the execution were of opinion from his demeanour, that he was not at the time in a condition to transact any important business. On petition by the executors for proof in solemn form, the second codicil was rejected by the Surrogate Judge:—Held, affirming his decision, that it was open to him to discredit the testimony of K., and he having done so, the Court ought not to interfere with his finding. 2. That K. being the principal beneficiary under the codicil, and the principal witness in support of it, and having had knowledge of it, and been a party to promoting its execution, was required to reasonably satisfy the mind of the court. *In re Archbold*, 34 N. S. Reps. 254.

Defective Execution — Witnesses not present — Testimony of witnesses — Refusal to establish will — Preparation by beneficiary — Suspicious circumstances. *Connell v. Connell*, 3 O. W. R. 35.

Formalities — *Acknowledgment — Witnesses — Request — Attestation.*]—The testatrix having requested that witnesses be called in order that she might complete the

execution of her will, two persons were brought, one of whom, presenting the instrument, which was signed by the testatrix, although not written by her, asked her if she was "perfectly satisfied with this," or "with this will." She answered, "I am perfectly satisfied." The two witnesses then signed the will in the presence of the testatrix and of several other persons, knowing it to be the will of the testatrix:—Held, that a document written in conformity to the directions of the testator, containing his wishes for the disposition of his estate, and signed by him, and also by two witnesses, is a will. 2. The acknowledgment by the testator, in the presence of the subscribing witnesses, and in answer to a question put by one of them, that the document signed is his will, is a sufficient compliance with art. 851 of the Civil Code, which requires an acknowledgment by the testator of the signature, "as having been subscribed by him to his will then produced" in presence of the witnesses. 3. Art. 851, C. C., which says the witnesses "attest and sign the will immediately, in presence of the testator and at his request," but does not prescribe any form of request, is sufficiently complied with, where the witnesses, at the request of the testator, have been asked to come there for the special purpose of witnessing the will, although, when present, they were not personally requested by the testator to sign. 4. The word "attest" in art. 851, C. C., means simply to sign as witness, no attestation clause being required. *Hannah* v. *Brereton*, Q. R. 23 S. C. 98.

Instructions for Will.] — *Ryan* v. *Harrington*, 3 O. W. R. 685.

Lost Will—*Evidence — Solicitor — Privilege—Declarations—Probate.*] — The doctrine of privileged communications as between solicitor and client exists for the benefit of the client and his representatives in interest, not for that of the solicitor, and in an action to establish the lost will of a testator, who was illegitimate and had died without issue, statements of the testator to his solicitor in reference to the making of and provisions in the will were held, against the objection of those who claimed under the lost will, to be admissible in evidence. Statements of a testator as to the provisions of his will are admissible in evidence in an action to establish it, and statements of this kind were in this case held to be sufficient corroboration of the evidence of the plaintiff, who had drawn, and was claiming large benefits under, the will in question, which, it was alleged, had been lost or stolen. The facts that the testator was aware that unless he made a will his property would go to the Crown; that he was an experienced man of business possessed of a large estate; that he had, after the will had been made, several times spoken of it as in existence, and had mentioned some of its provisions; and that during his last illness, of some days' duration, he had expressed no wish to make a will; were held sufficient to rebut the presumption of destruction of the will by the testator. *Stewart* v. *Walker*, 23 Occ. N. 320, 6 O. L. R. 495, 1 O. W. R. 489, 2 O. W. R. 990.

Proof of Execution—*Acknowledgment —Witnesses.*]—The last will and testament of A. C. was contested on the ground that it was in the handwriting of the residuary legatee, that it did not express the true will of the deceased, that deceased did not know or approve of it, and that it was not properly executed, not having been "signed or acknowledged by deceased in the presence of two or more witnesses, present at the same time," &c. The evidence shewed that, at the time the will was executed, deceased was present, but was sitting about 15 feet away from the witnesses; that the words at the end of the will were read over in a low tone so that the witnesses were unable to say whether they were heard by deceased or not. Neither of the witnesses was able to say that the signature of deceased was affixed to the will when they signed, or that he saw it if it was there, and both agreed that, if the signature was there, deceased did not in their presence acknowledge it to be her signature; nor did they hear her asked the question whether it was her signature; nor was there evidence of any other act or conduct on her part which could be considered the equivalent of an acknowledgment. According to the evidence of the witnesses she said nothing, and appeared to be indifferent to what was going on. One of the witnesses was unable to say, after leaving, whether he had witnessed a will or not:—Held, that, assuming it to be true, as sworn by the witness in support of the will, that deceased was asked, in presence of the witnesses, whether this was her will, and whether she wished the witnesses to sign, the evidence did not go far enough, it being essential to shew that the witnesses heard both question and answer. *In re Cullen*, 24 Occ. N. 141, 36 N. S. Reps. 482.

Testator's Signature—Conflict of evidence as to whether witnesses present—Lapse of time—Will drawn by person taking benefit—Onus. *Connell* v. *Connell*, 4 O. W. R. 360.

Revocation of Probate—*Evidence — Appeal on Facts—Parties to Proceedings.*] —In 1877 the will of H. was proved in common form before the Registrar of Probate on the oath of one of the subscribing witnesses, who swore that he and the other witness signed in the presence of the testator, and in the presence of each other. The will was acted upon, and remained unquestioned for a period of twenty-four years, when, after the death of the witness on whose oath it was proved, it was set aside by the Judge of Probate, on the testimony of the remaining witness, M. H., and his brother, that M. H. did not sign his name to the will as witness, until after the testator's death:—Held, reversing the decision of the Judge of Probate, that, after the long lapse of time, it was impossible to accept the evidence of M. H. and his brother—both being interested parties—to establish the invalidity of the will, as against the oath of the deceased witness upon whose testimony it was proved. While some weight should be attached to the finding of the Judge of Probate, it was impossible for the Court, on appeal, to feel bound by such finding, when it appeared that he came to the conclusion he did simply on the evidence of the two interested parties, and without considering other facts bearing on the case. The devisee of a portion of the property under the will conveyed his title to a third party, and by several intermediate conveyances it came to

M. et al., who opposed the setting the will aside:—Held, that M. et al., as "parties interested," were competent parties, and clearly entitled to be heard, even though "parties interested" were not specifically mentioned among those to be cited. Held, that the naming specifically of heirs, devisees, legatees, and next of kin, in the statute, was merely a matter of direction, leaving it open to those having an interest to intervene for the purpose of protecting their rights. *In re Hill Estate*, 34 N. S. Reps. 494.

IV. Legacies and Devises.

Ademption of Legacy—*Advancement.*]—A legacy is not revoked by a subsequent writing of the testator other than a will, unless the change of intention is thereby expressly stated. Thus, where a testator made his two sons his universal legatees, and made their legacies chargeable with the payment of certain sums to their sisters, and afterwards in the marriage contract of one of these sons he gave him the same property very nearly which he would have had as his half of the universal legacy, subject to the charge of paying to his sisters a sum equal to about half of the sums which he had designated for them by his will, the universal legacy, as regards the half of the charges which it involved, was not revoked nor satisfied by the marriage contract. *Dagenais* v. *Robin*, Q. R. 13 K. B. 62.

Ademption—Evidence. *Tuckett-Lawry* v. *Lamoureaux*, 1 O. W. R. 295; 3 O. L. R. 577.

Ademption—Parol evidence—Issue directed to be tried. Re McKenzie, 1 O. W. R. 739, 2 O. W. R. 1076.

Advances in Lifetime of Testator—Provision as to, in will—Interest—Period of distribution. *Re Sweazey*, 3 O. W. R. 360.

Bequest—*Condition—Restraint of Religious Liberty—Public Policy—Quebec Law.*]—Action by the respondent to have declared invalid, as contrary to public policy and public order, a clause in the will of his grandfather, the late Louis Renaud, to the effect that any of the testator's grandchildren who did not profess the Roman Catholic religion, or who were not the off-spring of a marriage with a Roman Catholic, celebrated according to the rites of that church, should be excluded from the succession to his estate:—Held, that since the son of the testator (whose son the respondent was) had been married before the death of his father, the marriage could not have been in any way influenced by the condition in question, and that therefore, under these circumstances, it could not be regarded as being contrary to public order and public policy. Judgment of Taschereau, J., 20 Occ. N. 443, reversed. *Lamothe* v. *Renaud*, 21 Occ. N. 392.

Bequest to Widow—Maintenance of children—Trust—Rights of children. *Re Shortreed*, 2 O. W. R. 318.

Bequest to Widow for Widowhood—Dower—Election—Intestacy in part—Power to sell—Conversion of realty. *Re Pollock*, 2 O. W. R. 109.

Bequest to Wife—*Election—Property of Wife—Mistake as to—Life Insurance.*]—A testator upon whose life there were two policies of insurance, one assigned to his wife "for the use and behoof" of his wife and children, and the other payable to his executors for the behoof of his wife and children, directed by his will that his whole estate, including insurance moneys, should be divided one-half to his wife and the other half to his children. By a codicil he directed that "in lieu of the house and premises (describing them) deeded to my beloved wife but since disposed of and the proceeds used in the business, I give, devise, and bequeath, and hereby direct, instruct, and empower my executors to pay over to my beloved wife the whole amount of my two life policies." The house and premises had not in fact been disposed of but were vested in the wife at the time of the testator's death:—Held, that the wife was entitled to the insurance moneys, and was not put to her election between the additional one-half given by the codicil and the house; the two elements essential to a case of election being wanting, viz., the disposition by the testator of something belonging to a person taking a benefit under the will—while in this case there was merely an erroneous statement of fact—and a gift to that person of something in the absolute control of the testator—while the insurance money was not. Judgment of Britton, J., 3 O. W. R. 309, affirmed. *Mutchmor* v. *Mutchmor*, 24 Occ. N. 314, 8 O. L. R. 271, 3 O. W. R. 931.

Charge on Land—Interest—Legatee also administrator with will annexed—Statute of Limitations. *Re Yates*, 1 O. W. R. 630; 4 O. L. R. 580.

Condition—*Pleading.*]—To an action for the recovery of instalments of a life annuity, where the defendant pleads that the annuity is not due to the plaintiff, because it has been given to her on condition that she remains a widow, and she has in fact remarried, she may reply that she was remarried at the date of the will, to the knowledge of the testator, and that her position is the same as then. *Gow* v. *Price*, 6 Q. P. R. 278.

Conditional Gift—*Charitable Bequest—Fulfilment of Condition—"Or Otherwise"—Ejusdem Generis—Exception.*]—The testator directed his executors to pay over to a town corporation $20,000 for the purposes of an hospital "so soon as a like sum of $20,000 should be procured by the corporation by a tax on the citizens, or from private donations, or otherwise, to be added to said bequest. The legacy was to lapse if the additional amount was not procured. The sum of $6,000 was raised by private subscription. The government of the province supplemented the amount by a grant of $14,000. It was contended on behalf of the residuary legatee that the grant from the government was not a compliance with the terms of the will:—Held, affirming the decision of Graham, E. J., 23 Occ. N. 216, that the words "or otherwise" in the will meant "from any source,"

and that the testator did not intend to place any restriction upon the executors as to the source from which the additional $20,000 should come. *In re Payzant*, 24 Occ. N. 140; *S. C., sub nom. Paulin* v. *Town of Windsor*, 36 N. S. Reps. 441.

Debt Due by Testator to Legatee—Satisfaction of debt—Presumption—Circumstances rebutting. *Re Watson*, 5 O. W. R. 354.

Description of Land—Statute of Frauds—Identifying land—Restraint on alienation—Invalidity—Repugnancy. *Re Corbett and Hartie*, 1 O. W. R. 744.

Discretion of Executors — Vested interest—Right to payment—Parties. *Ramsay* v. *Reid*, 2 O. W. R. 720.

Gift of Income from Realty Coupled with Devise of Remainder—Estate in fee simple subject to charge—Executors—Conveyance to devisees — Satisfaction of charge — Consent of chargee. *Re Day*, 6 O. W. R. 890.

Gift to Religious Society — *Mortmain Act — "Charitable and Philanthropic Purposes"—Uncertainty in Objects of Gift.*]—A bequest "to the West Lake Monthly Meeting of Hicksite Friends of West Bloomfield to be applied in charitable and philanthropic purposes" was upheld against the argument that it was void for vagueness and uncertainty in the objects to be benefited, Teetzel, J., saying that "charity was the dominant idea in the mind of the testator, and, while it is true that certain purposes may be philanthropic and not charitable in the ordinary sense, it is common knowledge that many subjects for benefaction are both charitable and philanthropic." If the words had been "charitable or philanthropic" the conclusion might have been different, as "or" would imply a discretion to select either "charitable" or "philanthropic" purposes. Williams v. Kershaw, 5 L. J. Ch. 86, 11 Cl. & Fin. 111 n., 42 R. R. 269, not followed. *Re Huyck*, 25 C. L. T. 358, 6 O. W. R. 112, 10 O. L. R. 480.

Gifts to Religious Societies — *Charitable Uses—Time of Execution of Will—Computation of Six Months—Religious Institutions Act — Special Act — Provisions as to Execution of Will Six Months before Death —Repeal by Mortmain Act of 1892 (R. S. O. c. 112) — "Land" — Proceeds of Sale — Mortmain Act of 1902—Effect of.*]—A will was executed on the 4th December, 1903; and the testatrix died on the 4th June, 1904. The testatrix gave and devised all her real and personal estate to her executors and trustees to sell, and, after payment of some small legacies and debts and expenses, to keep the residue of the moneys realized and invest it and pay the interest to the trustees of the Regular Baptist Church at Port Rowan, upon certain conditions, and on failure of compliance with the conditions, to pay one-half of the moneys to the Regular Baptist Home Missionary Society, and the other half to the Regular Baptist Foreign Missionary Society for their sole use. By 50 V. c. 31 (O.) these societies were authorized to receive gifts and devises of real and personal property, provided that no gift or devise of any real estate shall be valid unless made by deed or will executed at least 6 months before the death of the testator. There is a similar provision in s. 24 of the Religious Institutions Act, R. S. O. 1897 c. 307. Teetzel, J., held that the 6 months' limitation contained in these two Acts must be regarded as having been repealed by the later Mortmain and Charitable Uses Act, R. S. O. 1897 c. 112, passed on the 14th April, 1892, which removes every fetter upon testamentary power in favour of any charity, subject only to conditions therein mentioned. He was also of opinion that the gift was not of land, as interpreted by s. 3 of c. 112, but of "personal estate arising from or connected with land" within the meaning of s. 8. It was argued, however, that, notwithstanding the provisions of c. 112, the power of a testator by will to give lands or personal estate was restricted by the Mortmain and Charitable Uses Act of 1902 to wills made at least 6 months before the testator's death by virtue of s. 7, s.-s. 6, of that Act. The statute which is now R. S. O. c. 112 was based upon the English Act of 1891, and our later Act of 1902 upon the earlier English Act of 1888, but by s. 1 of the Act of 1902 it was provided that the Act should be read as part of R. S. O. c. 112. The result of this is, as construed by Teetzel, J., to put our two Acts practically in the same position as the two English Acts, as determined by In re Hume, [1895] 1 Ch. 422, and therefore s. 7 of the Act of 1902 does not apply to wills, but only to assurances inter vivos: see Re Kinney, 6 O. L. R. 459, 2 O. W. R. 881. The nice question whether the full period of 6 months had elapsed between the making of the will and the death of the testatrix was not determined. *Re Barrett*, 25 C. L. T. 357, 5 O. W. R. 790, 10 O. L. R. 337.

Identity of Devisee—Extrinsic evidence—Issue. *Re Robinson*, 3 O. W. R. 304.

Infant—Payment at majority — Interest. *Re Perrin*, 1 O. W. R. 209.

Mixed Fund — Interest — Majority. *Re Scadding*, 4 O. L. R. 632, 1 O. W. R. 467, 683.

Mortmain and Charitable Uses Act.]—*Re Bray*, 2 O. W. R. 520, 711.

Overpayment of Legatees—Judgment—Mistake—Repayment—Interest—Distribution. *Uffner* v. *Lewis*, 2 O. W. R. 441, 5 O. L. R. 684.

Payment at 25—Right to receive at majority—Declaration—Summary application. *Re Keating*, 2 O. W. R. 43.

Restraint on Alienation — Validity — Case stated—Reference to Divisional Court—Res judicata. *Re Phelan*, 1 O. W. R. 741, 2 O. W. R. 21.

Specific or Pecuniary — Debentures — Succession duties. *Re Mackey*, 2 O. W. R. 230, 690, 6 O. L. R. 292.

Subject to Charge — Maintenance of brother—Enforcement of charge—Judgment—Terms — Reference — Costs. *Spotswood* v. *Spotswood*, 2 O. W. R. 1090.

Trust for Church after Expiry of Life Estates—Time of making will—Statutes. *Re Naylor*, 1 O. W. R. 809.

Uncertainty as to Legatee — Legacy paid into Court—Motion for payment out—Decision on affidavits instead of issue directed—Costs. *Re Hall*, 4 O. W. R. 420.

Vesting — Assignment by legatees. *Re Steckley*, 2 O. W. R. 725.

V. Testamentary Capacity and Undue Influence.

Action to Set Aside—Burden of proof—Want of testamentary capacity. *Northmore* v. *Abbott*, 1 O. W. R. 231, 2 O. W. R. 314.

Action to Set Aside—Testamentary capacity — Undue influence—Costs. *McFadyen* v. *McFadyen*, 2 O. W. R. 528

Codicil—*Increase of Amount of Legacy.*]—A codicil to a will, executed shortly before the testator's death, increased the provision for a niece of his wife who had lived with him for nearly thirty years, a considerable portion of which she was his housekeeper, was attacked as having been executed on account of undue influence by the niece:—Held, reversing the judgment of the Supreme Court of Nova Scotia, Taschereau and Sedgewick, JJ., dissenting, that, as the testator was shewn to be capable of executing a will at the time he made the codicil, considering the relations between him and his niece, even if it had been proved that she urged him to make better provision for her than he had previously done, such would not have amounted to undue influence: — Held, also, following Perera v. Perera, [1891] A. C. 354, that, even if there was ground for saying that the testator was not at the time capable of making a will, the codicil would still have been valid. *Kaulbach* v. *Archbold*, 22 Occ. N. 9, 31 S. C. R. 387.

Concurrent Findings of Fact by Courts Below — *Gifts in Expectation of Death.*]—Where there are concurrent findings of fact as to a testator's competence and freedom from undue influence:—Held, that they will not be disturbed unless it be made plain that there has been a miscarriage of justice, or at least that the evidence has not been adequately weighed or considered. Held, also, that gifts made by the testator to the respondent during his lifetime would not be avoided under art. 762 of the Civil Code, where there was neither allegation nor evidence that they were made in expectation of death. The proviso in that article, "unless circumstances tend to render them valid," requires that those circumstances should be investigated. *Archambault* v. *Archambault*, [1902] A. C. 575.

Delusions—*Onus—Evidence of Parties—Interest—Corroboration.*]—In March, 1897, testator made a will revoking a prior will made in 1890, materially reducing bequests to his wife and son, and giving away large portions of his estate to collateral relatives. The evidence shewed that, at the time of the making of the second will, the defendant was suffering from certain insane delusions as to the relations existing between his wife and son, and that the disposition of his estate made by the second will was affected by such delusions:—Held, that the decree of the Judge of Probate, admitting the second will to probate must be set aside, and the will declared inoperative and void. The existence of the delusion being established, the burden rested upon the parties setting up the second will to shew that it was made during a lucid interval. The objection that important testimony had been given by the wife and son, who were interested parties, lost the force that it would otherwise have had, where their testimony was corroborated in all essential particulars by disinterested witnesses. The provision of the Witnesses and Evidence Act, R. S. N. S., 5th series, c. 107, s. 16, excluding parties from giving evidence of dealings, transactions, or agreements with the deceased on the trial of any issue joined, or on any inquiry arising in any suit, action, or other proceeding in any court of justice, &c., has no application to an investigation of this kind as to questions of testamentary capacity. *In re Farquharson Estate*, 33 N. S. Reps. 261.

Evidence—*Art. 831 C. C.—Marriage Contract—Duress.*]—Judgment of Superior Court in review, Q. R. 25 S. C. 275, affirmed. *Hotte* v. *Birabin*, 35 S. C. R. 477.

Evidence—*Delusions—Undue Influence — Onus — Certificate of Physician — Costs.*] — The best evidence of testamentary capacity is that which arises from rational acts, and where the testatrix herself, without assistance, drew up and executed a rational will, medical evidence that she was mentally incapable of so doing will be rejected. Where one who benefits by a will procures it to be prepared without the intervention of any faithworthy witness, or any one capable of giving independent evidence as to the testator's intention and instructions, it will be regarded with suspicion, and its invalidity presumed, and the onus is on the party propounding it to clearly establish it. Where a physician improperly gives a certificate as to testamentary incapacity of his patient, it should not on that ground alone be rejected as evidence, if otherwise admissible, but the circumstances will affect the weight that should be attached thereto. Observations upon delusions and undue influence:—Held, on the facts, that the will of the testatrix was valid, but that the codicil was obtained by undue influence, and probate thereof was refused. In the unusual circumstances the Court made no order as to costs. *McHugh* v. *Dooley*, 10 B. C. R. 537.

Insane Delusion.]—F. in 1890 executed a will providing generally for his wife and making his son residuary legatee. In 1897 he revoked this will and executed another by which the provision for his wife was reduced, but still leaving sufficient for her support; the son was given half the residue, and the testator's daughter the other half; his wife was appointed executrix and guardian of the children. Prior to the execution of the last will F. had frequently accused his wife and son of an abominable crime, for which there was no foundation, had banished the son from his house, and treated his wife with violence. After its execution he was for a time placed in a lunatic asylum. On proceedings to set aside this will for want of testamentary capacity in F.:—Held, reversing the judgment in 33 N. S. Reps. 261, Sedgewick, J., dissenting, that the provision made by the will for the testator's wife and son, and the appointment of the former as executrix and guardian, were inconsistent with the

belief that when it was executed testator was influenced by the insane delusion that they were guilty of the crime he had imputed to them, and the will was therefore valid. *Skinner* v. *Farquharson*, 22 Occ. N. 197, 32 S. C. R. 58.

Onus of Testamentary Capacity — Undue influence. *Purdy* v. *Purdy*, 1 O. W. R. 449.

Proof of Insanity — *Evidence.*] — In order to avoid a deed or will on the ground of insanity, it is necessary to look first at the instrument itself and its provisions in order to see the mental condition of the maker; and if these provisions are such as a wise and just man would make in the like case, the Judge, unless there is irrefutable proof of insanity, should treat the instrument as valid. 2. The testimony of witnesses who did not see the testator for a long time before his death, and knew nothing of his mental faculties at the time when he made his will, has no significance, and cannot be a part of the chain of facts which constitute the general proof of insanity, unless it is sufficient in itself to annul the will, especially if there is medical testimony expressly contradicting it. *Hotte* v. *Birubin*, Q. R. 25 S. C. 275.

Senile Dementia — Insane delusions — Comprehension of terms of will—Attack on will by person accepting benefit—Costs. *McGarrigle* v. *Simpson*, 1 O. W. R. 685.

Spiritual Adviser—*Onus of Proof.*] — The influence of a person standing in a specially confidential relation to a testator (in the present case the spiritual adviser and confessor) may lawfully be exerted to obtain a will or legacy in his favour, so long as the testator thoroughly understands what he is doing and is a free agent, and the burden of proof of undue influence lies upon those who assert it; but, if the person who obtains the benefit takes part in the actual drawing of the will, the onus is cast upon him of shewing the righteousness of the transaction. *Collins* v. *Kilroy*, 21 Occ. N. 230, 1 O. L. R. 503.

Unsustained Charges of Fraud—Costs. *Taylor* v. *Delaney*, 1 O. W. R. 208, 409.

VI. Widow's Election.

Evidence of Election — *Ignorantia Juris.*]—A testator left to his wife all his personal estate absolutely, and his real estate for life or so long as she remained his widow, subject to which he devised his lands in specific parcels to his sons, and died in 1889. After his death his widow remained in possession of the land and supported the children, and built an addition to the house, and married again in 1891. She and her husband in 1893 took a lease of the property from the executors, to expire when the eldest son came of age. On this latter event happening in 1899, his parcel of land was conveyed to him by the executors, who then granted a new lease of the rest of the land to the second husband which was now current:—Held, that the widow was put by the will to her election:—Held, also, that, though there was no positive evidence that the widow knew she had a right to elect between the will and her dower, yet, on the principle ignorantia juris neminem excusat, she must be held to have made her election in favour of the will. *Reynolds* v. *Palmer*, 21 Occ. N. 78, 32 O. R. 431.

VII. Validity of Conditions.

Charitable Bequest — Validity—Application of executors for direction of Court—Question covered by authority. *Re Rose*, 6 O. W. R. 937.

Conditional Gift—*Charitable Bequest—Fulfilment of Condition — Procuring like Sum.*]—Testator left a legacy of $20,000 to the corporation of the town of Windsor to assist in building and maintaining a hospital for the sick, on condition that the town should "procure a like sum by a tax on the citizens, or from private donations or otherwise, to be added to this bequest." There was a gift over to another legatee, if the town, within seven years after the decease of testator, "fails to raise" the said additional sum. The sum of $6,000 was raised from private donations, and the balance of $14,000 was procured by grant from the Provincial Government:—Held, that the condition in the will was complied with, and the town corporation were entitled to be paid the legacy. *In re Payzant*, 23 Occ. N. 246.

Devise — *Restraint upon Alienation — Validity—Summary Application to Determine —Rule 938 — Scope of.*] — A testator devised lands to his sons, subject to a restraint upon alienation. The sons, desiring to mortgage the lands devised, applied under Rule 938 for a determination of the question whether the restraint was valid:—Held, that Rule 938 gives no authority to determine such a question. *In re Martin*, 25 Occ. N. 18, 8 O. L. R. 638, 4 O. W. R. 429.

Legacy—*Religious Liberty—Public Policy —Restrictions as to Marriage—Education—Exclusion from Succession.*]—In the Province of Quebec the English law governs on the subject of testamentary dispositions; and, therefore, in that province, a testator may validly impose as a condition of a legacy to his children and grandchildren, that marriages of the children should be celebrated according to the rites of any church recognized by the laws of the province, and that the grandchildren should be educated according to the teachings of such church, and may also exclude from benefit under his will any of his children marrying contrary to its provisions and grandchildren born of the forbidden marriages, or who may not have been educated as directed. Judgment noted in 21 Occ. N. 392 affirmed. *Renaud* v. *Lamothe*, 22 Occ. N. 357, 32 S. C. R. 357.

Restraint on Alienation — *Precatory Condition—Substitution—Heirs.*]—There may be a restraint upon alienation in a testamentary disposition, even where the testator has not used prohibitive terms, and has only expressed a simple wish, as long as there is no doubt as to his intention. 2. A restraint upon alienation constitutes a substitution, if it appears that the testator has made it in the interest of a person for whom he designs the property of which he forbids the alienation. 3. The restraint upon alienation, unless in favour of some of the presumptive heirs of

the testator, constitutes a substitution, not only in favour of the heirs to whom the restraint does not apply, but in favour of all the presumptive heirs. *Létang* v. *Latour*, Q. R. 24 S. C. 15.

Restraint on Alienation—*Time Limitation.*]—A devisee of real estate under a will was restrained from selling or incumbering it for a period of twenty-five years after the testator's death:—Held, that, as the restraint, if general, would have been void, the limitation as to the time did not make it valid. *Blackburn* v. *McCallum*, 23 Occ. N. 133, 33 S. C. R. 65.

VIII. Other Cases.

Action to Set Aside — Application for probate—Withdrawal of caveat—Burden of proof — Testamentary capacity — Undue influence. *Northmore* v. *Abbott*, 1 O. W. R. 231.

Action to Set Aside—Costs—Separate defence. *Slaven* v. *Slaven*, 1 O. W. R. 410.

Action to Set Aside — *Pleading — Absentee—Existence of.*]—The plaintiff suing in the name of an absentee to set aside a will must allege that the absentee was in existence at the time of the opening of the succession. *Tetreault* v. *Rochon*, 6 Q. P. R. 235.

Direction to Executor to Pay Funeral Expenses of Relative—Payment by executor of relative—Claim against estate—Administration order—Applicant—Beneficiary—Assignee of claim—Costs—Originating notice. *Re Atchison, Atchison* v. *Hunter*, 2 O. W. R. 856, 1145.

Direction to Pay Debts Out of Estate—Specific devise of personalty—Residuary devise of money and securities. *Re Anderson*, 1 O. W. R. 217.

Executors — Legacy duty — Discretion — Residue—Crediting legacy on mortgage—Predecease of legatee—Lapse. *Re Holland*, 1 O. W. R. 73, 3 O. L. R. 406.

Executors — Power to mortgage or sell land—Directions of will. *Re Crawford*, 1 O. W. R. 470, 4 O. L. R. 313.

Executors—*Power to Carry on Business of Testator — Sale of Business — Lease of Premises.*]—Where under a will no express power was given to carry on the deceased's business—a brewery business—an order sanctioning the carrying on of the same by the personal representatives was refused, but it was held that they had a discretionary power either to sell the chattel property with a lease of the brewery, or to sell the business as a going concern with a lease of the premises until the date fixed for distribution, and an agreement for sale, if deemed advisable, but subject to the approval of the beneficiaries, on an infant beneficiary attaining her majority. *In re Brain*, 25 Occ. N. 44, 9 O. L. R. 1, 4 O. W. R. 263.

Executors—Power to sell lands—Power to exchange—Vendor and purchaser. *Re Confederation Life Association and Clarkson*, 2 O. W. R. 943, 6 O. L. R. 603.

Implied Revocation of Earlier Will—*Consideration of Circumstances and Construction.*] — When a testator has successively made two wills, containing different provisions, but susceptible nevertheless of being carried out at the same time, unless the second will contains a clause expressly revoking the first, the Court may, in view of the circumstances and the interpretation of the provisions of the second will according to the presumed wish of the testator, decide that the provisions of the second will are incompatible with the first, and in consequence that the first will is revoked by the second. *Nelson* v. *Villeneuve*, Q. R. 25 S. C. 328.

Loss or Destruction — Establishing — Evidence—Solicitor—Privilege—Proof of execution—Proof of contents—Presumption of revocation—Rebuttal—Declarations of testator—Evidence of beneficiary—Corroboration—Admissions—Cross-examination. *Stewart* v. *Walker*, 6 O. L. R. 495, 1 O. W. R. 489, 2 O. W. R. 990.

Probate Fees — *Statutory Authority.*] — By Rule 1065, the appendices to the Supreme Court Rules form part thereof, and by s. 94 of the Supreme Court Act (R. S. B. C. 1897 c. 56) the Rules are declared to be valid and binding; therefore probate fees as set out in appendix M. of the Rules may be collected as being imposed by statutory enactment. *In re Porter Estate*, 10 B. C. R. 275.

Trustees—Advances—Division of estate—Discretion. *Hospital for Sick Children* v. *Chute*, 1 O. W. R. 321, 3 O. L. R. 590.

Trusts—Power to appoint new trustee—Exercise of—"Surviving brothers and sisters"—"Then"—Parties—Cestuis que trust. *Sanders* v. *Bradley*, 2 O. W. R. 697, 6 O. L. R. 250.

WINDING-UP.

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WITNESSES.

Order to Appear Again—*Re-service.*]—An order ought not to be given to witnesses subpœnaed, or present in Court, to appear upon another day, unless they have been first sworn. *Dechêne* v. *Dussault*, Q. R. 20 S. C. 296.

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ACQUIRE.—*In re Canadian Pacific R. W. Co., Sudbury Branch*, 36 S. C. R. 42.

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ACTUAL RESIDENT.—*Curren* v. *McEachren*, 5 Terr. L. R. 333.

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AGENT.—*Ontario Wind Engine and Pump Co.* v. *Lockie*, 24 Occ. N. 220, 7 O. L. R. 385, 3 O. W. R. 281.

AGGREGATE POPULATION OF CANADA. — *Atty.-Gen. for P. E. I.* v. *Atty.-Gen. of Canada*; *Atty.-Gen. for New Brunswick* v. *Atty.-Gen. for Canada*, [1905] A. C. 37.

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ALL BUSINESS YOU MAY SECURE.—*Miller* v. *Globe Printing Co.*, 6 O. W. R. 258.

ALL MY CHILDREN. — *In re Williams*, 23 Occ. N. 156, 5 O. L. R. 345.

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ALL THE RESIDENT RATEPAYERS AFFECTED BY SUCH PERMISSION.—*Curren* v. *McEachren*, 5 Terr. L. R. 333.

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AT OR NEAR.—*Montreal and Ottawa R. W. Co.* v. *City of Ottawa*, 22 Occ. N. 224, 4 O. L. R. 56; *Canada Atlantic R. W. Co.* v. *City of Ottawa*, 23 Occ. N. 209, 33 S. C. R. 376.

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CARRYING ON BUSINESS.—*Nelson* v. *Lenz*, 9 O. L. R. 50, 5 O. W. R. 21.

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OPPOSITE PARTY.—*In re Can. Pac. R. W. Co., and Batter*, 20 Occ. N. 317, 13 Man. L. R. 200.

OR.—*Re Chandler and Holmes*, 5 O. W. R. 647.

OR OTHERWISE.—*Paulin* v. *Town of Windsor*, 36 N. S. Reps. 441, S. C. Sub. Nom; *In re Payzant*, 24 Occ. N. 140.

OTHER.—*Re Garner*, 3 O. W. R. 584.

OWNER.—*Anderson* v. *Godsal*, 7 B. C. R. 404; *Rochester and Pittsburg Coal and Iron Co.* v. *The "Garden City,"* 7 Ex. C. R. 34; *Lloyd* v. *Walker*, 22 Occ. N. 256, 4 O. L. R. 112; *Sawyer* v. *City of Toronto*, 22 Occ. N. 25, 380, 2 O. L. R. 717, 4 O. L. R. 624; *British Columbia Timber and Trading Co.* v. *Leberry*, 22 Occ. N. 273.

PARTY CONCERNED.—*In re Ont. Silver Co. and Bartle*, 21 Occ. N. 112, 1 O. L. R. 140.

PARTY INTERESTED.—*In re Smith*, 23 Occ. N. 58, 9 B. C. R. 329.

PARTY TO OFFENCE. — *Rex* v. *Hendrie*, 6 O. W. R. 1015.

PASSENGERS.—*Re Chin Chee* (B.C.), 2 W. L. R. 237.

PAYMENT IN CASH.—*Tanner* v. *Cowan*, 9 B. C. R. 301.

PERFORMED IN PART.—*McDonald* v. *Hutchins*, Q. R. 12 K. B. 499.

PERMIT.—*Macartney* v. *Miller* (N.W.T.), 2 W. L. R. 87.

PERSON.—*Therrien* v. *Town of St. Paul*, Q. R. 23 S. C. 248; *Walker* v. *Lamoureau*, Q. R. 21 S. C. 492; *In re Wah Yun & Co.*, 11 B. C. R. 154.

PERSONAL EFFECTS.—*In re Way*, 24 Occ. N. 20, 6 O. L. R. 614, 2 O. W. R. 1072.

PERSON INTERESTED.—*In re Grand Trunk R. W. Co. and City of Kingston*, 24 Occ. N. 1, 8 Ex. C. R. 349.

PLACE OF DRAMATIC ENTERTAINMENT.—*Carte* v. *Dennis*, 21 Occ. N. 68, 267, 5 Terr. L. R. 30.

PLANT AND APPLIANCES.—*In re City of Toronto Assessment*, 22 Occ. N. 390.

POSTMASTERS IN CITIES.—*Lancaster* v. *Shaw*, 10 O. L. R. 604, 6 O. W. R. 316.

PREMISES.—*Martin* v. *Martin*, 24 Occ. N. 369, 8 O. L. R. 462, 3 O. W. R. 930.

PROCEEDING.—*Rex* v. *Rapay*, 5 Terr. L. R. 367; *McDonald* v. *Grundy*, 24 Occ. N. 356, 8 O. L. R. 113, 3 O. W. R. 731.

PROPER REGISTRY.—*Re Wallace and Flewin* (B.C.), 2 W. L. R. 13.

PROPERTY.—*Can. Pac. R. W. Co.* v. *Ottawa Fire Ins. Co.*, 9 O. L. R. 493, 5 O. W. R. 496.

PROVIDED.—*Hart* v. *City of Halifax*, 35 N. S. Reps. 1.

READY FOR TRIAL.—*Standard Life Assurance Co.* v. *Montreal Coal and Towing Co.*, Q. R. 13 K. B. 183.

REMAINING CHILDREN.—*Re Garner*, 3 O. W. R. 584.

RESIDE.—*In re North Renfrew Provincial Election; Wright* v. *Dunlop*, 24 Occ. N. 125, 7 O. L. R. 204, 3 O. W. R. 300.

RESIDED CONTINUOUSLY.—*In re Seymour Voters' Lists*, 2 Elec. Cas. 69.

RESIDENCE.—*Curren* v. *McEachren*, 5 Terr. L. R. 333.

RESPECTIVE.—*Re Smith*, 6 O. W. R. 45.

REVERSION. — *Osterhout* v. *Osterhout*, 24 Occ. N. 219, 390, 7 O. L. R. 402, 8 O. L. R. 685, 3 O. W. R. 249, 4 O. W. R. 376.

RIDING.—*Powis* v. *Ont. Accident Ins. Co.* 21 Occ. N. 164, 1 O. L. R. 54.

RIGHT HEIRS.—*Re Bown Trusts*, 9 O. L. R. 199, 5 O. W. R. 382.

ROLLING STOCK, PLANT AND APPLIANCES. —*In re City of Toronto Assessment Appeals; In re City of Ottawa Assessment Appeals*, 23 Occ. N. 258, 6 O. L. R. 187.

SAFE AND PRACTICABLE.—*Lovitt* v. *The "Calvin Austin,"* 9 Ex. C. R. 160; *The "Calvin Austin"* v. *Lovitt*, 25 Occ. N. 78, 35 S. C. R. 616.

SERIES OF TRANSACTIONS. — *Mason* v. *Grand Trunk R. W. Co.*, 24 Occ. N. 325, 8 O. L. R. 28, 3 O. W. R. 621, 810.

SHALL REMAIN STANDING.—*Christie* v. *Cooley*, 4 O. W. R. 79, 6 O. W. R. 214.

SISTER OF THE DECEASED.—*In re Oliver*, 21 Occ. N. 364, 455, 8 B. C. R. 91.

SUBJECT TO APPROVAL.—*Mason and Risch Piano Co.* v. *Thompson*, 3 O. W. R. 540.

SUBSTRUCTURES AND SUPERSTRUCTURES.—*In re City of Toronto Assessment Appeals; In re City of Ottawa Assessment Appeals*, 23 Occ. N. 258, 6 O. L. R. 187.

SUCH DAM OR OTHER STRUCTURE.—*James* v. *Rathbun Co.*, 6 O. W. R. 1005.

SUFFICIENT OUTLET.—*Chapman* v. *McEwen*, 6 O. W. R. 164.

SUPERSTRUCTURE.—*In re Can. Pac. R. W. Co. and Town of MacLeod*, 5 Terr. L. R. 192.

SURPLUS WATER.—*Caledonia Milling Co.* v. *Shirra Milling Co.*, 9 O. L. R. 213, 5 O. W. R. 170.

SURVIVING.—*Re Garner*, 3 O. W. R. 584.

SURVIVING BROTHERS AND SISTERS.—*Saunders* v. *Bradley*, 6 O. W. R. 436.

TEMPORARILY DOMICILED.—*Rex* v. *Townsend*, 21 Occ. N. 569.

TENANT FEU ET LIEU.—*Plante* v. *Guevremont*, Q. R. 18 S. C. 401.

TERRITORY OF DOMINION.—*Can. Pac. R. W. Co.—Sudbury Branch*, 36 S. C. R. 42.

THE REST OF MY SURVIVING CHILDREN.—*Re McCubbin*, 6 O. W. R. 771.

THEIR OWN PURPOSE.—*Caledonian Milling Co.* v. *Shirra Milling Co.*, 9 O. L. R. 213, 5 O. W. R. 170.

THEN.—*Saunders* v. *Bradley*, 6 O. W. R. 436.

THEN SURVIVING.—*Haight* v. *Dangerfield*, 23 Occ. N. 87, 5 O. L. R. 274.

THIRD PERSON.—*Bank of Toronto* v. *St. Lawrence Fire Ins. Co.*, [1903] A. C. 59.

TIME CERTAIN.—*Sinclair* v. *Preston*, 21 Occ. N. 97, 13 Man. L. R. 228.

TO CONDUCT THE TRIAL.—*Rex* v. *Walsh*, 23 Occ. N. 186, 5 O. L. R. 527.

TRAIN OF CARS.—*Harris* v. *The King*, 24 Occ. N. 388, 9 Ex. C. R. 206.

TRANSFER.—*Langley* v. *Kahnert*, 25 Occ. N. 69, 114, 9 O. L. R. 164, 4 O. W. R. 396, 36 S. C. R. 114.

UNDER PROMISE OF MARRIAGE.—*Regina* v. *Walker*, 1 Terr. L. R. 482.

UNLAWFULLY.—*Ex. p. O'Shaughnessy*, Q. R. 13 K. B. 178.

UNLAWFULLY DID STEAL. — *Rex* v. *George*, 35 N. S. Reps. 42.

UNPRODUCTIVE OF A SUBSTANTIAL NET PROFIT. *Re M.*, 6 O. W. R. 938.

USED ON THE RAILWAY. — *Atcheson* v. *Grand Trunk R. W. Co.*, 21 Occ. N. 108, 1 O. L. R. 168.

VALID IN CANADA.—*Barrett* v. *Elliott*, 24 Occ. N. 344, 10 B. C. R. 461.

VALUABLE SECURITY.—*Rex* v. *Wagner*, 5 Terr. L. R. 119.

VOLUNTARILY.—*Raser* v. *McQuade*, 11 B. C. R. 161.

WEARING APPAREL.—*Wensky* v. *Can. Development Co.*, 21 Occ. N. 601, 8 B. C. R. 190.

WHICH HAS SUCH EFFECT.—*Ross Brothers Limited* v. *Pearson* (N.W.T.), 1 W. L. R. 338, 575.

WIDENING.—*Watson* v. *Maze*, Q. R. 17 S. C. 579.

WILFULLY.—*Ex p. O'Shaughnessy*, Q. R. 13 K. B. 178.

WITHIN THE PROVINCE.—*Seaman* v. *Seaman*, 25 Occ. N. 109.

WITHOUT PREJUDICE. — *Re Boston Wood Rim Co.*, 5 O. W. R. 149; *McLennan* v. *Gordon*, 5 O. W. R. 98.

WORK FOR THE GENERAL ADVANTAGE OF CANADA.—*Hewson* v. *Ontario Power Co. of Niagara Falls*, 24 Occ. N. 332, 8 O. L. R. 88, 3 O. W. R. 865.

WORK OF OPERATIONS OF THE COMPANY.—*Sayers* v. *British Columbia Electric R. W. Co.* (B.C.), 2 W. L. R. 152.

WORKSHOPS NOW EXISTING. — *Town of Whitby* v. *Grand Trunk R. W. Co.*, 22 Occ. N. 173, 3 O. L. R. 536.

WORK AND LABOUR.

Action to Recover Value — Protection of plaintiffs' works from injury by defendants —Value of necessary work. *Lindsay Water Commissioners* v. *Fauquier*, 5 O. W. R. 635, 6 O. W. R. 400.

Agent — Joint liability — Guaranty — Damages for Unskilful Work — Set-off or counterclaim—Costs. *Kelso* v. *Thompson*, 1 O. W. R. 176.

Contract — *Action for Work Done — Authority of Agent — Findings of Jury.*]— In an action for work done and materials provided for certain steamers, the jury did not answer all the questions submitted, and the trial Judge gave judgment for the plaintiffs for the amount claimed for certain work covered by the certificate of an agent of the defendants, but discharged the jury as being unable to agree in respect of the other matters, and reserved further consideration:— Held, that on the findings as they stood the plaintiffs could not recover any amount other than the one allowed. *Galbraith* v. *Hudson's Bay Co.*, 7 B. C. R. 431.

Destruction before Delivery—*Fire—Risk of Workman.*]—A workman who undertakes to make repairs to a house and who furnishes materials, although the quantity of the materials, and therefore the price of the work, cannot be ascertained until the work is finished, can claim nothing from the owner of the house, if it is destroyed, before the completion and delivery of the work, by a fire which is not attributable to the fault of the owner. *Murphy* v. *Forget*, Q. R. 19 S. C. 135.

Work Done Upon Property of Another—*Payment for—Droit D'Accession—Mala Fides—Remedy.*]—If an article not belonging to a workman is transformed by his work into a different article which the owner wishes to get possession of, he is obliged to pay for the work done, whether the workman did it in good faith or not. 2. The workman so acting in bad faith is liable for damages and to criminal prosecution: a workman acting in good faith is not. *Godard* v. *Mercier*, Q. R. 25 S. C. 372.

See CONTRACT — MASTER AND SERVANT—MECHANICS' LIENS.

WORKMEN'S COMPENSATION ACT.

See MASTER AND SERVANT.

WOUNDING WITH INTENT.

See CRIMINAL LAW.

WRIT OF ATTACHMENT.

See ATTACHMENT OF DEBTS.

WRIT OF CA. SA.

See ARREST.

WRIT OF ELECTION.

See PARLIAMENTARY ELECTIONS.

WRIT OF EXTENT.

See ATTACHMENT OF DEBTS.

WRIT OF POSSESSION.

Order for—*County Court Judge—Appeal—Prohibition — Title to Land.*]—There is no appeal from the order of a County Court Judge upon a summary application of a purchaser at a sheriff's sale, for a writ of possession. If such an order were made without jurisdiction, prohibition would be the remedy. Upon such an application the Judge is not trying the title to lands, but is merely determining as a matter of discretion whether the purchaser should have possession. Such an application may be heard by the Judge of another district designated under s. 12 of c. 9 of the Nova Scotia statutes of 1889 to act in the place and stead of the Judge of the district in which the lands lie. *In re Gough*, 21 Occ. N. 92.

WRIT OF REVENDICATION.

Irregularities — *Affidavit — Service.*]—The omission to describe the person making the affidavit for a fiat for a writ of revendication, and the failure to serve a copy of the affidavit on the defendant, or leave it for him at the office of the Court, within three days, do not constitute fatal irregularities in the procedure. *Haddad* v. *Marcotte*, 4 Q. P. R. 313.

See EXECUTION — PLEADING — PLEDGE.

WRIT OF SAISIE-ARRET.

See ATTACHMENT OF DEBTS.

WRIT OF SUMMONS.

I. AMENDMENT, 1766.
II. INDORSEMENT, 1767.
III. INTITULING, 1768.
IV. RENEWAL, 1768.
V. RETURN, 1769.
VI. SERVICE, 1769.
VII. SMALL DEBT PROCEDURE, N. W. T., 1781.
VIII. SPECIAL INDORSEMENT, 1781.
IX. OTHER CASES, 1783.

I. AMENDMENT.

Costs.]—In an action between lessor and lessee, the plaintiff will be allowed, upon paying costs of motion, to add the words "summary procedure" to the writ and copy thereof. *Cusson* v. *Vaillantcourt*, 5 Q. P. R. 88.

County Court Summons — *Mistake in—Statute of Limitations — County Court Appeal.*]—In the notice at the end of a County Court summons the name of R. L. was by mistake inserted instead of that of the plaintiff. The plaintiff signed judgment by default for want of an appearance and plea, issued a writ of inquiry, and gave notice of the execution thereof, when the defendants took out a summons calling upon him to shew cause why the writ of inquiry, interlocutory judgment, and the writ and the service thereof, should not be set aside. At the return of the summons the plaintiff applied for leave to amend the writ of summons by inserting the plaintiff's name instead of that of R. L. and for leave to re-serve the same, when amended. This application the Judge of the County Court refused, although the Statute of Limitations would be a bar to the issuing of a new writ, and allowed that of the defendants. On appeal:—Held, that the amendment should have been allowed and an order made for the re-service of the writ as amended. Semble, that an appeal will lie from the decision of a County Court Judge on a point of law, even though the same does not arise at or out of the trial of an action. *Stewart* v. *Canadian Pacific R. W. Co.*, 20 Occ. N. 88, 35 N. B. Reps. 115.

Description of Defendant — *Company—Incorporation — Exception to Form — Costs.*]—Where the company defendant is described in the writ of summons as a "corps politique et incorporé" when it is not an incorporated body at all, as it appears from the statute creating it, an exception à la forme on this ground will not lie when the company fails to prove that it suffers a prejudice by being so described. 2. A motion to amend the writ by striking out the words objected to, will be granted. 3. No costs will be allowed on either proceeding. *Perrault* v. *Liverpool and London and Globe Ins. Co.*, 4 Q. P. R. 395.

Motion to Set Aside — *Exception as to Form — Time.*]—A motion to set aside an amendment made by the plaintiff to his writ of summons and declaration, as not having been authorized by the Court where authorization was necessary, is an exception to

the form, and is subject to the formalities of art. 164, C. P., as to the time for giving notice, etc. *Pizzuto* v. *Canadian Pacific R. W. Co.*, 3 Q. P. R. 471.

Service.]—If the plaintiff obtains leave to have his writ regularly signed by the prothonotary, and such signature is not affixed in open Court, he cannot foreclose the defendant from pleading without having first served such amendment upon him. *Beauchamp* v. *Gourre*, 4 Q. P. R. 201.

Style of Cause — *Irregularity or Nullity.*]—J. S., trading under the name of the British Columbia Furniture Company, commenced an action in such name in respect of a promissory note. A summons under Order XIV. having been dismissed on the ground that one person cannot sue in a firm name, the plaintiff obtained an order amending the style of cause:—Held, that the writ was not a nullity and that the irregularity was properly amended. *British Columbia Furniture Co.* v. *Tugwell*, 7 B. C. R. 361.

Substitution of Defendants.]—Where the plaintiff has sued the defendants as a corporation, he cannot, after the filing of an exception to the form, move to amend his writ by substituting for his designation of the defendants, the names of the members of the so-called corporation, which is in reality a partnership. *Lambe* v. *Thompson S. S. Line*, 4 Q. P. R. 161.

II. INDORSEMENT.

Action on Bond — *Special Indorsement —Necessity for — Unliquidated Damages— Costs.*]—The defendants appealed to a Supreme Court Judge in Chambers from the order of an examiner under the Collection Act, committing him to gaol, and gave a bond in the sum of $61.42 required by s. 32 of the Act, conditioned personally to appear before the Judge on the hearing of the appeal, and to surrender himself to prison in case of an adjudication of imprisonment. The appeal was heard and dismissed, and the adjudication below confirmed, and for an alleged breach of the condition of the bond by the defendant in not surrendering himself to prison, an action was commenced on the bond against the defendant and his sureties for the penalty of $61.42, by the issue of a general writ of summons. The defendants, before appearing, moved to set the writ and service aside, on the grounds (a) that being for a debt or liquidated demand the writ should have been specially indorsed under Order 3, Rule 5, and (b) that the writ in any event should have been endorsed with the usual claim for costs under Order 3, Rule 6:—Held, dismissing the motion with costs, that the claim was not a debt or liquidated demand for money, but was one in respect to which damages must be assessed. *Hennigar* v. *Brine* (*No. 2*), 24 Occ. N. 144.

Address of Plaintiffs — *Amendment.*]—Where the plaintiffs sue as trustees for a corporation, it is not necessary to indorse on the writ the addresses of the individual plaintiffs. The plaintiffs sued as trustees of the Standard Life Assurance Company, and their address was indorsed on the writ as "Edinburgh, Scotland:"—Held, insufficient address, but, as there was nothing misleading in their address, leave was given to amend by stating the place of business of the company. *Dundas* v. *McKenzie*, 10 B. C. R. 174.

III. INTITULING.

Municipal Election — *Contestation of — Quo Warranto.*]—The fact that a writ of summons, to which is annexed a petition to set aside a municipal election, pursuant to the charter of the city of Montreal, is intituled "writ of quo warranto," does not invalidate the petition. *Charbonneau* v. *Roy*, 3 Q. P. R. 363.

IV. RENEWAL.

Ex Parte Order — Withholding material evidence — Statute of Limitations. *Langley* v. *Costigan*, 5 O. W. R. 147.

Grounds for — *Sufficiency of—Statute of Limitations.*]—An ex parte order for the renewal of a writ of summons on the ground of inability to discover the defendant's place of residence having been made, it was shewn on a motion to set aside such order that the defendant had never changed his place of residence, and that it could readily be ascertained from the directory:—Held, that the order should not be set aside, the local Master who made the ex parte order having been satisfied as to the efforts made to effect such service, and nothing having been withheld from him; despite the fact that, but for the existence of the writ, the ordinary period of limitation would have expired. Howland v. Dominion Bank, 15 P. R. 56, and Mair v. Cameron, 18 P. R. 484, distinguished. *Canadian Bank of Commerce* v. *Tennant*, 23 Occ. N. 202, 5 O. L. R. 524, 2 O. W. R. 277, 393.

Service — *Rule 132.*]—The time allowed for renewal of a writ of summons is, upon the proper construction of Rule 132, to be reckoned inclusive of the date of issue or of a former renewal. Black v. Green, 15 C. B. 262, 3 C. L. R. 38, and Anon., 11 W. R. 293, 32 L. J. N. S. Ex. 88, 7 L. T. N. S. 718, followed. Where the original writ of summons was issued on the 5th November, 1898, and was renewed on the 4th November, 1899, the renewal ran out on the 3rd November, 1900, and service thereafter was of no effect. *Laird* v. *King*, 21 Occ. N. 34, 162; 19 P. R. 307; 1 O. L. R. 51.

Statute of Limitations — *Ex Parte Order—Master in Chambers—Local Judge.*]—The Master in Chambers has jurisdiction to rescind an order made on the ex parte application of the plaintiff by a local Judge for the renewal of a writ of summons, if material evidence has, even unintentionally, been withheld. Such an order was rescinded where on the ex parte application the facts that the writ had expired and that the Statute of Limitations had run against the claim, were not brought to the notice of the local Judge. *Williams* v. *Harrison*, 24 Occ. N. 24, 6 O. L. R. 685, 2 O. W. R. 1061.

V. RETURN.

Dismissal for Default of Notice — *Deposit of Copy—Time.*] — When a writ has not been returned, the defendant, in order to have the action dismissed for default, must not only give the plaintiff a notice within three days from the expiration of the time allowed for appearance, but must also deposit in the record office his copy of the process within the same three days. *Coté* v. *Corporation d'Irlande*, 4 Q. P. R. 123.

VI. SERVICE.

Addresses of Defendants — Omission — Defendant residing out of Ontario — Setting aside writ — Nullity. *State Savings Bank* v. *Columbia Iron Works*, 6 O. L. R. 358, 2 O. W. R. 733.

Bailiff—*Wrong District—Amendment.*] — A writ of summons addressed to the bailiffs of a certain district, and executed by a bailiff of another district, may, even after the lodging of an exception to the form founded upon such irregularity, be amended by addressing it to the bailiffs of the district in which it is desired to serve it. *Houle* v. *Paquet*, Q. R. 20 S. C. 297, 4 Q. P. R. 329.

Company — Head office removed from province — Substituted service. *Gold Run (Klondike) Mining Co.* v. *Canadian Gold Mining Co.*, 5 O. W. R. 411.

Deceased Defendant — *Appearance.*] — The defendant having been sued by the plaintiff, there was filed in the defendant's name an appearance and an exception to the form, alleging that the defendant died before the service of process, and that the service was irregular:—Held, that the plaintiff could not have served the defendant, who was dead, and for the same reason an appearance and defence could not be filed in the defendant's name. The parties were dismissed out of Court without costs. *Madore* v. *Graham*, Q. R. 18 S. C. 129.

Delay in—*Death of Sovereign—Nullity.*] —A writ of summons issued in the lifetime of her late Majesty and in her name, but served and reported after her death, is not on that account a nullity, and if a second action for the same cause is begun in the name of the King, a plea that the first action is still pending is a good plea. *Ryan* v. *Fortier*, 3 Q. P. R. 526.

Domicil—*Service on Attorneys — Certificate—Deposit—Exception—Affidavits.*] —The service of a writ of summons and declaration upon a defendant at his last known domicil and place of residence is regular, although the same is no longer his ordinary residence. 2. Under the circumstances of this case the plaintiff's motion for leave to serve the writ and declaration upon the defendant's attorneys ad litem, was granted. 3. A copy of the prothonotary's certificate as to the deposit made with a declinatory exception must be served upon the plaintiff. 4. Rule 47 of the Rules of Practice of the Superior Court, regarding affidavits, applies only to special demands, and not to pleadings. *Higginson* v. *Reid*, 5 Q. P. R. 394.

Foreign Corporation — Rule 159 — "Carrying on business in Ontario"—Service on general manager in Ontario. *Burnett* v. *General Accident Assurance Corporation*, 6 O. W. R. 144.

Foreign Corporation — *Officer Temporarily in Province — Setting Aside Service — Status of Applicant.*] — A writ of summons describing the defendant company as "doing business in the Province of British Columbia" was served upon J. G. McLaren, the manager of the defendant company, who was passing through British Columbia en route to Dawson. The company were incorporated in England, and not registered or licensed in British Columbia: — Held, that the service was irregular. Also that it is not necessary that a person who has been served with a writ should be a real defendant to entitle him to apply to set it aside. *Fall* v. *Klondyke Bonanza, Limited*, 9 B. C. R. 493.

Foreign Defendants — *Service on Traveller—Sale of Goods — Contract — Completion—Goods Delivered and Refused—Property of Defendant in Jurisdiction.*] — In a suit against a foreign commercial partnership, service of the writ of summons made upon a travelling salesman of the partnership, whose powers are limited to taking orders at prices furnished to him by his employers, is not sufficient to give jurisdiction to the Courts of the Province of Quebec. 2. A contract for the purchase of goods is complete at the place where the order is accepted by the vendor. 3. The presence in the Province of Quebec of a package of goods bought by the plaintiff from the defendants, and refused by him, which package the defendants' traveller is charged to take back if it is untouched and uninjured, and which he alleges is not so untouched, does not constitute property in the jurisdiction sufficient to give to the Courts of the Province of Quebec jurisdiction over the defendants. *Malouf* v. *Zeck*, 5 Q. P. R. 153.

Foreign Insurance Company—*Agent—Power of Attorney—Cause of Action.*]—An English insurance company, who had carried on business in Canada, and whose head office was at Toronto, by two powers of attorney had appointed its general agent at Toronto attorney to receive process under both R. S. O. 1897 c. 203, s. 66, and R. S. C. c. 124, s. 13, transferred its Canadian business to another company, and closed its Canadian offices, but the deposit under the Dominion Act had not been released, and neither of the powers of attorney had been cancelled. On a motion to set aside the service of a writ of summons, which was accepted by solicitors as if served on the Toronto agent of the company, subject to the right to move against it, on the ground that the company was not within the jurisdiction:—Held, that a writ of summons upon a policy issued in Quebec in respect of a loss upon property in Quebec was properly served upon the agent named as attorney at Toronto under Rule 159, and that the Court in Ontario, therefore, had jurisdiction to entertain the action. Semble, that the power of attorney required to be filed under R. S. C. c. 124, s. 13, is to receive service of process in any suit instituted in any province of Canada in respect of any liability incurred in such province, and not in respect of any liability incurred in Canada. *Armstrong* v. *Lancashire Fire Ins. Co.*, 22 Occ. N. 146, 2 O. L. R. 395.

Foreign Unincorporated Voluntary Association—*Parties—Incapacity— Proper Time to Raise Question.*]—The right to maintain an action or the liability to be sued can only be by or against persons as individuals, or as a corporation, or a partnership, or where individuals are carrying on business in a name other than their own, or where they have been given the capacity to own property and to act by agents. A local union of workmen, a purely voluntary association, occupying none of such capacities, are not liable to be sued; and a writ served upon them was therefore set aside. Taff Vale R. W. Co. v. Amalgamated Society of Railway Servants, [1901] A. C. 429, distinguished. Where it clearly appears that the association sued is not an entity, which may be sued by the name it bears, it is more convenient to set aside the service of the writ on a motion made therefor, than to allow the case to proceed to trial with a certainty of its ultimate dismissal. *Metallic Roofing Co. of Canada* v. *Local Union No. 30, Amalgamated Sheet Metal Workers' International Association*, 23 Occ. N. 152, 5 O. L. R. 424, 2 O. W. R. 183, 266, 819, 844.

Heirs of Deceased—*Infants—Curator — Renunciation — Vacant Succession.*] — The general provision of art. 135, C. C. P., authorizing service upon the heirs of a person deceased within the previous six months, without mentioning their names or residences, by leaving the document for them at the former domicil of the deceased, does not apply to heirs who are not capable of pleading, e.g., minors, and who, moreover, at the time of the service were not actually interested, their tutrix having renounced the succession of the deceased in their behalf. 2. The fact that the curator to the vacant succession may have had knowledge of the service of the writ and made no objection, cannot be taken as equivalent to a service nor avail to support an ex parte judgment obtained without legal service. Turcotte v. Dansereau, 27 S. C. R. 583, followed. *Marion* v. *Brien dit Desrochers*, Q. R. 23 S. C. 45, 52.

In Ontario on Defendant Resident Abroad—Appearance—Plea to jurisdiction—Dismissal of action—Frivolous or vexatious action — Master in Chambers — Rule 261. *Delap* v. *Codd*, 2 O. W. R. 790, 849.

Individual Defendant — *Partnership Name—Place of Business—Review.*] — Held, Taschereau, J., dissenting, that an individual carrying on business alone under a partnership name may be served at the place where he carries on such business by leaving copies of the writ of summons and declaration with a grown-up person left in charge of his office, and such individual, if he is not prejudiced thereby, cannot by inscription in review, demand the setting aside of a judgment entered for default by alleging that the service is void. *Bourdon* v. *Bradshaw*, Q. R. 18 S. C. 388.

Irregularities — Jurisdiction — Foreign lands — Confirming proceedings — Conditional appearance. *Saskatchewan Land and Homestead Co.* v. *Leadley*, 2 O. W. R. 745, 850, 917, 944, 1075, 1112.

Irregularity—*Dismissal of Action.*]—An action will not be dismissed upon exception to the form because the writ, addressed to the bailiffs of the district of Beauharnois, has been served upon the defendant at Montreal by a bailiff of the district of Montreal, no prejudice being alleged or proven. *Bromwell* v. *O'Farrell*, 5 Q. P. R. 85.

Irregularity — *Re-service — Exception to Form—Costs.*]—A writ of summons and the declaration annexed thereto irregularly served upon the defendant, may be regularly served again upon him after the filing of an exception to the form complaining of the illegality of the first service, provided that the second service is made within six months of the date of the writ, and in that case the plaintiff will be ordered to pay the costs of an exception to the form. *Alexander* v. *Helfenberg*, 5 Q. P. R. 246.

Nullity—*Re-service.*]—Service of a writ of summons if made otherwise than upon the defendant personally, or at his place of domicil, or at the place of his ordinary residence, or at his place of business, is absolutely a nullity, and the Judge cannot allow the plaintiff to re-serve, because the service is not only irregular, but non-existent. *Hudon* v. *Joncas*, 3 Q. P. R. 524.

On Foreign Corporation — *Service in Jurisdiction — Agent.*] — A writ of summons for service within the jurisdiction was, with the service thereof, set aside, where it appeared that the defendant was a foreign corporation, having no agent within the jurisdiction who could be served. *Ehman* v. *New Hamburg Mfg. Co.*, 4 Terr. L. R. 363.

On Insurance Company — Power of attorney — Removal of office from province. *Armstrong* v. *Lancashire Fire Ins. Co.*, 3 O. L. R. 395, 2 O. W. R. 599.

Out of Jurisdiction—*Action to Rescind Purchase of Shares.*]—An action to rescind the purchase from the defendant of shares in an incorporated company on the ground of misrepresentation, is not an action within Order XI., so as to enable the plaintiff to obtain an ex juris writ against the defendant. *Davies* v. *Dunn*, 21 Occ. N. 364, 8 B. C. R. 68.

Out of Jurisdiction—Cause of action—Alimony — Support of children — Creditor — Fraudulent conveyance—Action to set aside—Parties—Grantor—Action for alimony in another province—Stay of proceedings on claim for alimony in Ontario. *Eames* v. *Eames*, 3 O. W. R. 42, 65, 351, 377, 409.

Out of Jurisdiction—Cause of action—Contract—Breach — Discretion — Forum non conveniens. *Baxter* v. *Faulkner*, 6 O. W. R. 198.

Out of Jurisdiction—*Cause of Action—Conversion — Rule 162 (e).*] — The plaintiff sued two defendants, one of whom, O., lived in the Province of Quebec, for conversion of a picture. The other defendant, W., as the plaintiff stated, in breach of an agreement with the plaintiff in Ontario, delivered the picture to O. in Quebec, and O. wrongfully held it there. O. stated on affidavit that W. pledged the picture to him in Quebec, lawfully and in good faith, for money lent, and denied having any other dealings as to the picture, or any dealings whatever in Ontario:—Held, that the cause of action, if any, against O. did not come within the terms

of Rule 162 (e), and therefore service of the writ of summons upon him out of the jurisdiction should not be permitted. *Rourk* v. *Wiedenbach*, 21 Occ. N. 292, 1 O. L. R. 581.

Out of Jurisdiction—Cause of action—Contract—Correspondence—Rule 162—Forum—Discretion. *Craddock* v. *Bull*, 6 O. W. R. 715, 838.

Out of Jurisdiction—Cause of action—Contract—Breach—Fire insurance — Conditional appearance—Undertaking to prove cause of action — Rule 162 (e) — Insurance Act, s. 143. *Burson* v. *German Union Ins. Co.*, 3 O. W. R. 372.

Out of Jurisdiction—*Contract — Money had and Received—Place of Payment.*]—The defendants, a foreign company, contracted with the plaintiffs, a Victoria firm, to carry coal from Seattle to Alaska, and were paid the amount of the contract price. When the coal arrived at Dyea, the defendants demanded and collected from the plaintiffs' agent an additional sum for taking the coal in lighters from Skagway to Dyea. The defendants' agent promised to repay the amount in Victoria:—Held, setting aside an ex juris writ, that the claim for this amount really arose out of the contract, and therefore the Court had no jurisdiction. *Shallcross* v. *Alaska S. S. Co.*, 8 B. C. R. 203.

Out of Jurisdiction—*Contract—Place of Performance—Quebec Law—Discretion.*]—An agreement between the plaintiff and defendants provided for the purchase by the defendants, who resided and carried on business in Montreal, in the Province of Quebec, from the plaintiff, of certain plant and machinery and stock in trade of a business carried on by him at Montreal. The agreement was signed by the plaintiff in Toronto, in the Province of Ontario, and afterwards by the defendants in Montreal. The plaintiff sued for the price of the goods referred to in the latter part of the agreement, alleging that he had elected to sell the goods to the defendants, and had notified them of his willingness to do so, whereupon they became liable to pay him the price:—Held, that the contract was made in Montreal, and the obligations arising out of it were to be governed by the law of Quebec, according to which the domicil of the debtor is the place of payment, and therefore the action was not founded on a breach within Ontario of a contract to be performed within Ontario, and service of the writ of summons out of Ontario should not be allowed: Rule 162 (e). The obligation to pay did not arise directly from provisions of the agreement, but in order to make it complete there must have been an election to sell, and notice thereof to the defendants, and notice of the election was given by letter received by the defendants in Montreal. A proper discretion was exercised in setting aside an order allowing service of the writ out of Ontario. Comber v. Leyland, [1898] A. C. 524, referred to. *Phillips* v. *Malone*, 22 Occ. N. 32, 3 O. L. R. 47.

Out of Jurisdiction—*Contract—Place of Performance—Option Exercised through Post Office—Terms — Acceptance — Onus.*]—An appeal from the decision of Meredith, C.J., 22 Occ. N. 32, 3 O. L. R. 47, was dismissed with costs. Held, per Falconbridge, C.J., that if the agreement of the 1st May, 1899, was complete, the contract was made in Quebec; but, if it was to be completed by the subsequent acts of the parties, there was no authority to the plaintiff to use the post office as a means of communication. Per Street, J.—The plaintiff might have notified the defendants that he desired them to become the purchasers of the goods, but he had no right to prescribe the dates at which the defendants should pay for them. Their letter was only a proposal to take the goods upon the terms proposed therein, requiring an acceptance by the defendants to make it a complete contract, the onus of shewing which was on the plaintiffs, and was not satisfied. *Phillips* v. *Malone*, 22 Occ. N. 159, 3 O. L. R. 492, 1 O. W. R. 200.

Out of Jurisdiction—*Contract of Hiring — Breaches within and without Ontario.*] — The defendant was employed by the plaintiffs, who resided and carried on business in Ontario, to act as their traveller, at an agreed-on remuneration, in selling and taking orders for their goods over a prescribed route to British Columbia and return, his duties on such return requiring him to call at a number of places in Ontario, to make his report to the plaintiffs, and return his samples. After entering on the performance of the contract, and while in British Columbia, he wrote resigning his position. The plaintiffs refused to accept his resignation, and, after allowing a sufficient time to elapse for the performance of the contract, they brought an action in Ontario for breach thereof: — Held, by the Master in Chambers, dismissing an application to set aside an order for service of the writ of summons out of Ontario, that there was a breach of the contract within Ontario for which the plaintiffs were entitled to sue. On appeal to a Judge in Chambers, this order was varied by limiting the action to breaches in Ontario; but reserving to the plaintiffs the right to bring actions for breaches which occurred out of Ontario. *R. J. Lovell Co.* v. *Coles*, 22 Occ. N. 165, 3 O. L. R. 291.

Out of Jurisdiction—Contract—Sale of goods—Place of payment. *Burlington Canning Co.* v. *Campbell*, 6 O. W. R. 331.

Out of Jurisdiction—*Cause of Action, where Arising — Contract — Conditional Appearance.*]—The contract was not in writing, and a writ had been issued in the Province of Ontario and served in Manitoba, on affidavits setting forth that the contract was to be performed by payment in Ontario:—Held, that this satisfied what is required by Rule 1246, and, although defendants by affidavit disputed and said that the contract was made and to be performed in Manitoba, yet the issue could not and should not be determined in a summary way on affidavits, but the proper course for the defendant was under the Ontario Rule 173, providing for conditional appearance, favouring the former equitable practice, which was to enter such appearance and raise the want of jurisdiction by plea or demurrer. *Canadian Radiator Co.* v. *Cuthbertson*, 5 O. W. R. 66, 9 O. L. R. 126.

Out of Jurisdiction — Foreign administrator—Motion to add defendant—Evidence on motion. *Steadman* v. *Steadman*, 6 O. W. R. 420.

Out of Jurisdiction—*Contract—Breach — Place where Contract Broken — Sale of*

Goods—Place of Payment.] — The plaintiffs sued for breach of contract and for goods sold and delivered. Defendants carried on business and had their head office in Montreal, and the plaintiffs carried on business in Toronto. The defendants at Montreal gave to a travelling agent of the plaintiffs an order for goods to be delivered f. o. b. at Toronto: —Held, that the acceptance of the order by post was within the contemplation of the parties, and the contract must be taken to have been made when the plaintiff's letter of acceptance was posted at Toronto; and that the property in the goods passed to the defendants upon a delivery being made at Toronto, and a breach of the contract by non-acceptance was a breach within Ontario of an obligation to be performed within Ontario. The Chief Justice of the Common Pleas (delivering the judgment of the Divisional Court), expressed the view that the omission from the Ontario Rule 162 of the words "according to its terms," which are in the corresponding English Rule, leaves it open, in construing the contract in order to determine whether it is to be performed within Ontario, to apply the rule of law that the debtor must seek out his creditor to pay him, unless the application of it is inconsistent with the terms of the contract. Phillip v. Malone, 3 O. L. R. 47, 492, 1 O. W. R. 200, followed. *Blackley (William), Limited* v. *Eaton Costumes Co.*, 4 O. W. R. 417. Affirmed, 5 O. W. R. 57, 25 C. L. T. 92, 9 O. L. R. 57.

Out of Jurisdiction—*Foreign Company —Transfer of Assets in Ontario to Ontario Company—Defence.*] — On a motion to set aside a writ of summons, the order permitting service out of the jurisdiction, and the service thereunder, in an action brought in the Province of Ontario, by shareholders resident in the Province of Nova Scotia of a loan company incorporated in and with its head office and assets (real estate mortgages), except $1,200 in mortgages on land in Ontario, in the Province of Quebec, against the loan company and its liquidators, resident in the Province of Quebec, and a loan company incorporated in and with its head office in the Province of Ontario, to set aside an agreement transferring the assets of the Quebec company to the Ontario company, and making the shareholders of the Quebec company shareholders in the Ontario company, and for distribution of the proceeds of the assets, etc., on the ground that the Courts in Ontario had no jurisdiction and that the case did not fall within any of the clauses of Rule 162:—Held, that the action was not brought with reference to real estate in the same sense as Henderson v. Bank of Hamilton, 23 S. C. R. 716, and similar cases were; and that the case fell within Con. Rule 162, clauses (g) and (h). Motion dismissed without prejudice to defendants setting up want of jurisdiction as a defence. *Mackay* v. *Colonial Investment and Loan Co.*, 22 Occ. N. 389, 4 O. L. R. 571, 1 O. W. R. 569, 592, 646.

Out of Jurisdiction — *Foreigner — Notice.*]—The question in what circumstances and to what extent provisions in the Rules under the English Judicature Act are to be held incorporated with the Judicature Ordinance discussed. English Order XI. (Marginal Rules 64-70) is not in force in the Territories. The Judicature Ordinance, 1893, s. 32, authorizes an order for the service of a writ of summons ex juris, though the party to be served is not a British subject, and the other should provide for service of the writ of summons, not of a notice thereof. Judgment of Scott, J., 4 Terr. L. R. 322, 20 Occ. N. 108, on this and other points, affirmed. *Conrad* v. *Alberta Mining Co.*, 21 Occ. N. 102, 4 Terr. L. R. 412.

Out of Jurisdiction—Leave to issue writ —Affidavit—Intituling—Time for appearance —Vacation—Judgment. *Hamilton* v. *Mutual Reserve Fund Life Assn.*, 2 O. W. R. 155, 806.

Out of Jurisdiction—*Notice—Company Defendant.*] — The defendant company were incorporated by Act of the Parliament of Canada, and had their head office at Winnipeg. The plaintiffs obtained ex parte an order giving them leave to issue a writ of summons against the defendant company and to serve a notice of the same upon the company in Winnipeg. The notice having been served, the defendant company moved to set aside the service as irregular:—Held, that Order XI., Rule 4, did not apply. The defendant company were not a foreign company, and therefore the writ and not a notice thereof should have been served. The service of the notice was set aside with costs. *Manley* v. *Great West Life Assurance Co.*, 23 Occ. N. 205.

Out of Jurisdiction—*Order Before Action—Parties—Causes of Action—Joinder.*]—The proper practice under the Rules as they stand (Rules of 1897, Nos. 120, 128, 164) is to obtain, before the issue of the writ of summons, an order fixing the time for appearance to be inserted in the writ proposed to be issued, and allowing it to be served out of the jurisdiction. Where the affidavit filed on an application for such an order shewed that the cause of action alleged against three of the defendants, one of whom lived in Ontario, was the causing an information to be laid against the plaintiff in Quebec, and the plaintiff to be arrested upon a warrant in Ontario by the fourth defendant and taken to Quebec and prosecuted there upon a criminal charge of which he was acquitted, and that against the fourth defendant, the unnecessary and unjustifiable handcuffing of the plaintiff in Ontario:—Held, that the plaintiff was not entitled to join the fourth defendant with the other three, the causes of action being separate and having nothing to do with each other. Held, also, that, as one of the three remaining defendants lived in Ontario, and it was alleged that he joined in the laying of the information, he was a proper party to the action, within the meaning of Rule 162 (g), and an order should be made for the issue and service of the writ upon the other two in Quebec. Croft v. King, [1893] 1 Q. B. 419, followed. But the order should contain a clause providing that in case the action should be dismissed as against the defendant in Ontario, the plaintiff should consent to its dismissal as against the other defendants as well. *In re Jones* v. *Bissonnette*, 22 Occ. N. 53, 2 O. L. R. 54.

Out of Jurisdiction—Order for leave to issue writ — Fixing time for appearance — Parties—Separate causes of action—Joinder of. *Jones* v. *Bissonette*, 1 O. W. R. 13, 3 O. L. R. 54.

Out of Jurisdiction—Order for—Setting aside—Irregularities — Waiver — Moving for extension of time for appearance—Submitting to jurisdiction—Stay of proceedings—Previous actions pending — Proceedings under Miners Ordinance. *Wilson* v. *Graves* (Y.T.), 2 W. L. R. 594.

Out of Jurisdiction — Order permitting —Irregularity—Affidavit — British subject— Right to relief claimed—Omission to verify part of claim—Neglect to state grounds. *Confederation Life Association* v. *Moore*, 2 O. W. R. 941, 1030, 1087, 1120.

Out of Jurisdiction—Order permitting— Motion to set aside—Waiver. *Chambre* v. *Gundy*, 2 O. W. R. 243, 244.

Out of Jurisdiction — *Parties—Injunction — Con. Rule 162.*] — An order allowing service of a writ of summons out of the jurisdiction cannot be supported under clause (e) of Con. Rule 162, unless the injunction can properly be asked as against the defendant out of the jurisdiction sought to be served. In proceeding under clause (g) of Con. Rule 162 the defendant within the jurisdiction should be served with the writ and then an order applied for for leave to serve the defendant resident out of the jurisdiction with a concurrent writ, and failure to proceed in this way is not such an irregularity merely as can be condoned. Collins v. North British and Mercantile Ins. Co., [1894] 3 Ch. 228, followed. Livingstone v. Sibbald, 15 P. R. 315, Mackay v. Colonial Investment and Loan Co., 4 O. L. R. 571, 22 Occ. N. 389, and In re Jones v. Bissonnette, 3 O. L. R. 54, 22 Occ. N. 53, considered. *Postlethwaite* v. *McWhinney*, 23 Occ. N. 333, 6 O. L. R. 412, 2 O. W. R. 794, 851, 3 O. W. R. 411, 591, 696.

Out of Jurisdiction—Place where contract broken—Sale of goods—Place of payment. *Blackley Co.* v. *Elite Costume Co.*, 4 O. W. R. 417.

Out of Jurisdiction—*Powers of Territorial Legislature — Judicature Ordinance — Small Debt Procedure.*] — A colony having authority to establish courts of civil jurisdiction and to provide for procedure therein has also the power necessarily incident thereto of providing for service of process upon defendants residing out of its jurisdiction. The legislature of the Territories has authority under the powers conferred by the N. W. T. Act to make such provisions. Section 32 of Ordinance 5 of 1894 (amending J. O. 1898), relating to small debt procedure, provides: "The summons shall be returnable: (c) Where the defendant resides in any place in Canada outside the Territories, or in the United States of America, at the expiration of 20 days from the service thereof; (d) Where the defendant resides in any part of the United Kingdom, at the expiration of 30 days from the service thereof; (e) In any of the above cases it shall not be necessary to obtain an order for service out of the jurisdiction:" — Held, that neither an order for leave to issue a writ for service out of the jurisdiction, nor an order for leave to serve such a writ, is necessary under this procedure. Nor is it necessary that a proper case for service out of the jurisdiction should be shewn by the statement of claim; but semble, if a defendant served out of the jurisdiction can shew affirmatively that the action is not one in which service out of the jurisdiction would be allowed under the ordinary practice of the Court, he would be entitled to an order setting aside the service. *McCarthy* v. *Brener*, 2 Terr. L. R. 230.

Out of Jurisdiction — *Sale of Goods — Breach of Contract—Place of Performance—Property Passing — Order for Service — Affidavit—Forum—Discretion.*]—The defendants lived in England. One of them, being in Ontario, saw the plaintiffs, who lived in Ontario, and it was agreed that the plaintiffs should send samples of their goods to the defendants, which they did. The defendants, after inspection, ordered goods from the plaintiffs, to be shipped to Liverpool, via Leyland line from Boston, delivered f. o. b. vessel, and they were shipped accordingly. There was no evidence as to whether the goods were insured, or if so, by whom, in whose name, and for whose benefit. A second order was given and the goods shipped in the same way. Before this order was filled the defendants were sued in England for infringement of copyright in respect of a part of the goods, and in consequence returned the goods covered by the second order, and refused to pay for what they so returned:—Held, that the property in the goods passed to the purchasers on the delivery on board the vessel at Boston, and an action would thereupon lie in Ontario, which was the place for payment, for goods sold and delivered. The purchasers were entitled to inspect before accepting, but, even in a case of a sale by sample, prima facie the place of delivery is the place for inspection, and there was nothing in the contract to rebut the presumption; and therefore the action came within Rule 162 (1) (e), being for a breach within Ontario of a contract to be performed within Ontario; and service of the writ of summons on the defendants out of Ontario was properly allowed. 2. That it was not necessary for the plaintiffs, in obtaining an ex parte order allowing them to serve the defendants abroad, to disclose the facts that the defendants had refused to receive the goods, and returned them to the plaintiffs, and that they were in Ontario at the time of the application, or the facts regarding the copyright, or that the defendants had paid for all the goods which they retained. 3. That a proper discretion had been exercised in favour of an Ontario action; it was not a case in which the plaintiffs should be compelled to sue the defendants in England. *Atkinson* v. *Plimpton*, 23 Occ. N. 331, 6 O. L. R. 566, 2 O. W. R. 827, 914.

Out of Jurisdiction — Service on co-defendant in jurisdiction—Partnership—Rule 162 (g)—Action "properly brought" in Ontario. *Sparrow* v. *Rice and Barton*, 6 O. W. R. 559.

Out of Jurisdiction—Statement of claim — Default judgment — Irregularity—Setting aside. *Lovell* v. *Taylor*, 5 O. W. R. 525.

Place of — *Office of Firm — Prejudice — Costs.*]—The office of a commercial firm in which the defendant is a partner, is not that of the defendant, within the meaning of art. 128, C. P. Nevertheless, the service in this case not having caused prejudice, an exception to the form was dismissed with costs. *Patterson* v. *Levy*, 4 Q. P. R. 196.

Place of Business — *Domicil — Judge's Order.*] — It is only in default of a regular domicil or of an ordinary residence, that a defendant may be served with process at his place of business. 2. In spite of an order of a Judge permitting service at the place of business, upon a report of a bailiff to the effect that the domicil of the defendant is closed and unoccupied, an action in which process had been served in accordance with such order will be dismissed upon exception to the form. *Soucy* v. *Electric Printing Co.*, 5 Q. P. R. 107.

Place of Service—*Bailiff—Informality—Exception to Form.*]—The service of a writ of summons, addressed to a bailiff of the district of Saint Francis, upon a defendant in the district of Arthabaska, by a bailiff of the latter district, is not a nullity per se; and an exception to the form will not lie where no prejudice is suffered. *Hackett* v. *Courchesne*, Q. R. 19 S. C. 215.

Proof of—*Oath—Person Administering—Default Judgment.*]—A judgment cannot be obtained by default against a defendant served in another province, if the oath of the person who has signed the report of service has been taken before a notary, instead of before one of the persons designated by art. 137, C. P. *Lydon* v. *Moore*, 4 Q. P. R. 169.

Return—*Motion for Leave to Make Return—Motion to Dismiss—Costs — Leave to Sue in Formâ Pauperis.*] — A motion to authorize a plaintiff to return a writ after the time has expired will be granted with costs of motion against the plaintiff. 2. In such case, a motion for congé-défaut, made after a motion for leave to return after time expired, should be dismissed without costs. 3. Leave to sue in formâ pauperis will not be granted by the Superior Court when the action is more properly one for the Circuit Court (e.g., alimony.) *Boiteau* v. *Boiteau*, 5 Q. P. R. 301.

Return without Bailiff's Report of Service—*Irregularity—Amendment.*] — An action will not be dismissed upon exception to the form because the report of service does not appear upon the writ, if this irregularity is afterwards remedied; no prejudice having been caused, the exception to the form will be dismissed with costs against the plaintiff. *Soucy* v. *Forget*, 5 Q. P. R. 154.

Substituted Service — *Extra-provincial Company—Affidavit—New Material on Application to Discharge Order—Discretion.*]—An affidavit leading to an order for substituted service is a jurisdictional affidavit. An affidavit leading to an order for substituted service, under s. 130 of the Companies Act, on an extra-provincial company licensed to do business in British Columbia, should shew clearly that the company is an extra-provincial one licensed to do business in the province. On an application to set aside an order for substituted service it is discretional with the Judge to allow the plaintiff to read further affidavits setting out facts omitted in the affidavit on which the order was made, and where in the exercise of his discretion he refused leave, the Court on appeal declined to interfere. *Centre Star Mining Co.* v. *Rossland Great Western Mines, Limited*, 24 Occ. N. 160, 10 B. C. R. 262.

Substituted Service—*Fraud—Foreigner—Judgment—Sale of Lands—Title—Leave to Defend.*]—In an action by judgment creditors of a company for a declaration that the individual defendants were trustees of certain lands for the company and for a sale of such lands and payment of the plaintiffs' claim out of the proceeds, an order was made for substituted service by mail of the writ of summons upon H., one of the defendants, upon an affidavit of the plaintiffs' solicitor shewing that the writ had been sent to a certain person for service in Alaska, and exhibiting a letter from that person, giving the name of H.'s employer and certain information about him, but not stating definitely where he was. Proof of service in the way directed by the order having been given, and none of the defendants appearing, judgment was entered for the plaintiffs, and the lands sold thereunder: —Held, that the order for substituted service had been granted on sufficient material. 2. That no fraud on the part of the plaintiffs had been shewn. 3. Following Moore v. Martin, 1 N. W. T. Reps., part 2, p. 48, that service of the writ itself upon H., though a foreigner out of the jurisdiction, was neither a nullity nor irregular. 4. That, although H. had no actual notice of the proceedings, the Court had jurisdiction to deal with his interest in the property, and the title of the purchaser should not be interfered with. 5. But, as H. had disclosed a defence on the merits, he should be let in to defend upon terms. *Conrad* v. *Alberta Mining Co.*, 20 Occ. N. 108, 21 Occ. N. 102, 4 Terr. L. R. 322.

Substituted Service — *Motion to Set Aside — Status of Applicant — Solicitor.*] — Where a solicitor who was served with the writ of summons for the defendant, under an order for substitutional service, applied in his own name, but on the defendant's behalf, to set aside the service:—Held, that he had no locus standi. The Court will not set aside substitutional service if it appears or can fairly be inferred that the defendant has notice of the proceedings. Semble, that if the solicitor were not acting for or in communication with the defendant, he might have sent back the copy of the writ served, or might, as an officer of the Court have advised the Court that an error had been committed in ordering service upon him; and even a person who is not an officer of the Court may move to set aside the service if he is not an agent. Decision of Master in Chambers, 23 Occ. N. 335, 6 O. L. R. 356, 2 O. W. R. 921, affirmed on different grounds. *Taylor* v. *Taylor*, 24 Occ. N. 19, 6 O. L. R. 545, 2 O. W. R. 921, 953.

Time—*Dismissal of Action.*]—Service of a writ effected more than six months after issue, the writ not having been renewed, is void, and the action will be dismissed upon exception to the form. *Langevin* v. *Grand Trunk R. W. Co.*, 4 Q. P. R. 162.

Unincorporated Foreign Association —Parties—Service on officers. *Wallace* v. *Order of Railroad Telegraphers*, 5 O. W. R. 787.

Unincorporated Foreign Voluntary Association — International association — Service upon executive officer in Ontario— Conditional appearance—Question of incor-

poration—Pleading—Trial. *Small* v. *American Federation of Musicians*, 2 O. W. R. 26, 33, 98, 278, 310.

Validity—*Bailiff.*]—The service of process in an action made by a bailiff of the district where the writ issued, is valid, although the writ is addressed to a bailiff of another district. *Lapierre* v. *Brunet*, 6 Q. P. R. 384.

VII. Small Debt Procedure, N. W. T.

Failure to Serve—*Alias Writ—Limitation of Actions.*]—A writ of summons (under the small debt procedure) had been issued in an action on a debt before the period after which it would become barred by the Limitations Ordinance had expired; it was, however, never served; but after the expiry of the period fixed by the Ordinance an alias writ of summons was issued:—Held, in view of the provisions of Rule 542 of the Judicature Ordinance (C. O. 1898 c. 21), the issue of the alias writ of summons prevented the operation of the Limitations Ordinance, and that therefore, the Ordinance afforded no defence to the action. *Curry* v. *Brotman*, 4 Terr. L. R. 369.

Meaning of "Debt"—*Claim for Wrongful Dismissal.*]—A claim by a servant hired by the month against his master for wrongful dismissal in the middle of the month, does not fall within the meaning of the words "all claims and demands for debt" in Rule 602 of the Judicature Ordinance, 1898, and proceedings to recover the same cannot be taken under the small debt procedure. Where, however, the plaintiff has brought an action for such a claim under the small debt procedure, and it appears that the defendant has not been in any way prejudiced, the Court or a Judge will, under the power given by Rule 538 direct that the writ of summons and the service thereof shall stand, but that the action shall continue as an action under the ordinary procedure. *McNeilly* v. *Beattie*, 20 Occ. N. 292, 4 Terr. L. R. 360.

Place of Entering Suit.]—In a small debt action where the cause of action arises within the district of a deputy clerk, and the defendant resides within the said district, the writ must be issued out of the office of the deputy clerk of the district, and a writ issued by the clerk of the district from his own office will be set aside as irregular. *Sharples* v. *Powell*, 20 Occ. N. 291, 4 Terr. L. R. 94.

VIII. Special Indorsement.

Claims for Work and Labour and Goods Sold—*Absence of Express Contract.*]—A claim for reasonable remuneration for work and labour, even in the absence of an express contract as to the rate of remuneration, comes within the description of a "debt or liquidated demand," and may be the subject of a special indorsement; and claims for so many days' labour at so much per day and for goods sold and delivered at a named price, in the absence of an allegation of an express contract in either case, are in the nature of a quantum meruit for the labour and a quantum valebant for the goods, and, in both cases, equally good as the subject of special indorsements. *Graham* v. *Warwick Gold Mining Co.*, 37 N. S. Reps. 307.

Company Plaintiffs — *Incorporation—Bill of Exchange—Notarial Fees.*]—Action to recover the amount of a bill of exchange accepted by the defendant as "Dean & Co." The action was begun by a specially indorsed writ of summons. The defendant applied to set aside the writ on the grounds that the plaintiffs being a foreign corporation, the writ should have disclosed how and where the company were incorporated, and that the plaintiffs, claiming notarial fees, must proceed in the ordinary way by declaring:—Held, that the writ was good in form. (2) That under s. 57 of the Bills of Exchange Act, the plaintiffs had a right to interest, bank charges, and notarial fees as part of the bill of exchange. *Cowan Co.* v. *Dean*, 21 Occ. N. 574.

Company Plaintiffs — *Incorporation—Clerical Error—Amendment.*]—Application to set aside the writ of summons on the grounds that in the special indorsement the incorporation of the plaintiff company had not been set out, and that the writ was issued in the name of Victoria instead of Edward VII.:—Held, that the writ was in good form; (2) that the plaintiff should be allowed to amend under 60 V. c. 24, s. 218 (N.B.), on payment of costs. *London House* v. *Puddington and Merritt*, 21 Occ. N. 573.

Company Plaintiffs — *Incorporation—Particulars.*]—A specially indorsed writ of summons issued under 60 V. c. 24 by a foreign company need not aver the incorporation of the company. Particulars of claim under a specially indorsed writ may be attached to the writ. *North Packing and Provision Co.* v. *Merritt*, 21 Occ. N. 573.

Covenant.]—An indorsement upon a writ of summons of a claim for principal and interest under a covenant in a mortgage in order to be a good special indorsement within the meaning of Order III., Rule 6, and Order XIV., Rule 1, must allege that the moneys are due under the covenant. *British Columbia Land and Investment Agency, Limited* v. *Cum Yow*, 8 B. C. R. 2.

Foreign Judgment—*Interest Till Judgment—Liquidated Demand.*]—A claim for interest "until payment or judgment" is not a claim for a liquidated demand within the meaning of Order II., r. 6, except where the cause of action is in respect to negotiable instruments, in which case the interest is, by s. 57 of the Bills of Exchange Act, deemed to be liquidated damages. Interest claimed under a statute cannot be the subject of special indorsement, unless it is stated in the indorsement under what Act the interest is claimed. A specially indorsed writ should state specifically the amount due, and when a claim is made for the taxed costs of a foreign judgment, the date of the taxation should be stated. Decision in 9 B. C. R. 27, 22 Occ. N. 154, reversed; Martin, J., dissenting. *Macaulay* v. *Victoria Yukon Trading Co.*, 22 Occ. N. 377, 9 B. C. R. 136.

Foreign Judgment — *Summary Judgment.*]—In an action on a foreign judgment the statement of claim indorsed on the writ

did not allege specifically against whom the judgment was recovered:—Held, that the writ was not specially indorsed; and a motion for summary judgment was refused. *Boyle v. Victoria Yukon Trading Co.*, 8 B. C. R. 352.

Interest—*Summary Judgment — Amendment of Indorsement — Re-service.*]—Summons for judgment under Order XIV., in an action for principal and interest due under a covenant in a mortgage. The statement of claim indorsed on the writ, in addition to the claim for principal and interest computed to a certain date previous to issue of writ, contained a claim for interest on the principal until payment or judgment:—Held, such claim for interest was not a subject of special indorsement under Order III., r. 6. Held, also, that where, on an application for judgment under Order XIV., it appears that part of the claim is not the subject of special indorsement, it is not open to the plaintiff to obtain an amendment and proceed, but a new summons must be taken out. Where the indorsement of a writ has been amended, redelivery but not re-service is necessary. *Pike v. Copley*, 22 Occ. N. 218, 9 B. C. R. 52.

Omission of Formal Words — *Motion for Summary Judgment.*]—A motion for summary judgment under Order XIV. was refused on the ground that the writ of summons was not specially indorsed, the indorsement not being headed with the words "statement of claim." *Vancouver Agency v. Quigley*, 8 B. C. R. 142.

Promissory Note—"*Duly Presented*"—*Summary Judgment.*]—Appeal from an order giving the plaintiffs leave to sign final judgment under Order XIV. The statement of claim indorsed on the writ stated plaintiffs' claim as being on a note dated . . . payable four months after its date to the order of M. L. Wurzburg & Company, at their office, Halifax, N. S., indorsed . . . and which said note was duly presented for payment and was dishonoured:—Held, a good special indorsement. Cunard v. Symon-Kaye Syndicate, 27 N. S. Reps. 340, distinguished. *Union Bank of Halifax v. Wurzburg & Co., Ltd.*, 22 Occ. N. 402, 9 B. C. R. 160.

Signature of Plaintiff's Solicitor—*Order XIV.*]—Summons for judgment under Order XIV. Preliminary objection that the writ was not specially indorsed, in that it was not signed by the plaintiff's solicitor:—Held, that it was not a good special indorsement. *Oppenheimer v. Oppenheimer*, 21 Occ. N. 576, 8 B. C. R. 145.

IX. OTHER CASES.

Action for Revocation of Letters Probate — Practice — Affidavit verifying indorsement—Citation to custodian of letters—Stay of proceedings. *McLagan v. McLagan*, (B.C.), 2 W. L. R. 12.

Address of Defendant—*Foreign Defendant.*]—The address of the defendant is a necessary part of the writ of summons, and in a proper case the writ may be amended by inserting it. But where the address of a foreign defendant was omitted, no explanation of the omission being given, and no cause of action in Ontario against the foreign defendant being shewn, the writ was, on his application, set aside with costs. *State Savings Bank v. Columbus Iron Works*, 23 Occ. N. 306, 6 O. L. R. 358, 2 O. W. R. 733.

Application to set aside—Irregularity—Intituling of affidavits. *Toronto and British Columbia Lumber Co. v. Moore* (B. C.), 2 W. L. R. 239.

Irregularities—*Prejudice—Qui Tam Action—Reference to Sovereign—Name of Plaintiff.*]—In an action qui tam, the defendant cannot set up grounds resulting from irregularities of the plaintiff as long as they do not cause prejudice. 2. The word "us" in the words "suing as well as in his own name as for us" contained in form 3 of the Rules of Practice of the Superior Court is sufficient to designate his Majesty the King. 3. It is not necessary to give all the plaintiff's names, provided he is sufficiently designated in the writ. *Ridgeway v. Collier*, 5 Q. P. R. 308.

Irregularity — Action in name of next friend—Consent not filed—Application of English Rule—Death of plaintiff—Revivor—Effect on irregularities. *Hourston v. Spence* (N.W.T.), 2 W. L. R. 343.

Saisie-revendication — *Declaration — Filing—Time—Record.*]—A writ of summons or of saisie-revendication filed without the original declaration is an absolutely void proceeding, and a defendant, who has appeared in the cause, but who has not pleaded, may take advantage of the nullity at any stage of the cause without having recourse to an exception to the form, and have the action dismissed upon motion to that effect even on the day fixed for hearing; for it such case there is really no action before the Court. 2. A declaration placed upon the record outside of the time allowed to the plaintiff for a return of his action and a long time after the return of the writ, without the consent of the opposite party or the permission of a Judge, is irregularly upon the record and will be considered as if it were no declaration at all. *Bouchard v. Boivin*, 6 Q. P. R. 41.

Summary Matter — *Heading of Writ.*]—The provisions of the Code of Procedure relating to summary matters do not apply unless the words "summary procedure" are written or printed at the head of each original and copy of the writ of summons. *Bernard v. Carbonneau*, 6 Q. P. R. 348.

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See APPEAL COURTS.

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